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Station Casinos, LLC, Aliante Gaming, LLC, d/b/a Aliante Station Casino & Hotel, Boulder Station, Inc., d/b/a Boulder Station Hotel & Casino, NP Palace, LLC, d/b/a Palace Station Hotel & Casino, Charleston Station, LLC, d/b/a Red Rock Casino Resort Spa, Santa Fe Station, Inc., d/b/a Santa Fe Station Hotel & Casino, Sunset Station, Inc., d/b/a Sunset Station Hotel & Casino, Texas Station, LLC, d/b/a Texas Station Gambling Hall & Hotel, Lake Mead Station, Inc., d/b/a Fiesta Henderson Casino Hotel, Fiesta Station, Inc., d/b/a Fiesta Casino Hotel, and Green Valley Ranch Gaming, LLC, d/b/a Green Valley Ranch Resort Spa Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE, AFL–CIO. Cases 28–CA–022918, 28–CA–023089, 28–CA–023224, and 28–CA–023434

September 28, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On September 22, 2011, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent[1] and the Acting General Counsel filed exceptions, supporting briefs, and answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions, except as modified below, and to adopt the recommended Order as modified.[4]

The Respondent operates 18 casino resorts (or Stations) in Las Vegas, Nevada. On February 18, 2010,[5] the Charging Party Union kicked off its "Now or Never" campaign to organize the employees at the Respondent's Stations. The consolidated amended complaint alleged that the Respondent committed myriad violations of Section 8(a)(1) and (3) of the Act at 10 of its Stations during this organizational campaign. Although the judge dismissed a number of allegations, he found 82 separate violations. Except as discussed below, we affirm the judge's findings for the reasons he stated.[6]

1. Sound Bytes and Sound Byte Alerts

On February 19, employees started wearing Union buttons to work and speaking to coworkers about the Union. That same day, or soon after, the Respondent started to read "Sound Bytes" at its meetings with employees.

Sound Bytes were written statements prepared by Human Resources Director Valerie Murzl and the Respondent's counsel. Each Sound Byte generally followed the same formula: a statement of certain facts, arguments, and "hyperbole" (as characterized by the judge) supporting the Respondent's position against unionization, and assertions that the Union was not being honest. Five of the 13 examples in the record concluded with the statement "Don't sign a card with this corrupt union!!!" or "If asked to sign a union card, just say no!!!!!!" The Sound Bytes were distributed to assistant managers, managers, directors, and supervisors at each Station, who were responsible for communicating the Sound Bytes' messages to the employees, and often read them to employees at preshift meetings.

"Sound Byte Alerts" were shorter versions of Sound Bytes and consisted generally of one-sentence antiunion or pro-Station Casino statements followed by the exhortation "Don't sign a union card!" They were distributed to managers and posted in designated areas at two of the Respondent's Stations: Fiesta Henderson Casino Hotel

[1] We note that in another case involving the same parties (Cases 28–CA–023436 and 28–CA–062437), which issued on June 27, 2012, the Acting General Counsel, the Respondent, and the Charging Party filed a joint motion requesting that the names of Respondents Station Casinos, Inc. and Palace Station Hotel & Casino, Inc. be changed to reflect that these two Respondents were dissolved and their assets transferred to third-party purchasers in a Chapter 11 bankruptcy proceeding. That motion was granted on September 24, 2012. Accordingly, we have also implemented those changes here.

[2] We note that the Acting General Counsel has only excepted to the dismissal of six allegations. The Respondent argues that the judge erred in allowing the Acting General Counsel to amend the complaint to allege additional statements of futility at Sunset Station. The Respondent's argument is moot because the judge dismissed the additional futility allegations, and there are no exceptions to those dismissals.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We will modify the judge's recommended Order to conform to the violations found. We will also substitute a new notice to conform to the Order as modified.

[5] All dates are in 2010, unless otherwise stated.

[6] As reflected in our Amended Conclusions of Law, where we affirm the judge's conclusion that the Respondent has committed a particular unfair labor practice, we find it unnecessary to pass on whether the Respondent committed identical or similar violations at other Stations in those instances where such findings would be cumulative and would not materially affect the remedy.

and Fiesta Rancho Casino Hotel. They were also printed in Fiesta Rancho's *Que Pasa* newsletters, which were distributed regularly to employees. A couple of the *Que Pasa* newsletters contained only the statement "Don't sign a union card."

The Acting General Counsel argued that the Respondent's printed and oral communications, including both the Sound Bytes and Sound Byte Alerts, threatened employees in violation of Section 8(a)(1) by telling them not to sign union membership cards. For the reasons stated by the judge, we adopt his finding that the Sound Bytes were lawful antiunion propaganda under Section 8(c) of the Act. We find merit, however, in the Acting General Counsel's exception contending that the judge failed to address the more abbreviated Sound Byte Alerts. Unlike the Sound Bytes, the Sound Byte Alerts were devoid of any context (i.e., facts, the Respondent's views, or arguments) and were directly disseminated to employees via physical posting and in widely distributed newsletters. Without any context, the Sound Byte Alerts would reasonably be viewed by employees as direct admonitions not to sign union cards or engage in union activity. See *Thunderbird Motel, Inc.*, 180 NLRB 656, 660 (1970) (adopting judge's finding that supervisor's statement to employee not to sign any union cards was unlawful); see also *Caribe Staple Co.*, 313 NLRB 877, 883 (1994) (employer's statement to employee not to get involved with the union was unlawful). Accordingly, we find that the Respondent's Sound Byte Alerts threatened employees in violation of Section 8(a)(1).[7]

2. Work rules

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by orally promulgating an overly broad and discriminatory rule prohibiting its employees from engaging in union activities in the parking garage at Santa Fe Station. We find it unnecessary to pass on whether that conduct also violated Section 8(a)(3). In addition, we do not rely on *New York New York Hotel & Casino*, 356 NLRB No. 119 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cited by the judge, which dealt with off-duty employees of the employer's contractor and not, as in this case, off-duty employees of the Respondent.

We adopt the judge's findings that the Respondent violated Section 8(a)(1) by directing Red Rock Station employees not to wear union buttons and by maintaining and enforcing an overly-broad confidentiality rule in its counseling forms. We also adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) by prohibiting Palace Station employees from discussing issues of common concern at preshift meetings, by prohibiting Sunset Station employee Jose Omar Mendoza from speaking up at a preshift meeting, and by disciplining him for disregarding the restriction.[8]

3. Surveillance

We agree with the judge that the Respondent violated Section 8(a)(1) when Fiesta Henderson Station Supervisor Rusty Hicks followed Ann Galo on February 25 during her shift and prohibited her from speaking to coworkers after she started wearing a Union button. By this conduct the Respondent clearly engaged in unlawful surveillance. We find it unnecessary, however, to pass on the judge's finding that such conduct also created an unlawful impression of surveillance.[9]

4. Coercive interrogations and other unlawful statements

As previously stated, we have affirmed the judge's findings that the Respondent's officials committed numerous violations of Section 8(a)(1) in questions and statements to employees.[10] In adopting the judge's finding that the Respondent violated Section 8(a)(1) when

[7] We therefore find no need to pass on whether Fiesta Rancho Station Supervisor Monte Durbin threatened employees not to sign a union card. Member Hayes, on the other hand, would affirm the judge's finding that Durbin threatened employees in violation of Sec. 8(a)(1), and he would not pass on whether the Sound Byte Alerts were unlawful.

[8] Member Hayes agrees with the judge that the Respondent did not effectively repudiate its unlawful directives to employees not to wear their union buttons at Red Rock Station, but he does not necessarily endorse all elements of the test in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

In affirming the judge's finding that the Respondent's confidentiality rule set out in its counseling forms violates Sec. 8(a)(1), Member Hayes notes that the record evidence shows that the rule had been construed to prohibit Sec. 7 activity and enforced accordingly.

Finally, Member Hayes does not find that the Respondent violated Sec. 8(a)(3) and (1) by orally promulgating an overly-broad and discriminatory rule at Palace Station prohibiting its employees from discussing issues of common concern at preshift meetings. He notes that the employees were told that meetings would be limited to company business only and essentially that employees could no longer voice their opinions or give rebuttals to any manager remarks at these meetings. Within that context, Member Hayes believes that employees would reasonably construe the restrictions on commenting as a permissible general limitation on the conduct of a work-related meeting that was not selectively targeted at union or other protected activity. For the same reasons, Member Hayes also finds that the Respondent did not violate Sec. 8(a)(3) and (1) at Sunset Station when Supervisor John Beagle prohibited employee Jose Omar Mendoza from speaking up at a preshift meeting, and disciplined him for disregarding the restrictions.

[9] Although the judge found that the conduct created an unlawful impression of surveillance in his analysis, his conclusions of law refer only to unlawful surveillance.

[10] In affirming the judge's finding that supervisors at Red Rock Station violated Sec. 8(a)(1) when they solicited complaints and grievances from employees, promised better benefits and improved working conditions, and granted employees benefits to dissuade them from engaging in union activities, Member Hayes relies solely on the conduct of Supervisor Chad Tretiak.

Green Valley Station Supervisor Brian Tedeschi interrogated employee Michael Wagner, we note that Wagner explicitly told Tedeschi that he was uncomfortable talking to Tedeschi about the Union, and Tedeschi nonetheless continued their discussion. We further adopt the judge's finding that, during the same conversation, Tedeschi violated Section 8(a)(1) when he informed Wagner that employees would have a tougher time communicating with management if they selected the Union.[11] But we decline to adopt the judge's additional finding that Tedeschi threatened Wagner in that same conversation by saying that the employees would be subject to closer supervision if the Union came in, because that finding is not supported by the record.

We find it unnecessary to pass on whether Palace Station Supervisor Elena Widlowski committed a separate violation of Section 8(a)(1) by calling employee Antonia Gutierrez into the human resources room. This directive was part and parcel of the unlawful threats Widlowski made to Gutierrez while they were in the human resources room, as found by the judge and adopted here.[12]

We adopt the judge's finding that Boulder Station Supervisor Arturo Lopez unlawfully instructed employees not to speak or listen to union supporters and to call human resources if the Union came to their homes. In light of those findings, we conclude that Lopez' further statement to employees to call the police if the Union would not leave their homes upon request violated Section 8(a)(1). Within the context of Lopez' other coercive and unlawful statements, his directive to call the police was not lawful Section 8(c) speech but coercive and unprotected.[13]

5. Adverse employment actions at Fiesta Henderson Station

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) on March 10 by sending employee Ana Galo home early, when business was slow—thereby denying her the opportunity to work—even though she had more seniority than another employee. We find it unnecessary to pass on whether the Respondent also unlawfully sent Galo home early on March 14.[14]

In addition, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by requiring employee Maria Camacho to request permission from a supervisor to move between her workstations and by prohibiting Camacho from using guest entrances. We agree with the judge that the Respondent's reasons for imposing the restrictions on Camacho were pretextual. Specifically, contrary to the Respondent's contention that the restrictions were reminders of already-existing company rules, Camacho was the only employee subjected to the restrictions, and the restrictions were imposed on her only after she became active in the Union.[15]

6. Discriminatory discipline at Sunset Station

We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by issuing discipline to employee Jose Omar Mendoza for talking about the Union in front of customers.[16]

For the reasons explained below, we also affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) when Supervisor Dragan Buljugija gave employee Hilda Griffin a verbal warning on March 14. Buljugija had previously given Griffin a verbal counseling on March 3, allegedly for not keeping a bathroom clean, after Griffin refused Buljugija's direction to remove a union button Griffin was wearing. That counseling was ultimately rescinded by order of Human Resources Representative Stephanie Riga.

On March 14, Buljugija again called Griffin and told her that one of her bathrooms needed attention. When Griffin went to inspect the bathroom, she saw Supervisor Joyce Faulkner there. According to Griffin's credited testimony, no guests were present. Griffin asked Faulk-

[11] Member Hayes does not find that employees would reasonably view this statement as a threat.

[12] Member Hayes finds it unnecessary as well to pass on whether Widlowski's statements were unlawful.

[13] Member Hayes would not find this separate violation for giving lawful advice about what an employee could do if union supporters refused to leave that employee's home.

[14] Member Griffin would find that Supervisor Rusty Hicks also unlawfully sent Galo home early on March 14. He notes that the Respondent excepted to this finding solely on evidentiary grounds and that the record supports Galo's testimony that she was sent home early that evening.

[15] Although, as previously stated, Member Hayes does not necessarily endorse all elements of the *Passavant* test, he agrees with the judge's finding that the Respondent did not effectively repudiate the unlawful suspensions and discharges of Fiesta Henderson Station employee Adelina Nunez and Green Valley Station employee Teresa DeBellonia

[16] We note that there are no allegations that Mendoza used profanity. The present case is therefore distinguishable from *NLRB v. Starbucks Coffee Corp.*, 679 F.3d 70, 80 (2d. Cir. 2012) (holding that *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979), is not applicable to situations where an employee, while discussing employment issues, utters obscenities in the presence of customers).

Member Hayes would find that Mendoza's discipline was lawful. Mendoza voiced sustained complaints about work at a customer's table. The complaints were loud enough to be overheard by a customer at another table and sufficiently upsetting to provoke that customer to write a letter of complaint to management. In Member Hayes' view, Mendoza's unprovoked verbal outburst on the restaurant floor, even if bereft of obscenity, was sufficiently opprobrious to warrant removal of statutory protection under the analytical framework in *Atlantic Steel*, supra.

ner if she thought the bathroom was dirty and who might have complained to Buljugija. Griffin also asked Faulkner to tell Buljugija that the bathrooms were clean, mentioning that she had recently received a warning from Buljugija. Faulkner responded, "[Y]es."

Afterward, Faulkner called Buljugija and prepared a written statement complaining that Griffin, while in front of guests, accused Faulkner of making a complaint about the bathroom. That evening, Buljugija gave Griffin a verbal counseling for interpersonal relations based on Faulkner's complaint. Buljugija added that if Riga rescinded the warning, he would just give Griffin another one because he had plenty of paper. When Griffin asked Buljugija if the warning was because of her union button or for personal reasons, Buljugija told Griffin to take her button off. Griffin refused. The next day, Griffin contacted Riga again to have the warning rescinded. Riga upheld the warning because Faulkner had accused Griffin of complaining about the bathroom in front of guests.

The judge found the March 14 warning unlawful. He reasoned that the Griffin's exchange with Faulkner was protected concerted activity because Griffin was enlisting Faulkner's assistance in preventing what Griffin reasonably believed might be another discriminatory writeup by Buljugija. The judge then applied *Atlantic Steel*, 245 at 816, to determine whether Griffin's conduct during the otherwise protected exchange was so egregious as to lose the protection of the Act. He concluded that it was not.

The Respondent contends that the judge erred in failing to apply the motive-based analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In effect, the Respondent contends that it lawfully disciplined Griffin for engaging in a verbal confrontation with Faulkner in an incident unassociated with any protected concerted activity.

The result would be no different under a *Wright Line* analysis. Under that test, the Acting General Counsel must make an initial showing that Griffin's union activity was a motivating factor in the Respondent's decision to discipline her. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer. See *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). The burden then shifts to the respondent to prove, as an affirmative defense, that it would have taken the action even in the absence of her union activity. See id.

The Acting General Counsel clearly met his initial *Wright Line* burden. In particular, Buljugija's comments and actions on March 3 and 14 provide strong direct evidence of his animus against Griffin's open support for the Union. Indeed, Buljugija had already unsuccessfully attempted to discriminatorily discipline Griffin based on the pretext of poor work performance.

Furthermore, the Respondent failed to prove that it would have warned Griffin in the absence of her union activity. As the judge found, Buljugija's reason for disciplining Griffin—allegedly for engaging in a verbal confrontation with Faulkner in front of guests when, according to Griffin's credited testimony, no guests were present—was pretextual. Buljugija's threat to give Griffin yet another warning if Griffin was able to get this one rescinded only underscores his lack of concern for and reliance on a legitimate ground for discipline. A finding that the proffered reason for discipline is pretextual necessarily means that a respondent fails to meet its *Wright Line* rebuttal burden. See, e.g., *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003), and *Limestone Apparel Corp.*, 255 NLRB 722 (1981). Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by disciplining Griffin on March 14.

AMENDED CONCLUSIONS OF LAW

1. Insert the following as paragraph 2.

"2. By physically posting Sound Byte Alerts, which admonished employees not to sign union cards, and printing them in its *Que Pasa* newsletters, the Respondent violated Section 8(a)(1) of the Act. (Fiesta Henderson and Fiesta Rancho Stations)."

2. Substitute the following for paragraph 18.

"18. By denying work opportunities to Galo on March 10 because of her union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (Fiesta Henderson)."

3. Substitute the following for paragraph 63.

"63. By orally issuing and enforcing a discriminatory rule on March 18 prohibiting employees from engaging in union activities in the parking garage at the Santa Fe facility, the Respondent violated Section 8(a)(1) of the Act. (Santa Fe)."

4. Delete paragraphs 8–11, 13–14, 21, 25–27, 32–36, 40–41, 43–45, 48–50, 54–55, 64–70, 74, and 82.

5. After paragraph 2, reletter the other paragraphs accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Station Casinos, Las Vegas, Nevada, its officers, agents, successors,

and assigns, shall take the action set forth in the Order as modified below.

1. Substitute the following for paragraph 1(e).

"(e) Physically posting and printing written material that admonishes employees not to sign union cards."

2. Delete paragraphs 1(d), (x), (aa), (cc), (ee), and (oo), and reletter the other paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE, AFL–CIO, or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for filing charges or giving testimony under the Act.

WE WILL NOT maintain and enforce a rule on our "Record of Counseling" forms that states "[t]his counseling

session is confidential and should only be discussed with Management or Human Resources."

WE WILL NOT threaten employees not to sign Union cards.

WE WILL NOT physically post and print written material that admonishes employees not to sign union cards.

WE WILL NOT threaten employees with unspecified reprisals if they support or select the Union as their bargaining representative.

WE WILL NOT threaten employees with additional work if they select the Union as their bargaining representative.

WE WILL NOT threaten employees with losing benefits if they select the Union as their bargaining representative.

WE WILL NOT issue and enforce overly-broad and discriminatory rules that prohibit employees from speaking with or listening to union supporters.

WE WILL NOT ask employees to advise us of the union activities of other employees.

WE WILL NOT advise employees to call the police if union supporters refuse to leave their homes after being asked to do so.

WE WILL NOT promise increased benefits and/or improved terms and conditions of employment to employees to dissuade them from supporting the Union.

WE WILL NOT inform employees that it would be futile for them to support the Union as their bargaining representative.

WE WILL NOT unlawfully interrogate employees about their union membership, activities and sympathies.

WE WILL NOT unlawfully engage in surveillance of employees' union activities.

WE WILL NOT threaten employees by inviting them to quit their employment because they support the Union.

WE WILL NOT punish employees by making them work alone because they support the Union.

WE WILL NOT issue and enforce overly-broad and discriminatory rules that prohibit employees who support the Union from assisting each other at work.

WE WILL NOT deny work opportunities to employees because of their union activities.

WE WILL NOT issue and enforce rules that prohibit employees from moving to another station without permission because they have engaged in union activities.

WE WILL NOT impose more onerous working conditions on employees because of their union activities.

WE WILL NOT deny employees benefits in the form of open discussion at preshift meetings because they support the Union.

WE WILL NOT issue and enforce overly-broad and/or discriminatory rules that prohibit employees from discussing issues of common concern (including but not limited to the union organizing campaign) at preshift meetings.

WE WILL NOT threaten employees with job loss if they support the Union as their bargaining representative.

WE WILL NOT threaten employees that we will end the ability of employees to talk to their supervisors and managers if employees select the Union as their bargaining representative.

WE WILL NOT issue and enforce discriminatory rules that prohibit off-duty employees from engaging in union activities at Station Casinos' facilities, including but not limited to employee parking garages.

WE WILL NOT grab employees because they support the Union.

WE WILL NOT threaten employees with discharge if they engage in union activities.

WE WILL NOT prohibit off-duty employees from accessing Station Casinos' facilities because of their union activities.

WE WILL NOT issue and enforce overly-broad and discriminatory rules that prohibit employees from wearing union buttons.

WE WILL NOT solicit complaints and grievances from employees and thereby promise increased benefits and improved terms and conditions of employment if employees refrain from supporting the Union.

WE WILL NOT grant benefits to employees to dissuade them from supporting the Union.

WE WILL NOT threaten employees with unspecified reprisals if they sign union membership cards.

WE WILL NOT threaten employees with reduced work hours because they are engaging in union activities.

WE WILL NOT threaten employees with losing the graveyard shift because they are engaging in union activities.

WE WILL NOT threaten employees with adverse employment action for speaking about the Union in front of customers.

WE WILL NOT discipline employees for engaging in protected activity at preshift meetings.

WE WILL NOT threaten employees with further discipline because they support the Union.

WE WILL NOT discipline employees for engaging in protected activity.

WE WILL NOT issue and enforce overly-broad and discriminatory rules that prohibit employees from discussing the Union.

WE WILL NOT threaten employees that we will engage in surveillance of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Teresa Debellonia and Adelina Nunez full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Teresa Debellonia and Adelina Nunez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions and discharges of Teresa Debellonia and Adelina Nunez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL make Ana Galo whole for any loss of earnings and other benefits resulting from loss of work opportunities, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Hilda Griffin and Jose Omar Mendoza, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

STATION CASINOS, INC.

Stephen Wamser, Pablo Godoy, and *Erica Berencsi, Esqs.,* for the Acting General Counsel.

Harriet Lipkin, Esq., of Washington, D.C. and *Dianne LaRocca, Esq.* of New York, New York, for the Respondent.

Richard McCracken and *Kristin Martin, Esqs.,* of San Francisco, California, for the Charging Party.

DECISION

I. STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Las Vegas, Nevada, in segments from October 25, 2010, through May 3, 2011.[1] The charge in Case 28–CA–022918 was filed on February 24, 2010, and was amended on May 27, 2010. The charge in Case 28–CA–023089 was filed on July 2, 2010, and was amended on August 31, 2010. The consolidated amended complaint (covering Cases 28–CA–022918 and 28–CA–023089) was issued on August 31, 2010, and was subsequently amended on multiple occasions before and during trial.

Regarding Case 28–CA–023224, the charge was filed on October 15, 2010, and was amended on December 21, 2010. GC Exh. 1(fb), par. 1. The Acting General Counsel filed the complaint in Case 28–CA–023224 on December 21, 2010, and filed an amended complaint on March 4, 2011. (GC Exh. 1(fb) at pp. 1–2.)

For Case 28–CA–023434, the charge was filed on April 6, 2011. (GC Exh. 1(a) (Case 28–CA–23434).)[2] The Acting General Counsel filed the complaint in Case 28–CA–023434 on May 3, 2011. (GC Exh. 1(c) (Case 28–CA–023434).)

Collectively, the consolidated amended complaint (in Cases 28–CA–022918 and 28–CA–023089) and the complaint in Case 28–CA–023224 allege that Station Casinos, Inc. (Station Casinos or the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by: engaging in speech and conduct (during an ongoing union organizing campaign by the Charging Party) that have interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act; and discriminating against employees who engaged in union activity, and thus discouraging membership in a labor organization. The complaint in Case 28–CA–23434 alleged that Station Casinos violated Section 8(a)(3), (4), and (1) by: suspending and discharging an employee for engaging in union activity, and thus discouraging membership in a labor organization; and by suspending and discharging an employee for filing charges or giving testimony under the Act.

The Respondent filed timely answers that denied and/or asserted affirmative defenses to the alleged violations in the complaints in all four cases. (See GC Exhs. 1(w) and (ff); see also GC Exh. 1(e) (Case 28–CA–023434).) As the trial progressed, the Respondent verbally denied all new allegations that the Acting General Counsel added to the consolidated amended complaint (in Cases 28–CA–022918 and 28–CA–023089) via further amendments.[3]

On the entire record,[4] including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] The exact trial dates were: October 25–29, November 1–4, and December 13–15, 2010; January 10–13, January 31 through February 3, February 28 through March 4, March 21–22, and May 2–3, 2011.

[2] The exhibits for Case 28–CA–023434 are located in an exhibit file that is separate from the exhibits for the remaining 3 case numbers.

[3] The Respondent did not oppose the Acting General Counsel's various requests to amend the complaint during trial to incorporate new allegations. The Acting General Counsel did not oppose the Respondent's request to deny the new allegations verbally instead of filing additional written answers to the complaint. The final version of the consolidated amended complaint in Cases 28–CA–22918 and 28–CA–23089 is included in the record as Acting General Counsel (GC Exh. 2(c)).

[4] The trial transcript is generally accurate, but I make the following corrections to clarify the record: Transcript (Tr.) 106, L. 20: the speaker was Ms. Murzl, not Mr. Wamser; Tr. 201, L. 4: "9(d)" should be "9(b)"; Tr. 237, L. 18: "881" should be "8(a)(1)"; Tr. 244, LL. 1–2: "881" should be "8(a)(1)"; Tr. 506, L. 22: "adver temperance" should be "adverse inference"; Tr. 537, LL. 5–6: "Maria, you are not to speak anything about the Union in here. Okay?" should be "Maria, no speak nothing about Union in here"; Tr. 553, LL. 3, 8 & 11: speaker was Ms. Berensci, not Ms. LaRocca; Tr. 553, L. 20: "Santa Fe" should be "Aliante"; Tr. 556, L. 7: speaker was Ms. LaRocca, not Ms. Berensci; Tr. 619, L. 21: "this close" should be "disclosed"; Tr. 620, L. 12: "it a station" should be "a distinction"; Tr. 723, L. 7: "but in" should be

by the Acting General Counsel, the Respondent and the Charging Party,[5] I make the following

II. BACKGROUND AND PRELIMINARY FINDINGS OF FACT

A. Jurisdiction

The Respondent, a corporation, operates a chain of "off-strip" casinos in the metropolitan area of Las Vegas, Nevada, where in the 12 months that preceded February 24, 2010, it derived gross revenue in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points located outside of the State of Nevada. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[6] I also find that the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE (the Charging Party or the Union) is a labor organization within the meaning of Section 2(5) of the Act.

B. Alleged Unfair Labor Practices—Overview[7]

Station Casinos operates 18 casinos in Las Vegas, Nevada, 10 of which are the subject of this case. (Transcript (Tr.) 55.) As a single employer, Station Casinos maintains one set of policies that applies to each of its properties. (Tr. 56; Jt. Exh. 1(a).)

Unlike the employees at many casinos in Las Vegas (particularly those located on the Las Vegas "strip"), Station Casinos' employees are not represented by a union, and do not work under the terms of a collective-bargaining agreement. (Tr. 54–56.) On February 18, 2010, the Charging Party set out to change that fact by kicking off a "Now or Never" union campaign to organize the workers at Station Casinos.[8] (Tr. 61–62.) In connection with that effort, the Charging Party held organizing meetings and enlisted Station Casinos employees to serve as union committee leaders. Union committee leaders generally were expected to encourage their coworkers to sign union cards by speaking to coworkers (at permissible times such as employee mealtimes and breaks) about the potential benefits of joining the Union. Beginning on February 19, 2010, union committee leaders wore their union buttons to work to express their support for the Union and to identify themselves to coworkers who might have questions about the Union or the organizing campaign.

Station Casinos decided to respond to the Charging Party's organizing campaign with its own campaign to oppose the Union. (Tr. 73, 86–87.) As one component of its responsive campaign, Station Casinos began issuing flyers, or "Sound Bytes," to its managers to express the company's views about the Charging Party's organizing campaign and the disadvantages (in the company's view) of union representation. (Tr. 90–91.) Managers were expected to read the Sound Bytes at employee meetings (called "huddles," "preshift meetings" or "Que Pasa meetings," depending on the location), and also posted the Sound Bytes on bulletin boards for employees to read. (Tr. 67, 104, 107–108.) Sound Bytes generally were available in both English and Spanish, but occasionally managers verbally translated the English versions of certain Sound Bytes into Spanish when a company-provided translation was not available. (Tr. 65, 92.) Station Casinos also encouraged its managers to provide facts, opinions and examples about the disadvantages of joining a union, but did not provide any specific guidelines or parameters to managers about the types of remarks that would be appropriate. (Tr. 90, 106–107.)

Once implemented, Station Casinos' response to the union organizing campaign produced a variety of outcomes. First, the content of some Sound Bytes prompted some employees to object or respond during staff meetings, at times leading to prolonged and sometimes heated exchanges between managers and employees (or between employees themselves) about the

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"buttons"; Tr. 824, L. 24: "indiscernible" should be "mortgage"; Tr. 1735, LL. 2 and 7: "exhibit 16" should be "exhibit 6(d)"; Tr. 1749, L. 20: "April" should be "February"; Tr. 1767, L. 9: "a stand" should be "sustained"; Tr. 1888, L. 22: "my ruling was" should be "my ruling was not"; Tr. 1937, LL. 5 and 18: "Juan" and "Laseuros" each should be "Dawn Vaseur"; Tr. 2052, LL. 14 and 16: "slave issue" should be "slavish"; Tr. 2099, L. 20: "liability" should be "reliability"; Tr. 2278, L. 4: "his" should be "his head"; Tr. 2310, L. 5: "indiscernible" should be "pointing to his head"; Tr. 2372, L. 24: "discouraged" should be "discharged"; Tr. 2390, L. 8: "employer is noted" should be "employer's motives"; Tr. 2439, L. 17: "frequent" should be "frequent before"; Tr. 2682, L. 8: "frivolous" should be "privileged"; Tr. 2709, LL. 1–2: "not issuing a lot of materials" should be "about a particular witness"; Tr. 2873, L. 17: "affected" should be "effective"; Tr. 2965, LL. 4–6: Ms. Lipkin read the sentence transcribed as "On Sept. 8 . . . Thank you, Rosa."; Tr. 2970, L. 25: "confused" should be "disputed"; Tr. 2976, L. 12: "You know" should be "It goes to whether"; Tr. 2983, L. 7: "it when it's" should be "the witness'"; Tr. 3165, L. 11: "attorney" should be "attorney-client privilege"; Tr. 3177, L. 13: "female" should be "email"; Tr. 3229, L. 11: "handing out" should "the remaining"; Tr. 3230, L. 16: "right" should be "ripe"; Tr. 3572, L. 23: "weigh" should be "waive"; and Tr. 3573, L. 4: "weigh" should be "waive."

[5] The Charging Party filed a brief in opposition to the Respondent's motion for sanctions for subpoena noncompliance, but did not file a brief on the substantive merits of the case.

After the posttrial briefs were filed, the Respondent filed a brief in opposition to the Acting General Counsel's requests (made in its posttrial brief) to amend certain portions of the complaint. I have addressed the Acting General Counsel's requested posttrial amendments where appropriate in this decision.

I hereby grant the Acting General Counsel's motion to supplement its posttrial brief. The Acting General Counsel sought only to make nonsubstantive changes to one paragraph in its brief, and the Respondent has not expressed any opposition to the Acting General Counsel's request.

[6] The Respondent admitted to a similar factual predicate for jurisdiction that covers Cases 28–CA–23224 and 28–CA–23434. See GC Exhs. 1(ff) (Case 28–CA–23224), pars. 2(g)–(i); GC Exh. 1(e), pars. 2(g)–(i) (Case 28–CA–23434).

[7] This case involves 10 casino locations, each of which has a distinct set of allegations and supporting evidence. I have only provided background facts in this section to offer some context for the case as a whole. The specific facts for each allegation in the complaint (organized by casino location) are addressed in section V of this decision.

[8] Station Casinos received official word about the Charging Party's organizing committee petition on February 19, 2010. Tr. 83–84.

merits of union membership. (Tr. 101–102.) In response, some Station Casinos managers prohibited certain employees from speaking at staff meetings, while other managers prohibited all employees from speaking at staff meetings, regardless of the topic.[9] (Tr. 103–104.) Second, managers handled the Sound Bytes in different ways, including paraphrasing or translating the Sound Byte in ways that communicated a different meaning than the written statement, and adding ad-libbed comments about the Union after reading the Sound Byte. (See, e.g., Tr. 396–397, 709, 1212, 1253–1254, 1257–1258.)

At the same time, some employees who began wearing union committee leader buttons (as well as others who engaged in union activity but did not wear a union button) began reporting a variety of alleged unfair labor practices to the Charging Party. The alleged violations include, but are not limited to: directions to take off their union buttons while in the workplace; interrogation about their union beliefs or activities; directions to stop engaging in union activities (such as leafleting or speaking to coworkers about supporting the Union), even while on break or off duty; orders not to speak at employee meetings because of their union activities; threats of reprisal for engaging in union activity; and disciplinary action[10] because of their union activities. (See GC Exh. 2(c).) I have addressed the specific factual allegations at each casino location below in section V.

III. SUBPOENA ISSUES

During trial, issues arose concerning the Charging Party's compliance with the Respondent's subpoena duces tecum B–621375. Specifically, although the trial began in October 2010, the Charging Party did not fully comply with the subpoena until February 2011. After considering the procedural history, the parties' arguments and the applicable case law, I determined (as stated in an order dated June 30, 2011) that limited sanctions are warranted to address the Charging Party's late disclosures. Specifically, I decided to strike the testimony of the following 4 witnesses for the Acting General Counsel: Wayne Brasher; Maria Jessica Corona; Maria Olivas; and Dawn Vaseur. For those witnesses (and only those witnesses), the Respondent's case was prejudiced by the Charging Party's late disclosure of video statements. I denied the Respondent's request that the entire case be dismissed, and I denied the Respondent's request for litigation costs. My rationale for those rulings is set forth in more detail below.

A. The Respondent Serves Its Subpoena Duces Tecum on the Charging Party

On October 6, 2010, the Respondent sent a subpoena duces tecum (B–621375) to the Charging Party. On October 12, 2010, the Charging Party filed a petition to revoke the subpoena in its entirety. I opened the trial by teleconference on October 25, 2010,[11] and after hearing oral argument, I granted the Charging Party's petition to revoke requests 1 through 5 in the Respondent's subpoena, explaining that those requests sought materials (e.g., communications between the Charging Party and casino customers, travel agents, celebrities and vendors) that are not reasonably relevant to the allegations in the complaint. (Tr. 16.)

Regarding request 6 of the subpoena,[12] I denied the Charging Party's petition to revoke (in part) and directed the Charging Party to provide the Respondent (by the morning of October 26, 2010) with any correspondence, photographs, web postings, posters and other documentation relevant to any allegation in the complaint. (Tr. 9–10, 12.) I granted the Charging Party's petition to revoke the subpoena as it applied to affidavits, statements, interview notes and investigatory notes, citing the work product doctrine and the Section 7 rights of employees who may have provided information to the Charging Party but would not be testifying as witnesses in the case. (Tr. 8, 15.) However, I also ruled that the Charging Party would have to disclose the affidavits and statements of any witness that testified for the Acting General Counsel, with disclosure due upon request at the start of cross-examination.[13] (Tr. 8.)

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[9] Before communication in staff meetings was limited during the union organizing campaign, it was fairly common for employees to speak at staff meetings to, among other things, ask questions about work assignments or clarify the nature of new policies or casino promotions that were announced at the meeting. Tr. 88.

[10] The Respondent follows a policy of progressive discipline, meaning that normally, discipline proceeds through the following steps: (1) coaching (a meeting with a manager to discuss employee performance or misconduct); (2) verbal written warning; (3) written warning; (4) final warning; and (5) termination. However, in some instances, an employee may receive more than one coaching, and in other instances, there may be no coaching (or progressive discipline) at all before higher levels of discipline are invoked. Tr. 1068. Coachings are normally recorded on log sheets kept in the employee's personnel file, while more serious levels of discipline are recorded on a "Record of Counseling." Tr. 1035. See also Jt. Exh. 6 (including examples of log sheets and records of counseling).

[11] Before the trial opened, I participated in a conference call on October 20, 2010, with the parties and provided my preliminary impressions of the Charging Party's petition to revoke the subpoena. I opened the trial on October 25, 2010, to make a formal ruling on the petition to revoke. At the parties' request, further trial proceedings were postponed until the morning of October 26, 2010, to allow the parties to exchange and review materials provided in response to various subpoenas.

[12] Request 6 of the subpoena sought the following materials:

> A copy of all correspondence, affidavits, statements, interview notes, investigatory notes, photographs, web postings, posters, and other documentation concerning any allegation in the Complaint, a copy of which is attached hereto. If any of the requested documents in whole or in part cannot be produced because they are deemed as privileged or otherwise subject to protection as trial preparation material, then describe the nature of the document not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable the assessment of the applicability of the privilege or protection. This request specifically excludes copies of affidavits taken by the National Labor Relations Board.

[13] The Respondent also served subpoenas on each of the individuals named in the complaint as an employee who allegedly experienced discrimination in violation of Sec. 8(a)(3) of the Act. None of the 8(a)(3) discriminatees (or any party acting on their behalf) filed a petition to revoke those subpoenas. However, the Charging Party did voluntarily assist the discriminatees with compiling and disclosing their

B. Early Problems with the Charging Party's Responses to the Respondent's Subpoena

Although the Charging Party disclosed various documents in response to the subpoena, occasional problems arose in the first week of trial with the Charging Party's disclosure of certain written witness statements. In one instance, the Charging Party simply did not have the statement available in the hearing room to tender upon request. (Tr. 122 (witness Damian Villa).) On another occasion, the Charging Party provided the front pages of two statements, but did not provide the back pages of those statements. (Tr. 235–236 (witness Jeanette Blazquez).) The Charging Party quickly cured those omissions by retrieving the missing materials from its files and providing them in time for the Respondent to review before completing cross-examination. (Tr. 123, 127–128 (Villa)); (Tr. 242–246 (Blazquez).) For one witness (Dawn Vaseur), however, the Charging Party could not locate a statement that Vaseur testified she prepared. The Respondent therefore had to complete its cross-examination without having the opportunity to review that statement. (Tr. 500–506 (Vaseur).)[14]

The Respondent also became concerned that the Charging Party did not provide all materials responsive to the subpoena. In particular, the Respondent believed that the Charging Party should have disclosed: a posting from the Charging Party's website that Valerie Murzl (the Respondent's corporate vice president of human resources and training) quoted in full in an email that she sent to other members of management (GC Exh. 5(a); Tr. 75–82); and two union flyers that witness Lisa Knutson stated she was handing out before security officers directed her not to leaflet (GC Exhs. 14–15; Tr. 436, 440–441). The Respondent did not object when the Acting General Counsel sought to introduce Murzl's email or the flyers that Knutson distributed into evidence.

C. The Respondent's November 2010 Motion to Dismiss

On November 1, 2010, Respondent filed a motion to dismiss the complaint in its entirety, citing the Charging Party's "repeated failure to comply with subpoena duces tecum B–621375." (GC Exh. 1(be).) In support of its motion, the Respondent asserted that the Charging Party's response to the Respondent's subpoena should have included: the web posting quoted in Murzl's email (GC Exh. 5(a)); the union flyers that Knutson distributed (GC Exhs. 14–15); and a video that the Respondent located on YouTube in which witness Dawn Vaseur spoke about her efforts to talk with coworkers about the Union (Exh. D to Respondent's motion to dismiss).[15] After hearing brief oral argument from the parties, on November 2, 2010, I directed the Charging Party to review its files and disclose any flyers or other materials that would be relevant as evidence in the case. (Tr. 772–776.) I also set a briefing schedule on the Respondent's motion. The Acting General Counsel and the Charging Party filed written oppositions to the Respondent's motion to dismiss on or before November 22, 2010. (GC Exhs. 1(bf), (bg).) The Respondent filed a reply brief on December 3, 2010. (GC Exh. 1(bh).)

In an order dated December 7, 2010, I denied the Respondent's motion to dismiss. (GC Exh. 1(bi).) I found that the Charging Party had substantially complied with the Respondent's subpoena, as it disclosed (among other materials) multiple incident reports and witness statements prepared by the witnesses who testified in the Acting General Counsel's case-in-chief,[16] as well as union fliers that would be presented at trial in connection with complaint allegations that related to leafleting activity. As to the alleged failure to provide photographs, web postings, posters and other documentation relevant to the allegations in the complaint, I found that the Respondent failed to show that such a violation occurred. The Respondent based its argument on a video clip that it located on YouTube, but I noted that the video only included the recorded remarks of a handful of Station Casinos' employees who made general remarks about the organizing campaign that did not relate to any specific allegation in the complaint. Since the Respondent did not show that the Charging Party withheld any materials of import that would be covered by its subpoena, I found that the Charging Party substantially complied with the subpoena and

subpoena responses to the Respondent, and in that connection the Charging Party represented (on October 25, 2010) that all written statements that the discriminatees prepared had been disclosed to the Respondent. Tr. 8–9; see also Jt. Exh. 9, pars. 3–4 (regarding subpoena B–621372, sent to witness Jose Omar Mendoza).

[14] At different occasions during the Acting General Counsel's case-in-chief, the Respondent also raised concerns about the accuracy of the Charging Party's representation (made at the beginning of the trial) that it disclosed all written statements of the alleged 8(a)(3) discriminatees. Specifically, for certain discriminatees, the Acting General Counsel disclosed additional written statements (obtained from the Charging Party, and not previously disclosed to the Respondent) when the Respondent requested copies of the witness' statements at the beginning of cross-examination. See Jt. Exh. 9 (Jose Omar Mendoza); Tr. 2912–2913, 2950 (Rosa Herrera); Tr. 3211–3212, 3222 (Antonia Gutierrez). To the extent that the Respondent requested immediate sanctions during trial because the statements were not disclosed at the start of trial in response to the subpoenas sent to individual witnesses, I denied those requests without prejudice to the Respondent's right request sanctions in posttrial briefing.

[15] The Respondent also cited the Charging Party's failure to provide certain written witness statements (of witnesses Villa, Blazquez and Vaseur) upon request at the beginning of cross-examination. See GC Exh. 1(be) at 5 (Respondent's motion to dismiss). As noted above, the Charging Party cured its errors as to Villa and Blazquez by providing the missing information; it could not, however, locate Vaseur's missing statement.

In subsequent pleadings, the Respondent abandoned its argument that the Charging Party's "glitches" with disclosing written witness statements warranted dismissal of the complaint or a subpoena enforcement action in Federal district court. See GC Exh. 1(bh) at 9–10 (Respondent's reply brief in support of its motion to dismiss); GC Exh. 1(bk) at 2 fn. 3 (Respondent's appeal from the Regional Director's refusal to initiate subpoena enforcement proceedings).

[16] I also noted that to the extent that certain limited problems had arisen with the Charging Party's responses to the subpoena (e.g., late disclosure of certain witness statements and union literature introduced into evidence; nondisclosure of witness statements that the Charging Party could not locate), those problems could be addressed with measures well short of dismissal to the extent necessary.

accordingly denied the motion to dismiss.[17] I also denied the Respondent's request that I adjourn the hearing to allow time for the Acting General Counsel to initiate a subpoena enforcement proceeding in Federal district court. As I explained, since the Charging Party substantially complied with the Respondent's subpoena, any subpoena enforcement action (if one would be filed at all) would only address matters that would be remote to the merits of the trial.

Trial resumed on December 13, 2010, at which time the Acting General Counsel filed a motion requesting that I clarify my December 7 order denying the Respondent's motion to dismiss. (GC Exh. 1(bj).) Specifically, the Acting General Counsel requested that I clarify my order to state that there had been no failure by the Charging Party to comply with the Respondent's subpoena (a finding that the Acting General Counsel maintained would be relevant to the Respondent's request that it initiate subpoena enforcement proceedings in Federal district court). The Respondent opposed the Acting General Counsel's request, and also requested that I reconsider my order denying its motion to dismiss.

I denied the Respondent's request that I reconsider my ruling on its motion to dismiss. As I explained, the Charging Party disclosed a variety of materials, and quickly provided additional documents when it became apparent that certain materials were overlooked. There were instances where the Charging Party could not locate specific documents (e.g., one of Dawn Vaseur's written statements), but the nondisclosure of those materials resulted from the items being lost or misplaced, and not from a deliberate refusal to tender the documents. I used the term substantial compliance to account for the accidental or inadvertent nondisclosure (or late disclosure) of particular documents. (Tr. 1205–1206.)

I also denied the Acting General Counsel's request for clarification, explaining that I did not see a need to clarify my order beyond the remarks that I made in response to the Respondent's request for reconsideration. I also noted that the decision on whether to initiate a subpoena enforcement action lay with the Regional Director, rather than with me. (Tr. 1205–1207.) Having ruled on all pending motions, we resumed hearing testimony in the trial.

[17] In that connection, I explained that even if I were inclined to find that the Charging Party has not substantially complied with the subpoena, my review of Board precedent indicated that the Board reserves the sanction of dismissal (or default judgment) for the rarest of circumstances where a party's misconduct has tainted the entire proceeding. The limited disclosure problems that the Respondent identified did not cause such a taint that would have justified the harsh sanction of dismissing the entire complaint.

I also considered the Respondent's argument that it could not prove a negative (i.e., it could not prove that the Charging Party withheld materials that should have been disclosed in response to the subpoena). Therein, however, lay the defect in the Respondent's motion—the lack of proof of any noncompliance, particularly given the Charging Party's disclosure a variety of materials covered by the subpoena. See GC Exh. 1(bi) at 2–3.

D. The Respondent Requests that the Acting General Counsel Initiate Subpoena Enforcement Proceedings

On December 20, 2010, the Regional Director declined the Respondent's request (made on December 9, 2010) to initiate subpoena enforcement proceedings. In response, on December 22, 2010, the Respondent asked the National Labor Relations Board (the Board) for special permission to appeal the Regional Director's decision. (GC Exh. 1(bk).) The Acting General Counsel opposed the Respondent's request. (GC Exh. 1(bl).)

E. My Interrogatories to the Charging Party

On January 11, 2011, I decided to pose 3 interrogatories to the Charging Party to develop the record regarding whether the Charging Party created and/or possessed any video interview material such as the video clip (Exh. D to the Respondent's motion to dismiss) that the Respondent located on YouTube.[18] (GC Exh. 1(da).) The Charging Party filed a timely response to my interrogatories on January 24, 2011, and represented that while it did possess video statements of certain witnesses, it concluded that the video statements were not relevant to the complaint. (GC Exh. 1(dc).)

In an order dated January 25, 2011, I directed the Charging Party to provide a copy of all video statements of all past witnesses to me for review in camera. (GC Exh. 1(dd).) I also directed the Charging Party to provide the video statements of any future witnesses to the Acting General Counsel for, as appropriate, either disclosure to the Respondent upon request at the beginning of cross-examination, or review by me in camera.[19]

F. Proof Emerges that the Charging Party Failed to Disclose Relevant Materials Covered by my Orders and the Respondent's Subpoena

On February 1, 2011, the Charging Party provided video statements of the following 7 witnesses for me to review in camera:[20] Dawn Vaseur; Wayne Brasher; Maria Olivas; Maria

[18] Among other reasons, I decided to pose the interrogatories to establish: what role the Charging Party had, if any, in creating the videos posted on YouTube (e.g., Exh. D to Respondent's motion to dismiss); and whether the Charging Party had any extended video footage of witnesses beyond the footage in the YouTube video.

[19] My orders during trial regarding witness statements required the Charging Party to disclose any witness statements to the Respondent for review upon request at the beginning of cross-examination, provided that the statements were relevant to the allegations in the complaint that the witness addressed in his or her testimony. I did not require the Charging Party to disclose any statements that did not meet those parameters because, among other reasons, the additional statements are protected as work product, and because the witnesses retain Sec. 7 rights concerning the additional statements. However, the consistent practice during trial was to have any additional statements available for in camera review in the event of any disagreements between the parties about what statements should be disclosed, and also in the event that new allegations were added to the complaint based on the witness' testimony. My order served the purpose of treating the video statements in the same manner.

[20] The Charging Party also provided a video of a June 23, 2010 press conference at which certain witnesses spoke. The press conference video did not raise any subpoena compliance issues because the Charg-

Jessica Corona; William Fountain; Michael Wagner; and Ignacio Martinez.[21] I reviewed the video statements, and determined that four of the witnesses (Vaseur, Brasher, Olivas and Corona) made statements that contained information that was clearly relevant to allegations in the complaint. Accordingly, on February 2, 2011, I provided the Respondent with a copy of the video statements of those witnesses,[22] and I advised the parties that upon request, I would permit the Respondent to recall any of the past witnesses for further cross-examination based on the video statements.[23]

In the same time period (February 1–3, 2011), it came to light (through the Respondent's cross-examination, followed by off-the-record inquiries by the Acting General Counsel) that the Charging Party maintains a library of video statements, including not only its own videos but also video statements recorded by television stations that have covered various union organizing campaign events. After a preliminary review of its video library, the Charging Party located videotaped remarks of yet another witness (Norma Flores, who testified in response to direct examination on February 3, 2011) that contained statements relevant to the allegations in the complaint. Rather than proceed with Flores' testimony (or the testimony of another witness) while the Charging Party reviewed its files, I and the parties agreed to adjourn the trial on February 3, 2011, and resume as scheduled on February 28, 2011.

G. The Charging Party Makes Additional Disclosures to the Respondent

In light of the new information about the deficiencies in the Charging Party's disclosures, I directed the Charging Party to do a complete review of its video library, media library and other files and disclose any further materials covered by the subpoena to the Respondent by February 11, 2011.[24]

The Charging Party complied with my instructions and disclosed a variety of materials to the Respondent by February 11, 2011. The Charging Party also provided numerous documents to me for in camera review, including materials that it believed were beyond the scope of the subpoena, and (at my direction) materials that it listed on its privilege log. I advised the parties that I would permit the Respondent to recall any witnesses for further cross-examination based on the belatedly disclosed materials. (Tr. 2706.) The Respondent elected to recall 3 witnesses (Delmi Aldana, Lorena DeVilla and William Fountain) for further questioning (Tr. 3414, 3430, 3455), and the parties submitted a joint stipulation regarding 5 additional witnesses (Fermina Medina, Wayne Brasher, Maria Jessica Corona, Maria Olivas, and Dawn Vaseur) in lieu of recalling them for further testimony. (Jt. Exh. 12.)[25]

In addition, on February 28, 2011, I set a briefing schedule for the parties to argue whether any sanctions (such as adverse inferences, permitting the Respondent to use secondary evidence to prove certain matters, or striking specific testimony or portions of the complaint or answer that were affected by noncompliance with the subpoena) should apply based on the belated disclosures. (Tr. 2707–2709.)

H. The Board Grants the Respondent's Request for Special Permission to Appeal the Acting General Counsel's Refusal to Initiate Subpoena Enforcement Proceedings

On March 3, 2011, the Board granted the Respondent's request for special permission to appeal the Acting General Counsel's refusal to initiate subpoena enforcement proceedings in Federal district court.[26] The Board remanded the matter to me, but only with the instruction to permit the Respondent to request a finding that the Charging Party had acted in contempt of, or refused to obey, the portions of the subpoena that I did not quash. The Board added that if either of the preconditions (contempt of or refusal to obey a subpoena) to the Board initiating a subpoena enforcement proceeding was met, then the Respondent would be in a position to request that the Acting General Counsel (on the Board's behalf) seek judicial enforcement of the subpoena.

Based on the Board's order, on March 3, 2011, I asked the Respondent if it still maintained that the Charging Party was

ing Party provided the Respondent with a copy of that video as part of its initial responses to the subpoena.

[21] At the time, Dawn Vaseur, Wayne Brasher, Maria Olivas, Jessica Maria Corona and William Fountain had already testified as witnesses for the Acting General Counsel.

[22] I also provided the Respondent with a copy of Fountain's video statement. While Fountain did not provide any specific information relevant to his testimony, he did briefly allude to two general topics (being told not to wear a union button, and being told not to sign a union card) that he addressed when he testified. In light of the Charging Party's performance with disclosure and the lack of any reason to believe that the Charging Party would be prejudiced if I disclosed Fountain's video statement, I decided to err on the side of disclosure and provide Fountain's video to the Respondent.

[23] The Charging Party did not offer a direct explanation for why it incorrectly asserted that none of the videos were relevant to the complaint. Through the Acting General Counsel, the Charging Party's attorney offered the baffling representation that he did not understand that the witnesses in the video statements testified to 8(a)(1) allegations in the complaint, and that he regretted not having been present at trial to hear the specific nature of each witness' testimony. Tr. 2645–2646.

[24] It also came to light that the Charging Party had altered its internet website. I directed the Charging Party to preserve any website material to ensure that the material would remain available for review and disclosure if warranted. Subsequently, the parties confirmed that while the Charging Party did alter the appearance of its website, all materials remained available on the site.

[25] At the Respondent's request (and my instruction) during cross-examination, Medina checked her files at home and produced two documents that she wrote that relate to her testimony. The parties stipulated to the contents of Medina's two documents in lieu of recalling her for further testimony. See Jt. Exh. 12, par. 1. The disclosure of Medina's additional documents does not raise a subpoena compliance issue because the record does not show that the Charging Party or the Acting General Counsel ever possessed the two documents that Medina provided, and because Medina was not one of the individual witnesses that the Respondent served with a subpoena duces tecum.

[26] In various pleadings filed with the Board, the parties advised the Board of the developments in trial regarding subpoena compliance through January 25, 2011. See, e.g., GC Exh. 1(de). For reasons that are not clear, however, none of the parties advised the Board of the significant developments regarding subpoena compliance (including the additional disclosures that the Charging Party provided) that occurred after January 25, 2011.

currently in noncompliance with the subpoena. The Respondent acknowledged that the Charging Party had made additional disclosures, but stated that it could not answer my question because the parties were still discussing questions that the Respondent had for the Charging Party about its responses to the subpoena. I granted the Respondent's request for time (until March 21, 2011, the day that trial would resume after adjourning on March 4, 2011) to attempt to resolve any lingering questions about the subpoena.

I. The Respondent Requests Further Information to Assess the Reasonableness of the Charging Party's Efforts to Comply with the Subpoena

In a letter dated March 15, 2011, the Respondent advised me that it still was seeking information about the reasonableness of the Charging Party's efforts to comply with the subpoena. The Respondent requested my assistance since the Charging Party did not respond when the Respondent posed its questions to the Charging Party directly.

I determined that the Respondent's request for information was permissible (particularly in light of the Charging Party's late disclosures in this case), and thus on March 17, 2011, I directed the Charging Party to identify a custodian of records who would be competent to testify about the Charging Party's efforts to comply with the Respondent's subpoena (B–621725).[27] (GC Exh. 1(fe).) See *Essex Valley Nurses Assn.,* 352 NLRB 427, 440–441 (2008); *Champ Corp.*, 291 NLRB 803, 803–804 (1988), enfd. 933 F.2d 688 (9th Cir. 990). The Charging Party designated Staff Director and Organizing Director Kevin Kline as its custodian of records.

Also on March 17, 2011, I participated in a conference call with the parties concerning the parameters and procedures that would apply when the Respondent recalled witnesses for further cross-examination based on materials that the Charging Party disclosed in February 2011. I advised the parties that I would not permit the Acting General Counsel to use the February 2011 materials as evidence in its case-in-chief. However, I also advised the parties that I would allow the Acting General Counsel to question any recalled witnesses on redirect about any materials that the Respondent addressed in its recall cross-examination.

On May 2, 2011, the Respondent began its case-in-chief and called Kline as a witness to testify about the Charging Party's subpoena compliance. Kline explained that from October 2010 to February 2011, he was responsible only for assembling the written witness incident reports and statements to disclose to the Respondent, while Research Director Ken Liu (with the assistance of the Charging Party's attorneys) was responsible for assembling the remaining materials covered by the subpoena. (Tr. 3512–3153, 3519–3520.) When it came to light in February 2011 that the Charging Party's subpoena compliance was deficient, Kline took on the responsibility of assembling materials to make a supplemental disclosure in response to the Respondent's subpoena. (Tr. 3520.)

J. The Acting General Counsel and the Respondent Agree to a Stipulation About the Charging Party's Subpoena Compliance

On May 3, 2011, the Acting General Counsel and the Respondent reached a stipulation concerning the Charging Party's compliance with the Respondent's subpoena (B–621375). Specifically, the Acting General Counsel and the Respondent stipulated:

(a) Before February 2011, the Charging Party did not reasonably and diligently search for materials responsive to subpoena duces tecum B–621375; and
(b) Commencing in February 2011, the Charging Party reasonably and diligently searched for materials responsive to subpoena duces tecum B–621375, and thus the Respondent would not request enforcement of the subpoena.

(Jt. Exh. 15, pars. 3–4.) The Charging Party did not join in the stipulation or present any rebuttal evidence regarding its efforts to comply with the subpoena.[28]

K. The Respondent Requests Sanctions for Subpoena Noncompliance

1. The parties' arguments

On April 15, 2011, the Respondent filed a motion for sanctions for subpoena noncompliance. The Respondent supplemented its motion on May 12, 2011, to address the testimony that Kline provided as the Charging Party's custodian of records. In its motion, the Respondent asserted that I should dismiss this case in its entirety as a sanction for the Charging Party's subpoena noncompliance, or alternatively dismiss the allegations in the complaint that were affected by the Charging Party's subpoena noncompliance. The Respondent also requested that I require the Charging Party to pay the Respondent's litigation costs associated with the Charging Party's subpoena noncompliance.

The Charging Party and the Acting General Counsel contended that I should not impose any sanctions for subpoena noncompliance because the Respondent's case was not prejudiced by the late disclosures, and because my prior rulings (permitting the Respondent to recall witnesses, and precluding the Acting General Counsel from using the February 2011 disclosures as evidence in its case-in-chief) were sufficient to ad-

[27] In my order, I noted that the parties retained the option of resolving this issue by other means before the custodian of records testified, including engaging in further discussions or exchanging correspondence about the Charging Party's efforts to comply with the Respondent's subpoena.

[28] The Acting General Counsel and the Respondent agreed to the stipulation before Kline finished testifying in response to direct examination by the Respondent, and without calling Liu (who was under subpoena and available to testify) as a witness. As part of the stipulation, the Acting General Counsel and the Respondent agreed that the record should be closed to further evidence. Jt. Exh. 15, par. 1. Since the Charging Party did not join in the stipulation, I granted it the option of presenting a rebuttal case limited to the issue of its subpoena compliance. In a letter dated May 5, 2011, the Charging Party advised me and the parties that it would not be presenting a rebuttal case. Accordingly, I issued an order on May 9, 2011, that closed the trial.

dress any harm caused by the Charging Party's subpoena noncompliance.

2. The applicable law

"The Board is entitled to impose a variety of sanctions to deal with subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transportation Co.*, 341 NLRB 394, 396 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005); see also *Equipment Trucking Co.*, 336 NLRB 277, 277 fn. 1 (2001) (striking portions of the respondent's answer that were affected by the respondent's noncompliance with the General Counsel's subpoena); *Lenscraft Optical Corp.*, 128 NLRB 807, 817 (1960) (striking the testimony of 3 witnesses for the General Counsel who were not available to be recalled for cross-examination based on statements that were incorrectly withheld). The Board's authority to impose such sanctions flows from its inherent interest in maintaining the integrity of the hearing process. Id. The exercise of the authority to sanction a party that fails to comply with a Board subpoena is a matter committed in the first instance to the judge's discretion. *Peerless Importers*, 345 NLRB 1010, 1011 (2005); *McAllister Towing & Transportation Co.*, 341 NLRB at 396.

In many cases, the need for sanctions arises after a party explicitly and deliberately refuses to comply with a valid subpoena, and the aggrieved party (typically to avoid delaying the trial) requests sanctions in lieu of seeking to enforce the subpoena in Federal district court. See, e.g., *Essex Valley Visiting Nurses Assn.*, 352 NLRB 427, 440–441 (2008); *San Luis Trucking, Inc.*, 352 NLRB 211, 213–214 (2008); *University Medical Center*, 335 NLRB 1318, 1334–1335 (2001), enfd. in pertinent part 335 F.3d 1079 (D.C. Cir. 2003); *Packaging Techniques, Inc.*, 317 NLRB 1252, 1253–1254 (1995).

The subpoena compliance issues in this case raise a different situation. Here, the Respondent requests sanctions because the Charging Party *delayed* disclosing materials that were responsive to the subpoena, and the delay caused prejudice to the Respondent's case. The seminal case on that issue (late disclosure of subpoenaed materials) is *People's Transportation Service*, 276 NLRB 169, 225 (1985), in which the Board endorsed using a multifactor analysis to evaluate whether sanctions are warranted to maintain the integrity of the hearing process. Specifically, the Board agreed that the following factors should be considered:

(1) the initial scope and specificity of the subpoena(s) directions;
(2) the volume of the records addressed, and those produced;
(3) the nature of the call, or request for production, and the nature and type of prior responses;
(4) other factors of record indicative of an opponent's actual intended compliance with subpoena direction, [including] whether . . . there has been voluntary prehearing and hearing response, or response to subsequent ruling on dispute thereon;
(5) the status of the record showing on [a] claim made of prior conduct of a reasonable and diligent search;
(6) the nature of the explanations offered for any late production;
(7) the point in [the] hearing at which [the records were] produced; and
(8) any other factors reasonably tending to establish there was good faith in adherence to [the Board's] subpoena process, [nothwithstanding the] late production.

Id. The Board also agreed that ultimately, the issue is whether the late disclosure of subpoenaed documents caused prejudice to the subpoenaing party, and resulted from either an earlier willful refusal to produce the documents, or an intent to disadvantage the subpoenaing party (as might be shown based on the factors above). Id. at 227 (indicating that for sanctions to apply, the aggrieved party needs to demonstrate that the late disclosure of documents caused prejudice to its case); id. at 229 (indicating that sanctions are not warranted if the disclosing party can provide a credible explanation for the late disclosure, even if the late disclosure caused prejudice to the subpoenaing party's case).

Since its decision in *People's Transportation Service*, the Board has not directly addressed the issue of sanctions for late disclosure of subpoenaed documents. However, the Board's decision to uphold the sanctions imposed in *McAllister Towing & Transportation Co.* is highly instructive. In *McAllister Towing*, the judge was presented with the respondent's petition to revoke three subpoenas issued by the General Counsel. In a conference call held the day before the hearing, the judge advised the parties that she would deny the respondent's petition to revoke the subpoenas and would expect the respondent to substantially comply with the subpoenas the following morning. 341 NLRB at 394. In that connection, the judge rejected the respondent's arguments that: (a) it did not have an obligation to gather documents covered by the subpoenas until the judge opened the trial and formally denied its petition to revoke; and (b) if the judge did deny its petition to revoke, the respondent would nonetheless be entitled to a reasonable time to gather and disclose documents in response to the subpoenas. Id. at 394–395.

On the first day of trial, the judge followed through with her promise to deny the respondent's petition to revoke the subpoenas, and ordered the respondent to provide its subpoena responses to the General Counsel. Instead of producing documents as ordered, however, the respondent asserted that although it would comply with the judge's order, it was entitled to a reasonable amount of time to do so, and the period for compliance did not start until the judge made her formal ruling. Id. at 395. The judge rejected the respondent's arguments, and granted the General Counsel's request for sanctions, citing the fact that the respondent had made virtually no effort to comply with the subpoenas in the 12 days after the subpoenas were served. Id. at 395–396 (noting that once the General Counsel requested sanctions, the respondent produced three pieces of correspondence covered by the subpoenas, but no other documents).

After the parties gave their opening statements, the respondent again raised the issue of subpoena compliance and asserted that it had begun reviewing documents that it planned to produce to the General Counsel. Id. at 396. Consistent with that representation, after the lunch break and before the first witness testified, the respondent notified the judge that it now had 3 boxes of documents available in the hearing room to produce in response to the subpoenas. Id. The General Counsel refused the documents, and the judge granted the General Counsel's request to proceed with the sanctions that were announced earlier. Id.; see also id. at 394 (noting that the judge's sanctions included making adverse inferences, permitting the General Counsel to use secondary evidence to prove facts in areas related to the subpoena noncompliance, and barring the respondent from rebutting the secondary evidence).

When the case was appealed to the Board, the Board upheld the judge's decision to impose sanctions. Id. at 398. First, the Board rejected the respondent's argument that its duty to comply with the subpoenas did not begin until the judge denied the respondent's petition to revoke. As the Board explained, "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." Id. at 397. Second, the Board explained that the respondent failed to comply with the subpoena because it did not fulfill its obligation to begin a good faith effort to gather responsive documents after the subpoenas were served, and it failed to take even minimally reasonable steps to substantially comply with the subpoenas in a timely fashion. Id. And finally, the Board agreed that the respondent's noncompliance with the subpoenas was likely to prejudice the General Counsel's case and the overall proceeding. Id. at 398 (observing that, among other things: the General Counsel would have been forced to alter the presentation of its case depending on when the respondent disclosed various documents; and the General Counsel might be forced to recall previously examined witnesses, which would have further disrupted and prolonged the hearing).

3. Should sanctions apply in this case?

After considering the factors set forth in *People's Transportation Service* and the guidance provided in *McAllister Towing*, I find that limited sanctions are warranted in this case because of the Charging Party's subpoena noncompliance. As I enforced it, the Respondent's subpoena required the Charging Party to make what should have been a straightforward disclosure—a collection of any materials relevant to the allegations in the complaint (excluding work product in the form of investigative reports and interview reports). Rather than making a broad disclosure that may have been overinclusive, the Charging Party decided to make a narrow disclosure limited to documents that specifically discussed allegations in the complaint or that a witness might reference when called to testify. (Tr. 775–776.) While the Charging Party's approach was technically permissible, it was also perilous because it increased the risk that the Charging Party might miss the mark and withhold materials that the Respondent was entitled to receive in response to its subpoena. In any event, the Charging Party chose its path early in the trial, and represented that it would make a complete (but targeted) disclosure to the Respondent consistent with my orders regarding the subpoena. (Tr. 12, 776.)

The Charging Party's subpoena obligations did not end when the Charging Party made its initial disclosures to the Respondent. To the contrary, it is well settled that a party who has made a disclosure in response to a subpoena must supplement or correct its disclosure in a timely manner if the party learns "that in some material respect the disclosure or response is incomplete or incorrect" and the additional or corrective information has not been provided to the other parties. Federal Rules of Civil Procedure, Rule 26(e)(1)(A). Rule 26(e)(1)(A) therefore recognizes that parties (and their attorneys) may make mistakes and that previously overlooked (or new) information may come to light, but places the onus on the subpoenaed party or attorney to supplement the record and correct any mistakes or oversights when they occur.

In some instances, the Charging Party did make supplemental disclosures that corrected earlier mistakes or oversights. For example, the Charging Party generally provided the Respondent with written witness reports and statements in a timely manner when requested at the start of cross-examination. Further, when written witness reports and statements were erroneously omitted from earlier disclosures, the Charging Party supplied the missing materials in time for the Respondent to review and use them during cross-examination.[29] (See, e.g., Jt. Exh. 9) (statements and reports by witness Jose Omar Mendoza were not provided in response to his individual subpoena, but were provided at the start of cross-examination); section III(B), supra (regarding statements of Janette Blazquez and Damian Villa). I do not find that sanctions are warranted in those instances.[30]

By contrast, the Charging Party's attorneys did not satisfy their obligation to supplement and correct the Charging Party's disclosures regarding video statements that certain witnesses

[29] The one exception was a report that Dawn Vaseur testified she prepared about an incident involving supervisor Robert Risdon. Tr. 500–506. The record does not show, however, that the Charging Party deliberately refused to disclose that report—instead, I infer that the Charging Party simply misplaced the report before trial. Sanctions are not warranted under that circumstance, and the issue is moot in any event since I have imposed a sanction based on the late disclosure of Vaseur's video statements.

[30] The Respondent also asserted that I should impose sanctions for the following February 2011 disclosures: (1) emails indicating that witnesses Norma Flores, Dawn Vaseur, William Fountain, and Union President Geoconda Arguello-Kline would be speaking to the media; (2) an email in which a union grievance specialist provided the name of a supervisor that is identified in the complaint; and (3) press releases that contain quotes attributed to witnesses about the union campaign (but not related to any allegation in the complaint covered by their testimony). See Motion for Sanctions at 8–9.

I do not find that sanctions are warranted for the February 2011 disclosure of these materials because the Charging Party was not obligated to disclose them in response to the subpoena. For example, the press releases and the emails about media interviews were beyond the scope of the subpoena because they are not reasonably relevant to any allegation in the complaint. Similarly, the email from the union grievance specialist was not covered by subpoena as I enforced it, because the email was an investigative report that was privileged as work product until the Charging Party (perhaps inadvertently) decided to release it.

provided to the Union. Indeed, although the Respondent notified the Charging Party of its concerns about missing video statements early in the trial (on November 1, 2010), the Charging Party did not voluntarily disclose the video statements (or voluntarily confirm that relevant video statements existed) at any point despite having multiple opportunities to do so.[31] The Charging Party's responses to my January 11, 2011 interrogatories about video statements were particularly troubling, because although I posed questions that the Charging Party could only answer if it watched the video statements and evaluated their content, the Charging Party still incorrectly asserted (on January 24, 2011) that it did not possess any video material that included information relevant to the complaint.[32] Furthermore, when I advised the parties that at least 4 of the video statements were clearly relevant and thus subject to disclosure, the Charging Party (despite having access to ample information about the nature of each witness' expected and actual testimony) offered the baffling explanation that it did not know that the witnesses who gave video statements would testify about violations of Section 8(a)(1) that were alleged in the complaint.[33]

Finally, I find that the Charging Party's failure to fulfill its subpoena obligations for the video statements caused prejudice to the Respondent's case regarding the witnesses who gave the statements. Just as the respondent's conduct in *McAllister Towing* caused prejudice to the General Counsel's case, the Charging Party's conduct in this case caused prejudice to the Respondent's case. Specifically, the belatedly disclosed video statements led the Respondent to recall one witness (William Fountain) for further testimony,[34] and also forced the Respondent to work out a stipulation aimed at avoiding recalling an additional four witnesses (Wayne Brasher, Maria Jessica Corona, Maria Olivas and Dawn Vaseur). In addition, while not dispositive on the issue of whether sanctions are warranted, the Respondent lost the opportunity to use the late disclosed materials when cross-examining the Acting General Counsel's witnesses in the first instance. Compare *McAllister Towing*, 341 NLRB at 398 (respondent's failure to disclose materials at the start of trial was likely to prejudice the General Counsel's case because the General Counsel would have been forced to alter the presentation of its case depending on when the respondent disclosed various documents, and the General Counsel might be forced to recall previously examined witnesses, which would have further disrupted and prolonged the hearing).

That being said, I also find that the prejudice to the Respondent's case was cured as to Fountain when I afforded the Respondent the opportunity to recall him for further questioning. Fountain only made passing and generic references (comprising a matter of seconds) to the topics that he addressed in his testimony, such that the limited information that he provided could be addressed effectively with further cross-examination after being recalled to the stand.[35]

In sum, using my discretion I found that sanctions are appropriate for the subpoena noncompliance related to Brasher, Corona, Olivas and Vaseur, because the prejudice to the Respondent's case for those witnesses was not cured merely by offering the Respondent the opportunity to recall those witnesses for further questioning.

4. What sanctions should apply in this case?

In its brief requesting sanctions, the Respondent asked that I dismiss the complaint in its entirety as a sanction for the Charging Party's failure to comply with its subpoena obligations. The Board has noted, however, that the sanction of dismissing the entire complaint for subpoena noncompliance is perhaps unprecedented. See *Peerless Importers*, 345 NLRB 1010, 1011 (2005); see also *General Drivers Local 554*, 253 NLRB 1, 2 (1980) (noting that dismissal for alleged subpoena noncompliance was not appropriate "because there are matters of public policy being litigated here and the public interest would not be served" by dismissal); *Selwyn Shoe Mfg. Corp.*, 172 NLRB 674, 674–675 (1968) (rejecting the respondent's request that the entire complaint be dismissed as a sanction for subpoena noncompliance because the General Counsel's delay in produc-

[31] The Charging Party did not confess error or disclose the video statements to the Respondent at any of the following points: (1) in response to the Respondent's November 1, 2010 motion to dismiss; (2) during oral arguments on November 2, 2010 regarding the motion to dismiss; (3) on November 16, 2010, the date that I offered for the Charging Party to make a supplemental disclosure; (4) on January 24, 2011, in response to my interrogatories about the video statements; or (5) on February 1, 2011, the date that the Charging Party provided 7 video statements to me for in camera review (pursuant to my order).

[32] The Charging Party's incorrect representation in response to my interrogatories is amplified by the fact that it was not difficult to determine that the video statements were relevant to the complaint. For example, in one of the videos, the union interviewer specifically asked the witness (Dawn Vaseur) to describe the unfair labor practice reports that she submitted to the Union. It would not have taken much effort for the Charging Party's attorneys to simply compare Vaseur's video statements to the transcript of her testimony (or to her affidavit or handwritten reports, for that matter), or alternatively to share the video statements with the Acting General Counsel's office (or me, for in camera review) to resolve any questions about whether the video statements were relevant.

[33] While the complaint identified the witnesses who were affected by alleged discrimination in violation of Sec. 8(a)(3), it did not identify the witnesses who were affected by alleged violations of Sec. 8(a)(1). See GC Exh. 2(c). That fact, however, should not have prevented the Charging Party from making appropriate disclosures. As noted above, the Charging Party had sufficient information (including unfair labor practice reports that most witnesses prepared) to enable it to identify the allegations that each witness would address when they testified. Moreover, even if I were to accept the Charging Party's explanation that it focused only on witnesses that were identified by name in the complaint, that explanation also fails because the Charging Party did not disclose the video statements of Maria Olivas or Maria Jessica Corona even though they were identified by name in the complaint as witnesses who would testify about 8(a)(3) allegations.

[34] The Respondent also recalled witnesses Delmi Aldana and Lorena DeVilla because of information that the Charging Party disclosed in February 2011. The late disclosures that the Charging Party made concerning Aldana and DeVilla did not implicate their testimony directly, but rather raised questions about whether those 2 witnesses gave media interviews that the Union failed to disclose. I permitted the Respondent to explore those questions when Aldana and DeVilla were recalled, and the questioning did not produce any new information about the complaint allegations covered by their respective testimony.

[35] The issue of sanctions is also moot for Fountain because I did not find his testimony to be sufficiently reliable to sustain the Acting General Counsel's burden of proof.

ing material to be used in cross-examining a witness did not taint the entire proceeding), enfd. in pertinent part 428 F.2d 217 (8th Cir. 1970). To the extent that the Board has imposed the severe sanction of dismissing the entire complaint, it has done so only where a party's misconduct has tainted the entire proceeding. See, e.g., *Fernandes Supermarkets, Inc.*, 203 NLRB 568, 568–569 (1973) (explaining that "by constantly filing and withdrawing repetitious charges both with and without merit, causing the charging party's representation petition to be alternately held in abeyance and processed, and then participating in the election, only to refile substantially identical charges after the election is lost," the charging party engaged in dilatory tactics that abused the Board's processes and warranted dismissing the entire complaint).

The Charging Party's subpoena noncompliance in this case did not taint the entire proceeding, and thus I denied the Respondent's request that I dismiss this case. While the Charging Party's late subpoena disclosures were improper and caused prejudice to the Respondent's case, the prejudice was limited to the testimony provided by 4 (out of 55) witnesses that the Acting General Counsel called in its case-in-chief.[36] In a situation such as this one, where the tainted evidence can be severed from other evidence that the Acting General Counsel offered in support of the allegations in the complaint, it is not appropriate to dismiss the entire complaint. Instead, less severe and more targeted sanctions can be imposed to address the prejudice that resulted from the Charging Party's late disclosures. See *Selwyn Shoe Mfg. Corp.*, 172 NLRB at 674–675 (agreeing that sanctions should apply to the allegations in the complaint that were affected by subpoena noncompliance related to one witness' testimony, but finding that no sanctions were warranted where the alleged violations were proven based on other (untainted) evidence).[37]

Turning, then, to the question of what lesser sanctions should apply, I found that it is appropriate in this case to strike the testimony of the 4 witnesses (Wayne Brasher, Maria Olivas, Maria Jessica Corona and Dawn Vaseur) for whom the Charging Party made late subpoena disclosures that caused prejudice to the Respondent's case. See *Equipment Trucking Co.*, 336 NLRB 277, 277 fn. 1 (2001) (approving of a similar sanction); *Lenscraft Optical Corp.*, 128 NLRB 807, 817 (1960) (same). In selecting this sanction, I noted that alternative lesser sanctions would not provide the Respondent with adequate relief. For example, it did not make sense for me to draw adverse inferences or authorize the Respondent to submit secondary evidence, because the Charging Party ultimately disclosed the subpoena materials at issue. Similarly, since the Acting General Counsel could not have used the late disclosures as evidence in its case-in-chief (because of the rule against hearsay, and also because of my March 17, 2011 instructions), it would not make sense for me to exclude the evidence as a sanction. By contrast, the sanction of striking the four affected witnesses' testimony is the most appropriate sanction for this case because it addressed the fact that the Charging Party's misconduct undermined the Respondent's efforts to challenge the four witnesses' credibility (which is relevant to all of the allegations that the witnesses covered when they testified).[38] Accordingly, I will apply this sanction where appropriate in this decision.

5. The Respondent's request for litigation costs

The Respondent also requested (in its motion for sanctions, and again in its posttrial brief) that I require the Charging Party to pay the litigation costs that the Respondent incurred in connection with its efforts to ensure that the Charging Party com-

[36] For most of the Acting General Counsel's witnesses, the Respondent has never maintained that it received late-disclosed evidence that implicated the witnesses' testimony.

[37] In its posttrial brief, Respondent presented two renewed requests that I dismiss this case in its entirety. First, the Respondent argued that dismissal is warranted because the Charging Party allegedly abused the Board's processes. See R. Posttrial Br. at 17–21 (alleging that the Charging Party filed meritless charges that it later withdrew, and engaged in deception via subpoena noncompliance). The Respondent's argument is without merit. As described later in this decision, the Acting General Counsel demonstrated that the Respondent committed several violations of the Act. There is no support in the record for the Respondent's contention that the Charging Party abused the Board's processes in presenting the underlying charges to the Board, or in presenting other charges that may have been withdrawn. Since I have addressed the Charging Party's subpoena noncompliance and the limited prejudice that it caused (via the sanction of striking the testimony of four witnesses), there is no basis for dismissing the entire case or for sanctioning the Charging Party for subpoena compliance delays that did not cause any prejudice to the Respondent.

Second, the Respondent argues that I should dismiss this case because the Charging Party should have provided it with all witness statements (excluding Board affidavits) at the start of trial in response to subpoena. See R. Posttrial Br. at 21–25. Respondent's argument is misguided for multiple reasons. For starters, the Respondent is incorrect regarding when it was entitled to receive statements in the Charging Party's possession. As I stated during the trial, the Charging Party did not need to produce witness statements at the start of trial because the statements were privileged as work product (as material that the Charging Party asked witnesses to prepare in anticipation of litigation), and also were confidential records of employee Sec. 7 activity. See *Central Telephone Co. of Texas*, 343 NLRB 987, 988 (2004) (a document qualifies as work product if it was prepared or obtained because of the prospect of litigation). Once the witness testified on direct examination, however, the Respondent (upon request) was entitled to that witness' relevant statements as permitted under the Board Rules and the Jencks Act. Cf. *Caterpillar, Inc.*, 313 NLRB 626, 626–627 (1993) (discussing Board Rules 102.118(b)(1)–(2) regarding the scope of the General Counsel's duty to disclose witness statements upon request at the start of cross examination). With the exception of the instances that I have previously described, the Charging Party complied with my order.

Even if I erred in my order regarding when the Charging Party should disclose its witness statements (which I did not), the Respondent's request for dismissal still defies logic. Any alleged error was harmless, because the Respondent did receive witness statements from the Charging Party (again, excluding the exceptions that I have identified) with sufficient time to review and use them during cross-examination. Additionally, it makes little sense to impose the harsh sanction of dismissal on the Charging Party (and the Acting General Counsel) based on actions that the Charging Party took in full compliance with my orders during trial.

Accordingly, for the foregoing reasons, I deny the Respondent's renewed requests for dismissal.

[38] I emphasize that the responsibility for these sanctions lies with the Charging Party, and not with the four witnesses whose testimony will be disregarded.

plied with the Respondent's subpoena. As the Board has explained, litigation costs (including attorney's fees) may be awarded where a party exhibits bad faith in either its actions leading up to the lawsuit or its conduct of the litigation. See *Service Employees District No. 1199 (Staten Island Community Hospital)*, 339 NLRB 1059, 1059 fn. 2 (2003) (explaining that attorney's fees are available under the bad faith exception to the "American Rule" that parties normally pay their own litigation costs); *Lake Holiday Manor*, 325 NLRB 469, 469 (1998) (same). The Board has also stated that litigation costs may be awarded for discrete misconduct (as opposed to awarding costs for the entire case) where appropriate. See *675 West End Owners Corp.,* 345 NLRB 324, 326 fn. 11 (2005), enfd. 304 Fed. Appx. 911 (2d Cir. 2008).

I do not find that an award of litigation costs is warranted here. Although I have found that the Charging Party failed to live up to its subpoena compliance obligations, the Charging Party's misconduct does not rise to the level of bad faith that would support an award of litigation costs. To the extent that the Board has found bad faith in the past, those findings have been predicated on abuses of the Board's processes or open defiance of the judge's orders. See *675 West End Owners Corp.,* 345 NLRB at 326 fn. 11 (collecting cases). Here, the Charging Party's subpoena noncompliance resulted from misconduct akin to recklessness (in the form of disregarding information that should have led it to supplement its disclosures with the aforementioned video statements), which warrants the sanction that I have imposed, but falls short of bad faith warranting an order to pay litigation costs. I also note that the subpoena noncompliance in this case was narrow in scope, as it affected only 4 of the Acting General Counsel's 55 witnesses (a fact that undermines the Respondent's theory that the Charging Party aimed to manipulate the proceedings as a whole). Finally, I have considered the fact that although the Board has decided several cases in which a party has explicitly and deliberately refused to comply with a subpoena (by withholding subpoenaed documents that are likely to be harmful to the party's case), I am not aware of any such case in which the Board has awarded litigation costs for that noncompliance. As a result, I cannot find that the circumstances of this case warrant a finding of bad faith and an award of litigation costs.

L. Ruling on Respondent's Motion for Sanctions and Litigation Costs

Based on the foregoing analysis, I will strike the testimony of the following four witnesses for the Acting General Counsel as a sanction for the Charging Party's subpoena noncompliance: Wayne Brasher; Maria Jessica Corona; Maria Olivas; and Dawn Vaseur. I have denied the Respondent's request that the entire case be dismissed, and I have denied the Respondent's request for litigation costs.

IV. LEGAL STANDARDS

A. Witness Credibility

In a case such as this one, the merits of the allegations depend in large measure on witness credibility regarding the nature of the statements and conduct that the witness observed or experienced in the workplace. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may be reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

Some of the witnesses in this case were not fluent in English, and yet (understandably) were called upon to testify about remarks that the Respondent's agents allegedly made to them in English. Given that fact, it bears noting that the credibility analysis remains the same—all of the credibility factors noted above are relevant, and any language barriers should simply be considered in the overall credibility assessment. See *Daikichi Sushi*, 335 NLRB at 623 (noting that while a language barrier is a legitimate concern, a witness' difficulties with English should not be hastily equated with unreliability or incompetence).

B. Section 8(a)(1) Violations

The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *KenMor Electric Co.*, 355 NLRB 1024, 1027 (2010) (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant, Inc.*, 330 NLRB 1339, 1339 fn. 3 (2000) (same); see also *Park N' Fly, Inc.*, 349 NLRB 132, 140 (2007).

The Board has provided additional guidance for specific types of statements and conduct that can arise in connection with an ongoing union organizing campaign. As a general matter, employers may permissibly engage in legitimate campaign propaganda about the merits of union membership, as long as the campaign propaganda is not linked to comments that cross the line set by Section 8(a)(1) and become coercive (from the objective standpoint of the employees, over whom the employer has a measure of economic power). See *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 5 (2011); *Inn at Fox Hollow*, 352 NLRB 1072, 1074 (2008); *Wal-Mart Stores*, 352 NLRB 815, 822 (2008); see also Section 8(c) of the Act (stating that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit"). Moreover, under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer may make lawful pre-

dictions of the effects of unionization if the predictions are based on objective facts *and* address consequences beyond an employer's control. *DHL Express*, 355 NLRB 1399, 1400 (2010); see also *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010) (noting that an employer may lawfully tell employees that collective bargaining may not necessarily lead to better working conditions for employees).

However, employer statements and conduct may run afoul of Section 8(a)(1) in the following ways:[39]

1. Changes to terms and conditions of employment

An employer violates Section 8(a)(1) if it communicates to employees that they will jeopardize their job security, wages or other working conditions if they support the union. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010). That principle holds true even if the employer does not specify the specific nature of the reprisal — the mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8(a)(1). Id., slip op. at 14.

Conversely, an employer may not promise or grant benefits to employees for the purpose of discouraging union support. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21 (2010). Notably, while the employer's motive is typically irrelevant to the merits of 8(a)(1) allegations, employer motive *is* relevant to promises or conferral of benefits, as the employer's motive for conferring a benefit during an organizing campaign must be to interfere with or influence the union organizing. Absent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act. Id. (citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), and *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992)); see also *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (explaining that the test in this circumstance is motive-based, and requires the Board to determine whether the record evidence as a whole, including any proffered legitimate reason for the wage increase and promotion offer to the employee, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with the employee's protected union activity); *Yale New Haven Hospital*, 309 NLRB at 366 (noting that an employer may establish a legitimate business reason for promising or providing benefits to employees by showing that the benefits were granted in accordance with a preexisting established program).

2. Futility

An employer may not tell employees that it would be futile for them to support a union. Examples of unlawful statements of futility include advising employees that the employer will never permit its workplace to be unionized (see *Goya Foods*, 347 NLRB 1118, 1128–1129 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008); *Wellstream Corp.*, 313 NLRB 698, 706 (1994)), and advising employees that the employer will not negotiate with a union (*Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 573–574 (2010); *Goya Foods*, 347 NLRB at 1132).

[39] This list is not intended to be exhaustive, but it does cover many of the types of alleged 8(a)(1) violations that are at issue in this case.

3. Interrogation

Allegations of interrogation must be decided on a case-by-case basis to determine whether an employer's questioning of employees, under all the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Stabilus, Inc.*, 355 NLRB 836, 850 (2010). To make that assessment, the Board considers such factors as whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, the place and method of the interrogation, and the truthfulness of the reply. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 13–14 (2010); *Stabilus, Inc.*, 355 NLRB at 850; *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Under this test, either the words themselves, or the context within which they are used, must suggest an element of interference or coercion. *Stabilus, Inc.*, supra at 850.

4. Leafleting

The Supreme Court has recognized a distinction of substance between the Section 7 rights of employees who are rightfully on the employer's property pursuant to the employment relationship, and the rights of nonemployee union organizers, and thus distinctly different rules of law apply to each. Under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the standard governing the rights of employees to leaflet, an employer may not bar employees from distributing union literature in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. 324 U.S. at 803 fn. 10; *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 7 (2011) (explaining that "it is well established that an employer that operates on property it owns ordinarily violates the Act if it bars its employees from distributing union literature during their nonwork time in nonwork areas of its property. Moreover, such an employer's off duty employees have a presumptive right to return to their work site and gain access to exterior, nonwork areas for purposes of otherwise protected solicitation"); see also *Babcock & Wilcox v. NLRB*, 351 U.S. 106, 113 (1956) (same). Thus, an employer who bars an employee from leafleting without proper justification runs afoul of Section 8(a)(1).[40]

[40] The Sec. 7 right to leaflet extends to workers (such as contractors) who are not strangers to the property because they regularly work on the premises even though the premises are not owned by their employer. When those types of employees seek to engage in organizational handbilling while off duty, "the property owner may lawfully exclude such employees only where the owner is able to demonstrate that their activity significantly interferes with his use of the property or where exclusion is justified by another legitimate business reason, including, but not limited to, the need to maintain production and discipline (as those terms have come to be defined in the Board's case law)." *New York New York Hotel & Casino*, 356 NLRB No. 121, slip op. at 13; see also id. (noting that "in some instances property owners will be able to demonstrate that they have a legitimate interest in imposing reasonable, nondiscriminatory, narrowly-tailored restrictions on the access of contractors' off duty employees, greater than those lawfully imposed on its own employees").

By contrast, an employer generally cannot be compelled to allow nonemployees (including union representatives) who are strangers to the employer's property to distribute union literature on the employer's property. *Babcock & Wilcox*, 351 U.S. at 113; *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533–534 (1992); but see *Babcock & Wilcox*, 351 U.S. at 113 (noting, as a narrow exception, that an employer must allow the union to approach its employees on the employer's property "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them").

5. Solicitation of employee grievances

Section 8(a)(1) prohibits employers from soliciting employee grievances in a manner that interferes with, restrains, or coerces employees in the exercise of Section 7 activities. The solicitation of grievances alone is not unlawful, but it raises an inference that the employer is promising to remedy the grievances. The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (2010) (citing *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994)); see also *Bally's Atlantic City*, 355 NLRB 1319, 1326 (2010).

An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign without an inference being drawn that the solicitations are an implicit promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003)); *Wal-Mart Stores*, 352 NLRB at 822–823. However, it is also the case that an employer cannot rely on past practice to justify solicitation of grievances where the employer significantly alters its past manner and methods of solicitation. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *Wal-Mart, Inc.*, 339 NLRB 1187, 1187 (2003)). And ultimately, the issue is not whether there has been a change in method of solicitation, but rather whether the instant solicitation implicitly promised a benefit. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (citing *American Red Cross Missouri-Illinois*, 347 NLRB 347, 352 (2006)).

6. Solicitation of employee reports on union activities of others

It is well settled that the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. Accordingly, an employer's invitation to employees to report instances of being harassed or pressured by employees engaged in union activity violates Section 8(a)(1). *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005); *Tawas Industries*, 336 NLRB 318, 322 (2001) (noting that an employer that combines a request for reports of harassment during union solicitation with a promise to discipline the individual accused of harassment (or otherwise take care of the problem) violates Section 8(a)(1) because the employer's statement has the potential effects of encouraging employees to identify union supporters based on the employees' subjective view of harassment, discouraging employees from engaging in protected activities, and indicating that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act). Moreover, an employer statement prohibiting harassment that does not explicitly restrict protected activity may still violate Section 8(a)(1) of the Act if one of the following factors is shown: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Boulder City Hospital*, 355 NLRB 1247, 1248–1249 (2010).

However, the Board has also explained that an employer may lawfully assure employees that it will not allow them to be threatened, and it may ask them to report such conduct because threats directed at employees are properly within the Respondent's legitimate concerns. Requests to report unprotected conduct to management do not reasonably tend to chill employees in the exercise of their Section 7 rights, but rather assist in assuring employees the free exercise of those rights. *Champion Home Builders*, 350 NLRB 788, 790 (2007).

7. Surveillance

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether, under all the relevant circumstances, reasonable employees would assume from the statement or conduct in question that their union or other protected activities have been placed under surveillance. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14. The standard is an objective one, based on the rationale that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. Id.; see also *Aladdin Gaming, LLC*, 345 NLRB 585, 585–586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008) (explaining that while a supervisor's routine observation of employees engaged in open Section 7 activity on company property does not constitute unlawful surveillance, an employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is out of the ordinary and is thereby coercive); *Flexsteel Industries,* 311 NLRB 257, 257 (1993) (noting that an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement).

8. Union buttons

The Supreme Court has held that employees have a Section 7 right to wear union insignia (such as union buttons) on their employer's premises, which may not be infringed, absent a showing of special circumstances. *Hawaii Tribune Herald*, 356 NLRB No. 63, slip op. at 18 (2011) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)); *Stabilus, Inc.*, 355 NLRB at 838. An employer also violates the Act if it enforces its uniform policy in a disparate manner (e.g., by enforcing the policy when employees wear union insignia, but not enforcing the policy when employees wear other insignia under similar circumstances). *Stabilus, Inc.*, 355 NLRB at 834.

9. Union talk

An employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters. *Pacific Coast M.S. Industries*, 355 NLRB at 1422, 1438–1439 (2010); *Stabilus, Inc.*, 355 NLRB at 862; *Altercare of Wadsworth Center for Rehabilitation*, 355 NLRB at 573. Such a rule does not prevent an employer from telling employees who have stopped work to talk to get back to work. *Pacific Coast M.S. Industries*, 355 NLRB at 11439.

10. Work rules

The Board has articulated the following standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1):

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB 744, 745 (2008) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004)), adopted in 355 NLRB 1154 (2010), enfd. 645 F.3d 475 (1st Cir. 2011).

C. Section 8(a)(3) Violations

The legal standard for evaluating whether an adverse employment action violates the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003). The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. Id. at 1066; *Pro-Spec Painting*, 339 NLRB at 949; *Bally's Atlantic City*, 355 NLRB at 1321 (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 2011 WL 3375578 (D.C. Cir.). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. *Pro-Spec Painting*, 339 NLRB at 949 (noting that where an employer's reasons are false, it can be inferred that the real motive is one that the employer desires to conceal—an unlawful motive—at least where the surrounding facts tend to reinforce that inference) (citation omitted). However, Respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Park N' Fly, Inc.*, 349 NLRB at 145 (citations omitted).

The *Wright Line* standard does not apply where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act. In such a single motive case, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003). Specifically, when an employee is disciplined or discharged for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Stanford Hotel*, 344 NLRB 558, 558 (2005) (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

D. Affirmative Defenses

An employer may avoid liability for unlawful conduct in some circumstances by repudiating the conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978). To be effective, the repudiation must be: timely; unambiguous; specific in nature to the coercive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct; and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. Id. The employer also must not engage in proscribed conduct after the repudiation. Id.

Although the decision in *Passavant* remains good law, in a subsequent decision the Board stopped short of endorsing all of the elements set forth in *Passavant*. See *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005). In addition, the Board has agreed that "by its terms the *Passavant* decision indicates that what an employer must do to cure a violation may depend on the nature of the violation." *Danite Sign Co.*, 356 NLRB No. 124, slip op. at 7 (2011); *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007) (finding that given the "relatively minor" importance of the employer's decision to increase the price of employee meals by 75 cents without bargaining with the union, the employer prevailed under the *Passavant* defense even though the repudiation did not completely accord with *Passavant* regarding timeliness and lack of ambiguity).

V. FINDINGS OF FACT, DISCUSSION AND ANALYSIS

A. General Observations

Before delving into the specific allegations, it is helpful at this point to provide some background on how the factual mer-

its of this case were litigated. The Acting General Counsel called 55 witnesses in its case-in-chief. The Respondent called one witness in its case (the Charging Party's designated custodian of records, who testified primarily about the Charging Party's efforts to comply with the Respondent's subpoena), and then reached an agreement with the Acting General Counsel that the record should be closed. (See Jt. Exh. 15.)

As I mentioned to the parties in an off-the-record discussion, the practical effect of the agreement to close the record is that the complaint allegations will succeed or fail based only on the testimony of the Acting General Counsel's witnesses (including cross-examination, which was extensive) and any relevant documentation that was admitted into the evidentiary record. In agreeing to close the record, the Acting General Counsel waived its right to request adverse inferences based on the Respondent's decision not to call responsive witnesses (see Jt. Exh. 15), and thus I have not made any such inferences.

Unless specifically noted in my analysis, I have used the following guidelines:

- Citations to the complaint refer to the amended consolidated complaint in Cases 28–CA– 22918 and 28–CA–23089 (see GC Exh. 2(c).
- All managers and security officers that I have identified in my analysis were either the Respondent's supervisors or agents (as defined by Sec. 2(11) and 2(13) of the Act) during the relevant time period. See GC Exh. 1(w), par. 4; Jt. Exh. 13.
- All dates refer to 2010.

In assessing witness credibility, I have considered the fact that almost all of the Acting General Counsel's witnesses were the Respondent's employees and testified under subpoena and against the Respondent's interests.[41] In addition, I have considered the testimony that the Respondent elicited for the purpose of impeachment (e.g., inconsistencies between the witness' testimony and written reports that the witness prepared). However, in writing this decision, I generally did not discuss impeachment evidence that I determined was not probative of the witness' credibility or that related to collateral matters. Similarly, where warranted I have considered (and addressed) whether the witness' ability to understand English affected the reliability of the witness' testimony about remarks in English that allegedly were made in the workplace.

I have also considered the evidence that the Respondent attempted to elicit to support a theory that the Union or its agents improperly influenced the Acting General Counsel's witnesses. The Respondent's theory did not pan out as a general matter, but I have addressed this theory where warranted for specific witnesses. Finally, when evaluating whether certain remarks or conduct were objectively coercive in violation of Section 8(a)(1), I have considered the evidence that the Respondent elicited regarding information that was available to employees (e.g., from the Union or in the Respondent's employee handbooks—(see, e.g., GC Exh. 26; Jt. Exhs. 2–5) about their legal rights.[42]

In the sections that follow, I discuss my factual findings and legal conclusions for the complaint allegations that apply to Station Casinos as a whole, as well for the complaint allegations that apply to each specific casino location.[43]

B. Station Casinos (all locations)

1. Valerie Murzl and Kevin Kelley—complaint paragraphs 16 and 17

a. Findings of fact

Historically, the Respondent has encouraged its employees to communicate with managers. (See Jt. Exh. 2, p. iv) (employee handbook passage encouraging employees to speak up and give the Respondent the opportunity to address employees' issues and concerns). While communication can occur in a variety of settings, the Respondent often received employee comments at brief preshift meetings (also known as "huddles"). (Tr. 60–61, 87–88.)

[41] Of the 55 witnesses that the Acting General Counsel called to testify, only Jose Omar Mendoza was a former employee. Valerie Murzl and Kevin Kelley testified as adverse witnesses called under Rule 611(c).

[42] Written policy statements (such as those that may be found in an employee handbook) do not per se insulate employers from liability for the actions of their supervisors or agents. To the contrary, an employer is generally held responsible for the statements or conduct of its supervisors or agents if the individual acted with actual or apparent authority with respect to the conduct. See *RCC Fabricators, Inc.*, 352 NLRB 701, 714 (2008); *Communication Workers of America*, 304 NLRB 446, 448 fn. 4 (1991). As the Board has explained:

> According to the Restatement 2d, *Agency, § 7*, actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied. Apparent authority, on the other hand, results from a manifestation by a principal to a third party that another is his agent. Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause third parties to believe that the agent has authority to act for him. Restatement 2d, *Agency, § 27.* As with actual authority, apparent authority can be created either expressly or . . . by implication.

Communication Workers of America, 304 NLRB at 448 fn. 4. If an agency relationship is established, then the supervisor's or agent's actions "will be imputed to the corporation whether covered by the agent or officer's instructions, whether contrary to his instructions, and whether lawful or unlawful." *Philips Industries*, 172 NLRB 2119, 2125 (1968), enfd. 410 F.2d 756 (4th Cir. 1969).

In this case, it is undisputed that the conduct at issue was carried out by the Respondent's supervisors and agents. It is also undisputed that the Respondent encouraged its supervisors to speak to employees about why they should reject the Union (by, among other things, reading Sound Bytes and describing their own experiences and opinions regarding unions). Based on those facts and the principles of agency law, I view with skepticism (but nonetheless have considered) the Respondent's suggestion that it is not liable for statements made by supervisors and agents that conflict with written policies that can be found in the Respondent's employee handbook. See, e.g., R. Posttrial Br. at 42 (asserting that a supervisor's directive to remove a union button could not be imputed to the company because the directive conflicted with the Respondent's written policies).

[43] The casinos are listed by the nicknames used to identify them over the course of the trial. The official names of each casino are stated in the caption to this case.

During the union organizing campaign, the Respondent frequently issued written statements (called Sound Bytes) that were read to employees at preshift meetings and presented information and arguments aimed at persuading employees not to sign a union card. (Tr. 67, 90; GC Exh. 6; Jt. Exhs. 7–8.) The Sound Bytes generally followed the same formula—Sound Bytes normally began with a statement of certain facts (accompanied by arguments and hyperbole in support of the Respondent's perspective), and with an assertion that the Union was not being honest with employees about the facts outlined in the Sound Byte. Most Sound Bytes then concluded with an exhortation such as "Don't sign a Union card" or "If asked to sign a Union card, just say No!" (See generally GC Exh. 6 (copies of Sound Bytes used at all of the Respondent's facilities).)[44] The following is an example of a Sound Byte that adheres to the formula outlined above:

> The Culinary Workers Union continues to mislead Station Casinos Team Members. The Union organizers say, "sign this card today; within months you will be union-represented; and soon after that you will have a contract that provides everything you want."
>
> Most Station Casinos Team Members know that the Union's claims are false. Please consider the experience of the Palace Station receivers: Eleven years ago, the Teamsters Union convinced the Palace Station receivers to sign union cards. The Union petitioned for a secret ballot election; the US government conducted a hearing; and a secret ballot election was conducted. The Union won the election, and the matter was submitted to a US Court of Appeals. The parties went to the bargaining table almost two years after the petition was filed. It took years for Palace Station and the Teamsters to reach an agreement; the terms of this agreement made the Palace Station receivers the lowest paid Station Casinos receivers in the Company. In addition, the Palace Station receivers' benefits were less than the benefits of other Station Casinos receivers.
>
> No one can predict the future. No one can predict whether your experience would be similar to that of the Palace Station receivers.
>
> Don't let the Union harass you into doing something that you don't want. If asked to sign a Union card, just say No.!!!!!!

(GC Exh. 6(c); see also GC Exh. 6 (containing additional examples of Sound Bytes).)

Corporate Vice President of Human Resources and Training Valerie Murzl encouraged managers to read the Sound Bytes with passion, and to aggressively state (in preshift meetings and elsewhere) facts, opinions and examples to argue why employees should not support the Union. (Tr. 87, 89–90, 97.) The Respondent's human resources directors and members of upper management did not monitor or provide guidelines to supervisors regarding the specific statements about the Union that supervisors made to employees in preshift meetings. (Tr. 105, 106–107.)

At the beginning of the organizing campaign, the Respondent permitted employees to ask questions and express their views about the Union during preshift meetings. (Tr. 89, 104.) In an email that Murzl sent to human resources directors on February 22, Murzl recognized that because of the Sound Bytes and the organizing campaign, many preshift meetings were "becoming quite interactive and are therefore longer than normal." (GC Exh. 5(f); Tr. 102, 104.) Murzl advised the directors that "[w]e are absolutely comfortable with that and want you to spend the necessary time required to satisfy everyone's questions."[45] Id.

On March 23, however, Murzl determined that the Respondent had allowed a sufficient period of time for employees to state their opinions about the Union in preshift meetings. (Tr. 104.) Accordingly, Murzl sent out a "reminder" email to human resources directors "that our huddles are a quick informational meeting intended for management only to present information that is important to our business, our operations and our Company." (GC Exh. 5(w).) Murzl also advised that "[i]f Team Members want to present any information of their own interest, like Girl Scout Cookies, Avon products, union support or nonunion support or any other topic, huddles are not the time or place. [Team Members] are free to speak with management privately when managers are available. Team Members may also share their thoughts, comments and interests while on their breaks in an authorized break area only." Id.; see also (Tr. 102.) There is no evidence that Murzl's email was presented or published to employees.

b. Discussion and analysis

The complaint alleges that from on or about February 19, until on or about June 1, the Respondent (through Murzl) used printed and oral "Sound Byte" communications (and other printed communications) that threatened employees by telling them not to sign union membership cards. (GC Exh. 2(c), par. 16.)[46]

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[44] The record also includes examples of Sound Bytes that were approved by Corporate Vice President of Human Resources and Training Valerie Murzl and used specifically at the Fiesta Henderson and Fiesta Rancho facilities. See Jt. Exh. 7 (Sound Bytes used at Fiesta Henderson); Jt. Exh. 8 (Sound Bytes included in the Fiesta Rancho "Que Pasa" newsletters). These casino-specific Sound Bytes were similar to the all-facility Sound Bytes discussed above, but were generally shorter. Example casino-specific Sound Bytes could be statements as short as "Don't sign a union card!" (see, e.g., Jt. Exh. 8(l)), or slightly longer statements such as "You could lose your right to vote in a secret ballot election if you sign a union card. Don't sign a union card!" See, e.g., Jt. Exhs. 7(d), 8(a).

[45] Murzl described this announcement as a temporary exception that she made to the "normal" rule that preshift meetings are reserved for casino business matters. Tr. 104. I do not doubt that this was Murzl's understanding of the purpose of preshift meetings, but the record establishes that in practice, the Respondent permitted employees to discuss a variety of topics at preshift meetings. See Tr. 433–434, 2597–2598.

[46] The Respondent asserts that the allegation in paragraph 16 should be dismissed because the allegation is not sufficiently specific to afford the Respondent the opportunity to investigate and respond to the allegation. See R. Posttrial Br. at 33 (arguing that the lack of specificity violates its due process rights). I deny the Respondent's request. The allegation in paragraph 16 provided the Respondent with ample notice of the nature of the communications at issue (Sound Bytes and other written communications that are in the evidentiary record), as well as the time frame in which the communications were allegedly made.

The complaint also alleges that since March 23, the Respondent (through Murzl) issued a policy reminder that: denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced an overly broad and discriminatory rule that prohibited employees from discussing issues of common concern (including but not limited to the union organizing campaign) and required any discussions about the Union to be one-on-one with management. (GC Exh. 2(c), par. 17.)

I found Murzl and Kelley to be generally credible witnesses. Both were poised and confident witnesses who offered clear answers to the Acting General Counsel's questions, and much of Murzl's testimony was corroborated by documentation that was introduced into the evidentiary record. I accordingly have credited Murzl's and Kelley's testimony regarding matters within their personal knowledge.

The Acting General Counsel did not demonstrate that the Sound Bytes and other written communications that the Respondent used were unlawful as drafted. Although the Sound Bytes did exhort employees not to sign union membership cards or support the Union, the Sound Bytes were not coercive or threatening when read in their entirety. To the contrary, the Sound Bytes presented information, and then presented the Respondent's argument for why employees should reject the Union based on that information. With that foundation, a reasonable person would understand that the exhortation "Don't sign a Union card," was being used as an emphatic conclusion to the Respondent's argument in opposition to the Union. In short, the Sound Bytes were lawful antiunion propaganda that is protected by Section 8(c) of the Act.[47] I would therefore recommend that the allegation in paragraph 16 of the complaint be dismissed.

Turning to Murzl's March 23 policy reminder email regarding employee discussion at preshift meetings, the Acting General Counsel asserted two theories for why the policy reminder was unlawful: (1) the policy reminder denied employees a benefit (open discussion at preshift meetings) that they previously enjoyed because they supported the Union; and (2) the policy reminder stated an overly broad and discriminatory rule that explicitly prohibited (or at a minimum could be construed as prohibiting) Section 7 activity. (See GC Exh. 2(c), par. 17.) In response, the Respondent questioned whether open discussion at preshift meetings is a "benefit." The Board, however, addressed that issue in *Parts Depot, Inc.*, where it held that an employer violated Section 8(a)(1) by, in an effort to dissuade employees from supporting the union, offering employees a new open door policy (i.e., a new benefit) under which employees could bring their grievances and concerns directly to one of the employer's vice presidents. 332 NLRB 670, 673 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001). Based on that authority, as well as the testimony in the record that the Respondent had a past practice of permitting employees to ask questions and voice concerns at preshift meetings, I find that open discussion at preshift meetings was indeed a benefit that the Respondent provided to employees.[48]

There is merit, however, to the Respondent's contention that Murzl's policy reminder email cannot serve as a stand-alone basis for finding an unfair labor practice because there is no evidence that it was distributed to employees. I find that while Murzl's email arguably outlined improper limitations on the ability of employees to discuss "personal interests" such as the Union, the record does not show that any employees (other than supervisors) received her email. Because the email was not published to employees, it could not have had a chilling effect on their Section 7 rights. See *Loparex, LLC*, 353 NLRB 1224, 1227, 1233 fn. 13 (2009) (complaint allegation that employer enforced a work rule that violated Sec. 8(a)(1) was dismissed because the evidence did not show that the rule was published to employees); *St. Francis Hotel*, 260 NLRB 1259, 1260–1261 (1982) (same). The Acting General Counsel therefore failed to establish a violation of the Act, and I thus recommend that the allegations in paragraph 17 of the complaint be dismissed.[49]

2. Complaint (Case 28–CA–23224) paragraph 7

a. Findings of fact

Since on or about April 15, 2010, the Respondent has included the following language on the "Record of Counseling" forms that it issues to employees in connection with disciplinary matters:

> This counseling session is confidential and should only be discussed with management or Human Resources.

(Jt. Exh. 11, par. 1.) Immediately below that instruction, the Record of Counseling forms include the following language:

> TO THE TEAM MEMBER: You are given this notice in order that you many have an opportunity to correct unacceptable behavior. If you fail to correct this behavior as addressed above, or engage in any other violation of company rules or conduct, you will subject yourself to further disciplinary action, up to and including termination. PLEASE NOTE that by signing this form, you are simply acknowledging that you

That is sufficient under the Board's requirements. See *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953) (a complaint is adequate if it provides a plain statement of the alleged unfair labor practices that is sufficient to allow the respondent to put on a defense).

[47] My finding here is limited to the text of the Sound Bytes themselves. The actual implementation of the Sound Byte campaign by individual supervisors (who, for example, may have added their own remarks or altered the Sound Bytes) is another matter, and is addressed on an allegation-by-allegation basis in this decision.

[48] Although Murzl testified that preshift meetings were only intended to provide managers with the opportunity to communicate business-related instructions to employees (in a one-way-street communication format), several other witnesses credibly testified that in practice, the Respondent permitted employees to speak and ask questions at preshift meetings on a variety of topics. See, e.g, Tr. 433–434 (Lisa Knutson); 2597–2598 (Jose Reyes).

[49] My recommendation that the allegation in paragraph 17 be dismissed is based on the text of Murzl's March 23 policy reminder email. To the extent that the Acting General Counsel has alleged that the Respondent violated the Act in specific preshift meetings conducted by individual supervisors, I have addressed those claims on an allegation-by-allegation basis in this decision (taking into account whether Murzl's policy reminder email might be corroboration evidence for the restrictions that individual supervisors imposed on preshift meetings).

> had this discussion, were shown this document and had the opportunity to respond to it.

Id.

From April 15 to December 21, 2010, the Respondent issued 3,504 records of counseling to nonsupervisory employees. Each of those records of counseling forms contained the language quoted above regarding when and with whom counseling sessions should be discussed. (Jt. Exh. 11, par. 2; see also Jt. Exh. 11, par. 3) (providing an example of one employee who was verbally prohibited from discussing discipline issued to her on May 29, 2010).

b. Discussion and analysis

The complaint alleges that from on or about April 15, 2010, the Respondent has violated Section 8(a)(1) by maintaining and enforcing a rule on its "Record of Counseling" forms that states, "This counseling session is confidential and should only be discussed with Management or Human Resources." (GC Exh. 1(fb), pars. 5, 7.)

The facts relating to this allegation are not in dispute. On the merits of the alleged violation, I reject the Respondent's argument that the disputed language (that the counseling session is confidential and should only be discussed with management or human resources personnel) was directed only to managers and supervisors (and not to employees). (See R. Posttrial Br. at 38.) There is nothing in the Record of Counseling form that advises employees that they should disregard the language about confidentiality, nor is there any language in the form that limits the confidentiality clause to only managers and supervisors.[50] Thus, an employee presented with the counseling form would reasonably conclude that the Respondent expected them to comply with the instructions on the form concerning confidentiality.

As for the law regarding work rules, the Board's standard for determining whether an employer's maintenance of a work rule violates Section 8(a)(1) states as follows:

> If the rule explicitly restricts Section 7 activity, it is unlawful. If the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In applying these principles, the Board refrains from reading particular phrases in isolation, and it does not presume improper interference with employee rights.

NLS Group, 352 NLRB at 745.

The Respondent's rule that employees should only discuss counseling sessions with management or the human resources office is unlawful because employees could reasonably construe the rule to prohibit Section 7 activity such as expressing concerns about discipline to union representatives or other employees. Although the confidentiality rule here (unlike the rule in *NLS Group*, supra) did not specify a consequence for employees who did not comply with the rule, the rule remains coercive and violates Section 8(a)(1) because it could reasonably be interpreted as presenting employees with the unlawful choice of either complying with the rule (at the expense of exercising their Section 7 rights) or breaking the rule and risking raising the ire of their employer. I therefore find that from on or about April 15, 2010, the Respondent violated Section 8(a)(1) by maintaining and enforcing a rule on its "Record of Counseling" forms that states, "This counseling session is confidential and should only be discussed with Management or Human Resources." (GC Exh. 1(fb), par. 7.)

C. Aliante Station

1. Maria Lourdes Cruz—complaint paragraphs 5(a), (b), and (c), and 15(a)

a. Findings of fact

Maria Lourdes Cruz began wearing a union button to work on February 19, 2010, placing the button on the right side of her uniform. (Tr. 569.) Upon arriving at the office at the start of her shift on February 19, she spoke with Assistant Room Manager Craig Browning, who told her that she was not supposed to be wearing her union button because it was not part of her uniform. Browning directed Cruz to remove the button, but Cruz refused, asserting that she had a right to wear it. (Tr. 570.)

Moments later, Sous Chef Lonnie Haney joined Browning and Cruz in the office. Browning advised Haney that Cruz was wearing a union button, and Haney also told Cruz that she could not wear the button. (Tr. 570.) Browning added that Cruz could do whatever she wanted if she worked in Paris (another casino that is located on the Las Vegas strip and is not owned by the Respondent), but not on the Aliante property. (Tr. 570–571.)

Browning decided to contact John Bray, the director of the food and beverage department. After a delay of 5 minutes, Browning and Haney took Cruz to meet with Bray in Bray's office.[51] (Tr. 571, 585.) When Browning reported that Cruz was not supposed to be wearing a union button, Bray responded that it was fine for Cruz to wear the button, and Cruz returned to work. (Tr. 572, 585–586.) Fifteen to 20 minutes later, Browning called Cruz into his office and apologized. (Tr. 572.)

On February 20, Browning called Cruz and 2 other employees into his office for a regularly scheduled preshift meeting. Browning told the employees, "Well ladies, as you all know, we have members of the Union here on the property. The only

[50] In support of its argument, the Respondent points to the subsequent "To the Team Member" paragraph, which does include some employee-specific information. It does not follow, however, that employees should disregard the remaining information on the Record of Counseling, where important details about the alleged infraction and resulting discipline are provided. Moreover, if the Respondent intended for the confidentiality paragraph to apply only to managers and supervisors, it could have stated that explicitly with a phrase such as "To Managers and Supervisors." It did not do so, and thus left the clear impression that employees should comply with the confidentiality language.

[51] The Acting General Counsel and the Respondent stipulated that employees are made to report to Aliante Station's food and beverage director's office to discuss guest commendations and complaints, receive feedback, and review special room service order requests. Jt. Exh. 14, par. 1.

thing I can tell you is not to sign any of the Union cards." (Tr. 573, 587.) Browning was not reading from any written material when he made his remarks. (Tr. 586–587.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and 8(a)(1) because Browning and Haney stated and enforced an overly broad rule prohibiting Cruz from wearing her union button, and because Browning: interrogated Cruz about her union activities; threatened Cruz with discipline by requiring her to go to Bray's office; and disciplined Cruz by taking her to Bray's office. (GC Exh. 2(c), pars. 5(a)–(b); 15(a).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Browning created an impression that employee union activities were under surveillance, and threatened employees by telling them not to sign union cards. (GC Exh. 2(c), par. 5(c).)

I have credited Cruz' testimony. I found her to be a solid and confident witness, and she demonstrated excellent recall of the details about the conversations that formed the basis of her testimony. Cruz also was candid about the steps that the Respondent took to apologize for its misconduct regarding her union button. Finally, although Cruz testified in Spanish with the assistance of an interpreter, her testimony did not suggest that she had any difficulty understanding the remarks that her supervisors made to her in English.

The facts about Cruz' exchange (on February 19) with Browning, Haney and Bray are generally not in dispute. I agree with the Acting General Counsel that Browning and Haney made inappropriate remarks about Cruz' union button that ran afoul of Section 8(a)(1). In particular, I note that I agree that Browning improperly (and in violation of Section 8(a)(1)) threatened Cruz with discipline by ordering her to report to Bray's office because she was wearing a union button. Regardless of whether Bray actually imposed discipline, Browning's directive to Cruz to report to Bray's office violated Section 8(a)(1) because Browning's order reasonably tended to coerce Cruz in the exercise of her Section 7 rights by creating the fear of disciplinary action because she was wearing a union button.

With that being said, it does not follow that the Respondent in fact discriminated (via discipline or otherwise) against Cruz in violation of Section 8(a)(3) merely by summoning Cruz to a supervisor's office as alleged in paragraph 15(a) of the complaint.[52] As the Board has held, verbal warnings, coachings and reprimands are only forms of discipline if they lay a foundation for future disciplinary action against the employee. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in pertinent part 206 Fed. Appx. 405 (6th Cir. 2006), cert denied 127 S.Ct. 2033 (2007); *Progressive Transportation Services*, 340 NLRB 1044, 1046 fn. 7 (2003). While the Respondent has stipulated that it does use coachings as part of its progressive discipline system, the record does not show that Bray gave Cruz a coaching or any other form of discipline when she visited his office. Nor does the record show that a mere visit to a supervisor's office lays a foundation for future disciplinary action. Because the visit to Bray's office was not a disciplinary action and did not otherwise affect any of the terms or conditions of Cruz' employment, I recommend that the allegation in paragraph 15(a) of the complaint be dismissed. See *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403–404 (1993) (dismissing 8(a)(3) allegation because a "conference report" that the employer issued to the employee about protected activity was not part of the employer's progressive disciplinary system and did not affect any term or condition of employment within the meaning of Section 8(a)(3)).

As for the 8(a)(1) violations that occurred (as noted above) on February 19, I agree with the Respondent that it sufficiently repudiated Browning's and Haney's misconduct. When Browning, Haney and Cruz arrived at Bray's office, Bray (the senior member in the meeting) unequivocally advised everyone that Cruz could wear her union button in the workplace. Bray's instructions were: timely (occurring only 5 minutes after the initial exchange between Browning, Haney and Cruz); unambiguous; specific to the misconduct at issue (Cruz' right to wear a union button, and the fact that she was taken to Bray's office because she was wearing the button); communicated directly to the employees involved; and of a nature that assured Cruz that she could continue wearing her union button without interference. Consequently, the Respondent successfully met the standard for repudiating unlawful conduct, as set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978).[53]

Turning to the remarks that Browning made to Cruz and 2 other employees on February 20, the Acting General Counsel failed to demonstrate that Browning's remarks violated Section 8(a)(1) of the Act. Browning's comment to employees (at a regularly scheduled preshift meeting) that he was aware of union members being on the property was permissible because he was essentially stating the obvious—that as the employees were aware, the union organizing campaign was underway. Cf. *Aladdin Gaming, LLC*, 345 NLRB at 585–586 (noting that a supervisor's observation of employees engaged in open Section 7 activity on company property does not constitute unlawful

[52] Put another way, there is a distinction between threatening an employee with discipline (in violation of Section 8(a)(1)), and actually imposing discipline (in violation of Section 8(a)(3)). An employer may commit the former violation by merely directing an employee to report to a supervisor's office because they support the Union, but not (without more) the latter violation.

[53] The Board's decision in *Raysel-IDE, Inc.*, 284 NLRB 879, 881 (1987) is directly on point. In that case, the respondent's general manager violated Section 8(a)(1) by telling an employee to remove her union button and never again wear it at the plant. Id. (noting that no other employees were present at the time). The Board found, however, that the respondent effectively repudiated the violation when the general manager (24 hours later) retracted his statement, apologized to the employee, and assured the employee that she could wear her union button at the plant whenever she pleased. Id.; see also *Atlantic Forest Products*, 282 NLRB 855, 855, 872 (1987) (finding no violation where improper directive against wearing union buttons was rescinded within 3 hours). Compare *Comcast Cablevision*, 313 NLRB 220, 253 (1993) (in a case where multiple employees were told they could not wear union buttons, the repudiation was not effective because the retraction (1 week later) was not timely and the context in which the violation occurred was not free from other unlawful conduct; it was also questionable as to whether the retraction was communicated to all of the employees who heard the initial prohibition of union buttons).

surveillance). Browning's subsequent statement that the employee's should not sign union cards was also lawful, as Browning merely stated the company's preference that the employees reject the Union, and did not add any additional remarks that reasonably tended to coerce employees in the exercise of their Section 7 rights.

I recommend that the allegations in paragraphs 5(c) and 15(a) of the complaint be dismissed because the Acting General Counsel did not prove by a preponderance of the evidence that the Respondent violated the Act.

I recommend that the allegations in paragraphs 5(a) and 5(b) of the complaint be dismissed, because the evidence shows that the Respondent repudiated the misconduct that is alleged in those paragraphs of the complaint.

2. Maria Jessica Corona—complaint paragraphs 5(d), (e), (f), and (i), and 15(j)

a. Sanction for subpoena noncompliance

As previously noted, I have decided to strike Maria Jessica Corona's testimony as a sanction for the Charging Party's subpoena noncompliance. This sanction is warranted because the late disclosure of Corona's video statement prejudiced the Respondent's case regarding Corona's testimony. See section III(I)(3)–(4), supra. Since no other evidence in the record supports the allegations in paragraphs 5(d), (e), (f), and (i), I recommend that those allegations of the complaint be dismissed.

I also recommend the allegation in paragraph 15(j) of the complaint be dismissed. Although the Acting General Counsel's evidence for that allegation is not limited to Corona's testimony (as set forth below in the alternative findings of fact), that additional evidence is not sufficient to prove the allegation in paragraph 15(j) in the absence of Corona's testimony.[54]

In the interest of making a complete record, I have made alternative findings of fact and conclusions of law that are set forth below.

b. Alternative findings of fact

Maria Jessica Corona, a cook in the buffet, began wearing a union button to work on February 21, 2010. (Tr. 645–646.) That same day, Sous Chef Lonnie Haney noticed Corona's button, pointed at it, and laughed while saying, "What is that?" Corona responded that she had a right to wear a union button, and warned Haney that he could get in trouble if he said anything. (Tr. 647, 702, 719.)

On March 4, Corona and 13 of her coworkers attended a preshift meeting conducted by Sous Chef Henry Rodriguez. Rodriguez, who was relatively new to the casino, told employees at the meeting that he had received an email and was told to ask employees why they wanted a union. Rodriguez added that he was informed that the Union "was not coming in," and asked the employees what they wanted in exchange for stopping the union organizing campaign.[55] (Tr. 648–649, 706.) After 2 employees expressed support for the Union, Room Chef Nicholas Johnson asserted that the Union was lying to employees by promising that they would have a 40-hour work week if they signed a union card. (Tr. 649–650.) When employees responded that the casino also lied by promising 40-hour work weeks and not delivering on that promise, Johnson asked employees to give him a week to see what he could do.[56] (Tr. 650; see also Jt. Exh. 12, par. 4) (Corona's video statement, in which she mentioned that on or about January 21, 2010, the casino promised that the 10 most senior employees would receive 40-hour work weeks in connection with the bids for shifts that were being considered).

Later in the day on March 4, Johnson approached Corona and asked her what shift she wanted to work. Johnson explained that the casino had authorized the 10 most senior employees (including Corona) to resume working 40 hour weeks, and thus was keeping its promise. (Tr. 651.) Johnson then asked Corona if she would stop organizing now that she had a 40-hour work week. Corona refused, telling Johnson to keep the hours because she was not for sale. (Tr. 652.) However, by March 7, Corona observed that she was back on a 40-hour weekly schedule.[57] (Tr. 652.)

On March 8, a health inspection at the buffet revealed that food at certain buffet stations was not being maintained at the proper temperature. (GC Exh. 23.) The next day (March 9), Haney spoke to Corona and her coworkers at the preshift meeting and told them about the "demerits" noted in the health inspection. Haney went on to assert that the "real" health department would have shut them down. (Tr. 653.)

Later on March 9, Corona received a verbal counseling because she did not fill out the temperature logs[58] for her station during her shift that day. (Jt. Exhs. 6(b)–(c); Tr. 653–654.) The casino also disciplined Eddie Heath (another cook in the buffet who does not wear a union button or otherwise advertise any support for the Union) on March 9, issuing him a final written warning because he did not fill out his temperature logs

[54] Among other things, Corona's testimony is the only evidence that could be used to establish her union activities and animus (required elements for an initial showing of discrimination under *Wright Line*).

[55] Corona's phrasing at trial was initially confusing, as she said that Rodriguez (as well as Johnson) asked employees "why [they] wanted to stop organizing the union." Tr. 649, 650. She later clarified that employees were asked what they wanted in exchange for stopping the union organizing effort. Tr. 704.

[56] Johnson also asked employees what they wanted in exchange for stopping the organizing campaign. Tr. 650, 704.

[57] Corona also received two "soaring star" awards that the casino provides when employees receive a good compliment from a customer or do hard work. Tr. 652. It was not unusual, however, for employees who had been disciplined to also receive soaring star awards. See, e.g., Jt. Exhs. 6(f) (Eddie Heath); 6(k) (Juan Mendoza); 6(o) (Alex Torres).

[58] Employees are expected to measure and record (in temperature logs) the temperature of the food at their buffet stations at periodic intervals to ensure that the food is maintained at a safe temperature. Depending on the circumstances, food that is not kept at the proper temperature must be reheated, cooled, or discarded. Tr. 653–654, 783, 1064. The Respondent routinely disciplined employees for not filling out temperature logs and for not keeping food at the proper temperature before the union organizing campaign began. See Jt. Exh. 6(g) (Eddie Heath); 6(m), (o) (Alex Torres); 6(q) (employee G.d.l.T.); 6(s) (employee J.V.); 6(u) (employee J.T.); 6(w) (employee H.M.); 6(y) (employee L.M.L.); 6(aa) (employee C.d.l.R); 6(cc) (employee C.A.); 6(ee) (employee D.A.); 6(gg) (employee J.A.). The Respondent continued to discipline employees for temperature log infractions after the union organizing campaign started. See Jt. Exh. 14(A).

during his shift. (Jt. Exhs. 6(f) and (i); Tr. 1069.) Corona admitted at trial that she did not fill out her temperature logs on March 9, but explained that she did not do so because the buffet was very busy that day. Corona also asserted that coworkers Alex Torres, Juan Mendoza and employee A.G. committed the same infraction on March 9 (not filling out temperature logs), but were not disciplined. (Tr. 654.) However, the evidence shows that Torres did not work on March 9, and shows that Mendoza worked but was not disciplined on March 9.[59] (Tr. 1064–1065 (Mendoza); Tr. 818–819 and R. Exh. 37 (Torres).)[60]

On March 18, Corona and her coworkers attended a preshift meeting conducted by Rodriguez. Rodriguez read the following Sound Byte to the employees at the meeting:

> Who is on your side—Station Casinos or the Culinary Workers Union? You be the judge.
>
> Fact: Station Casinos purchased the Santa Fe [ ].
>
> Fact: Gaming Commission approval was required prior to finalizing the purchase.
>
> Fact: The Culinary Workers Union asked the Gaming Commission to approve of the purchase only if Station Casinos offered all of the new Santa Fe Station jobs to employees of the former owners.
>
> Fact: The Culinary Workers Union wanted to steal transfer and promotion opportunities from Station Casinos team members.
>
> Fact: Station Casinos fought hard to oppose the Culinary Workers Union's effort to cheat Station Casinos team members.
>
> Fact: Station Casinos convinced the Gaming Commission that Station Casinos team members deserved Station Casinos benefits and opportunities.
>
> Fact: If the Culinary Workers Union had won that fight, hundreds of Station Casinos team members would have been denied transfers and promotions.
>
> Fact: The Culinary Workers Union is not your friend.
>
> Fact: The Culinary Workers Union attempted to cheat you before, and if you sign a union card, the Culinary Workers Union may attempt to do so again.
>
> If you are asked to sign a Union card, just say no!!

(GC Exh. 6(j); Tr. 709–710.) Corona testified that after reading the Sound Byte, Rodriguez stated that if employees did sign union cards, there would be consequences. Corona also testified that when Rodriguez finished his remarks, he allowed her to look at the Sound Byte and she saw that the paper said "There will be consequences" on the bottom of the paper. (Tr. 657.)

c. Discussion and analysis of alternative findings of fact

The complaint alleges that the Respondent violated Section 8(a)(3) and Section 8(a)(1) in the following ways:

1. On or about February 21, Haney: interrogated employees about their union membership, activities and sympathies (GC Exh. 2(c), par. 5(i)).
2. On or about March 4, Rodriguez interrogated employees about their union membership, activities and sympathies, and informed employees that it would be futile for them to support the Union as their bargaining representative (GC Exh. 2(c), par. 5(d)).
3. On or about March 4, Johnson: solicited employee complaints and grievances and thereby promised employees increased benefits and improved terms and conditions of employment if they refrained from union activities; granted its employees benefits in the form of increased hours of work to dissuade them from supporting the Union; and promised employees increased hours of work to dissuade them from supporting the Union (GC Exh. 2(c), par. 5(e)).
4. On or about March 9, the Respondent disciplined Corona and Eddie Heath (GC Exh. 2(c), par. 15(j)).
5. On or about March 18, Rodriguez threatened employees by telling them not to sign Union membership cards, and threatened employees with unspecified reprisals if they supported the Union as their bargaining representative (GC Exh. 2(c), par. 5(f)).

In the absence of any sanction, I would find that Corona was a partially credible witness. Corona came across as earnest in her testimony, and most of her testimony (except as noted below) was plausible despite occasional instances where her testimony lacked clarity (and thus was not credited). I have given only limited weight to Torres' testimony because he demonstrated a poor recall for dates and instances of discipline, and presented contradictory testimony about whether he worked on March 9. I have also given limited weight to Mendoza's testimony, as he also was not able to recall relevant details about being disciplined on March 8.

Regarding Corona's exchange with Haney about her union button on February 21, I would find that the Acting General Counsel failed to prove that the questioning reasonably tended to interfere with, restrain or coerce the exercise of Section 7 rights. While Haney was perhaps unwise to laugh and point at

[59] Mendoza testified at trial and asserted that on March 8, he was not disciplined for failing to complete his temperature logs. Tr. 1064–1065. However, records from Mendoza's personnel file (which I credit) show that Mendoza received a coaching on March 8 for not filling out his temperature logs. Jt. Exh. 6(k). Mendoza did not testify about any events that occurred on March 9. Tr. 1064–1067.

Torres also testified at trial, and initially stated that he worked on March 9 and was not disciplined for failing to fill out his temperature logs. Tr. 783. However, Torres later admitted (consistent with his time sheets, which I credit) that he was not at work on March 9 because it was his day off. Tr. 818, 822; R. Exh. 37.

Neither Mendoza nor Torres wore union buttons or otherwise advertised their support for the Union. Tr. 1069. Employee A.G. (referenced by Corona as another coworker who failed to complete temperature logs on March 9 but was not disciplined) was not called as a witness, and there is no evidence in the record about whether A.G. supported the Union.

[60] Although the headings for R. Exhs. 37 and 38 show the year as "2000," I credit Torres' and Mendoza's agreement that the exhibits reflect their time sheet entries for 2010.

Corona's union button, that fleeting interaction was not coupled with any other commentary or conduct that conveyed an element of interference or coercion. I would therefore recommend that the allegation in paragraph 5(i) of the complaint be dismissed even in the absence of a sanction for subpoena noncompliance. See *Aladdin Gaming, LLC*, 345 NLRB at 599 (no violation of 8(a)(1) where a supervisor asked an employee what he was wearing, and then stated "Oh, is that a union button?"); *Teksid Aluminum Foundry*, 311 NLRB 711, 715–716 (1993) (finding that a supervisor's snide observation about an employee's union button, in the form of asking "where's your Union button" and laughing before walking way, did not violate 8(a)(1)).

By contrast, I would find that Rodriguez' remarks to employees on March 4 did run afoul of Section 8(a)(1). (See GC Exh. 2(c), par. 5(d).) Viewing the remarks as a whole, Rodriguez's message to employees was that they were wasting their time with the union organizing campaign (the Union is not coming in), and that their efforts to organize were unwelcome (why do you want a union and what will it take for you to stop organizing?). Through those statements, Rodriguez unlawfully told employees that it would be futile to support the Union, and interrogated employees about their motives and demands associated with the union organizing campaign in such a way that reasonably tended to coerce employees in the exercise of their Section 7 rights (with the implicit message being that the employees were stirring up trouble and the employer wanted them to explain why).

I would also find that Johnson's remarks and conduct on March 4 violated Section 8(a)(1). (See GC Exh. 2(c), par. 5(e).) Johnson solicited employee complaints and grievances when he asked employees what they wanted in exchange for stopping the union organizing campaign. When employees expressed concern about the lack of 40-hour work weeks (in part as a rebuttal to Johnson's remarks about the Union's veracity), Johnson promised to address the issue, and made good on his promise in short order by offering 40-hour work weeks to the 10 most senior employees (including Corona). Although the record does show that the Respondent promised 40-hour work weeks to senior employees in January 2010 (before the union organizing campaign began), I would reject the argument that the Respondent had a legitimate business reason for granting the increased hours in the time period reflected here. The unrebutted testimony shows that Johnson promised and granted the additional work hours to Corona and other senior employees to address concerns that employees raised during the debate in the preshift meeting about the Union. The record also shows that Johnson specifically asked Corona if she would stop her organizing activities after she received her 40-hour weekly schedule. I would therefore find that, as alleged in paragraph 5(e), the Respondent's solicitation of grievances was unlawful and not consistent with its past practices of seeking employee input, and I would also find that the Respondent's motive for promising and granting the additional hours was an unlawful one—to interfere with or influence employees who were supporting the Union. See *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19, 21 (2010).

Turning to the evidence regarding the discipline that Corona received on March 9, I would find that the Acting General Counsel did not show that the Respondent disciplined Corona and Heath for discriminatory reasons. Regarding Corona, while the Acting General Counsel presented sufficient evidence to make an initial showing of discrimination (under the *Wright Line* framework), it did not rebut the Respondent's evidence that it would have disciplined Corona even in the absence of her union activities. There is no dispute that Corona committed an infraction, as she admitted that she failed to fill out her temperature logs on March 9.[61] The record is also clear that the Respondent routinely disciplined employees for similar infractions both before and after the union campaign began. With that background, the Acting General Counsel is forced to make a more nuanced disparate treatment argument—that the Respondent improperly gave Corona a written verbal warning instead of a coaching (like Mendoza) because of her union activities. I do not find that argument to be persuasive—the Respondent's policies do not require coaching to be used as a first step in discipline, and I cannot find that the Respondent's decision to issue a written verbal warning to Corona was unreasonable given that she had previously been coached on multiple occasions in 2010 (although for time and attendance related infractions) while Mendoza had incurred no infractions in 2010 before he was coached for not completing his temperature logs. (Compare Jt. Exh. 6(b) (Corona) with Jt. Exh. 6(k) (Mendoza).)[62]

Finally, I would recommend that the allegations in paragraph 5(f) of the complaint be dismissed. When Corona testified, it was evident that she had a limited ability to recall specifics about the events of March 18. Corona offered a very limited description of Rodriguez' comments at the March 18 meeting, and it was not until cross-examination that it became clear that Rodriguez read a Sound Byte to employees at the meeting. I therefore would not credit Corona's testimony that Rodriguez told employees that there would be consequences (i.e., unspecified reprisals) if they signed a union card, because Corona's memory of the meeting is not sufficiently reliable, and her testimony is not corroborated. I would also find that the Sound Byte itself was not coercive or unlawful—although the Sound Byte did conclude with the phrase "If you are asked to sign a union card, just say no!," that statement (particularly when

[61] Both the Acting General Counsel and the Respondent argued this allegation as if Corona's temperature log infraction occurred on March 8 (the day of the health inspection) instead of March 9. While the parties' arguments are arguably consistent with the record of counseling issued to Corona (which references the health inspection but bears a date of March 9), Corona testified that she committed the infraction on March 9. Compare Jt. Exh. 6(c) with Tr. 654 and Jt. Exh. 6(b). This ambiguity in the record does not affect my analysis.

[62] My finding that the Respondent did not discriminate against Corona precludes the Acting General Counsel's related argument that the Respondent discriminated against Heath by disciplining him in an effort to mask its intent to punish Corona for supporting the Union. See GC Posttrial Br. at 122. I note, however, that there is ample (and unrebutted) evidence that supports the Respondent's decision to issue a final written warning to Heath, including evidence that he had been previously disciplined for poor food safety practices. See Jt. Exhs. 6(g) and (h).

considered in the context of the entire Sound Byte) is protected by Section 8(c) as a lawful expression of the Respondent's opinion and argument for why employees should not support the Union.

In sum, I recommend that the allegations in paragraphs 5(d), 5(e), 5(f) and 5(i) and 15(j) of the complaint be dismissed because of the sanction that I have imposed.

If no sanction were imposed and I were to rely on my analysis of the alternative findings of fact, I would recommend that the allegations in paragraphs 5(e)(1), (f) and (i), and 15(j) of the complaint be dismissed based on the evidentiary record. I would also find that the Respondent violated Section 8(a)(1) as alleged in paragraphs 5(d) and (e)(2)–(3) of the complaint.

3. Mayra Gonzalez – complaint paragraph 5(g)

a. Findings of fact

Mayra Gonzalez signed a union card on or about February 18, 2010, doing so while she was in the employee dining room. Several coworkers observed Gonzalez sign her union card, as did Assistant Housekeeping Manager Elizabeth Barahona, who was at a nearby table. (Tr. 554.)

On April 1, Gonzalez attended a preshift meeting in the housekeeping department. At the meeting, Barahona stated (in English) that employees should be careful what they sign because if they signed a union card they might get in trouble or receive more rooms to clean. (Tr. 554.) Barahona added that if the Union came in, employees might receive less money. (Tr. 554–555.) Although she had read Sound Bytes at other meetings, Barahona did not read from any written material while making her remarks on April 1. (Tr. 563–564.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Barahona threatened employees with unspecified reprisals, additional work, and losing benefits if they selected the Union as their bargaining representative. (GC Exh. 2(c), par. 5(g).)

I have credited Gonzalez' testimony. Gonzalez was a poised witness who provided short and detailed testimony about the events in dispute, and remained poised and confident in her testimony during cross-examination. I also note that although Gonzalez requested (through counsel) that the interpreter be available to provide assistance if needed, Gonzalez testified in English without difficulty (and thus I infer that she was able to understand Barahona's remarks even though they were made in English).

Barahona's remarks to the employees at the meeting were objectively coercive. Barahona was aware from both her observations and the ongoing Sound Byte campaign that the union organizing campaign was in progress.[63] The remarks that Barahona offered about the Union had a reasonable tendency to be coercive because the remarks effectively were warnings to employees that the terms and conditions of their employment could worsen (in the form of additional work, lower pay, or other unspecified "trouble") if they signed union cards. See *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 1 (2010) (explaining that in the absence of any reference to the uncertain nature of the collective bargaining process, it was unlawful for an employer to state that the terms or conditions of employment could get worse if the union organizing campaign succeeded).

I find that the Respondent, through Barahona's comments on April 1, violated Section 8(a)(1) by threatening employees with unspecified reprisals, additional work, and losing benefits if they chose to support the Union. (GC Exh. 2(c), par. 5(g).)

4. Erendira Rivero–complaint paragraph 5(h)

a. Findings of fact

Erendira Rivero began wearing her union button on February 18, 2010, and wore her button to work by placing it on her uniform. (Tr. 593.) On April 15, Rivero attended a preshift meeting with 10–14 coworkers. Room Chef Nicholas Johnson conducted the meeting. (Tr. 594.) Initially, Rivero did not understand the meaning of Johnson's remarks (which were made in English), so she asked him to repeat them. (Tr. 594.) After Johnson repeated his remarks, Rivero formed the impression that Johnson had told employees not to sign union cards because if the Union came in, employees would lose their existing seniority and new seniority would be determined by a raffle. (Tr. 594–595, 626, 629.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Johnson threatened employees by telling them not to sign union cards, and by telling them that they would lose seniority if they selected the Union as their bargaining representative. (GC Exh. 2(c), par. 5(h).)

I found Rivero to be a partially credible witness, insofar as she was generally forthright in her answers to questions, and appeared to make a genuine effort to honestly and accurately describe the preshift meeting with Johnson. That being said, however, the record raised material questions about the reliability of Rivero's uncorroborated account of the meeting. Johnson made his remarks in English, and Rivero (a Spanish speaker) admitted that she did not understand Johnson's initial remarks and therefore asked him to repeat them. Although Johnson did repeat himself, questions remain regarding whether Rivero accurately heard and understood Johnson's comments.

Viewing Rivero's testimony as a whole (as well as the fact that the Acting General Counsel did not call any other employee who was present at the meeting to corroborate Rivero's testimony), I find that Rivero's testimony about Johnson's remarks was not sufficiently reliable to carry the Acting General Counsel's burden of proof. Accordingly, I recommend that the allegations in paragraph 5(h) of the complaint be dismissed.

[63] Approximately 6 weeks passed between the day that Barahona saw Gonzalez sign a union card and the day that Barahona made her remarks to employees about the consequences of signing a card. While I do not find that Barahona's remarks were specifically made in response to seeing Gonzalez sign a union card, Gonzalez' testimony does show that Barahona was aware of the ongoing union activity in the casino.

D. Boulder Station

1. Luz Sanchez–complaint paragraphs 6(a), (b), (c) and (i)

a. Findings of fact

On February 19, 2010, Luz Sanchez (along with 15 coworkers) attended a 55-inute staff meeting conducted by Internal Maintenance Supervisor Arturo Lopez, Director of Hotel Operations Michael Pavicich, Team Member Relations Manager Marieugenia Vazquez, and General Manager Brian Skagen. (Tr. 722–723, 725.) All of the remarks by supervisors at the meeting were communicated in both Spanish and English. (Tr. 725, 749–750.) Lopez began the meeting by telling the employees that there were people with union buttons in the casino, and instructing employees not to approach, speak to, or listen to them. (Tr. 723, 745–747.) Lopez also instructed employees not to sign a union card, and added that if union supporters bothered or harassed employees at their homes, the employees should call the human resources department and that department would fix everything. (Tr. 723, 751.) Further, Lopez advised employees that if union representatives would not leave employee homes after being asked to do so, the employees should call the police. (Tr. 723, 750–751.)

Michael Pavicich spoke next at the meeting. (Tr. 723–724.) Pavicich instructed the employees not to sign union cards, and asserted that the Respondent would solve all of the employees' problems (unlike the Union, which never fixed any problems). (Tr. 724, 754.) After Pavicich concluded his remarks, Brian Skagen instructed employees not to sign union cards. (Tr. 724.)

Last, Marieugenia Vazquez spoke and asserted that Station Casinos was one family and would always fix the employees' problems.[64] (Tr. 725, 754.) Like the previous speakers, Vazquez instructed employees not to sign union cards. (Tr. 725.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Lopez: stated and enforced a rule prohibiting employees from speaking to union supporters; asked employees to report the union activities of other employees to human resources; and directed employees to call the police if they were contacted at home by union supporters or agents. (GC Exh. 2(c), par. 6(a).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Pavicich, Skagen and Vazquez: threatened employees by telling them not to sign union cards; attempted to dissuade employees from supporting the Union by promising them benefits in the form of solving all of their problems (Pavicich and Vazquez only); and informed employees that it would be futile to support the Union as their bargaining representative (Pavicich only). (GC Exh. 2(c), pars. 6(b), (c) & (i).)[65]

I found Sanchez to be a credible witness. She was confident and forthright in her testimony, and provided a significant amount of detail about the meeting where the supervisors made the remarks that are at issue. In addition, Sanchez' testimony held up despite vigorous cross-examination on a variety of topics.

Lopez' remarks at the meeting were improper in three ways. First, by instructing employees not to speak or listen to union supporters, Lopez outlined an overly broad and discriminatory rule that explicitly restricted Section 7 activity (or at a minimum, could reasonably be interpreted as restricting such activity). See *NLS Group*, 352 NLRB at 745. Indeed, the directive not to speak or listen to union supporters conveyed an implicit warning that an employee who violated that rule would run the risk of an unspecified reprisal or adverse consequence merely for exercising their rights under the Act.

Second, it was improper for Lopez to ask employees to contact the human resources if union supporters "bothered" or "harassed" them in their homes. As the Board explained in *Tawas Industries*, 336 NLRB 318, 322 (2001), an employer that combines a request for reports of harassment during union solicitation with a promise to discipline the individual accused of harassment (or a promise to take care of the problem) violates Section 8(a)(1) because the employer's statement has the potential effects of: encouraging employees to identify union supporters based on the employees' subjective view of harassment; discouraging employees from engaging in protected activities; and indicating that the employer intends to take unspecified action against subjectively offensive activity without regard for whether that activity was protected by the Act.

Third, it was improper for Lopez to advise employees to call the police if union supporters refused to leave their homes after being asked to do so.[66] Although not directly on point, the Board has recognized that an employer may seek to have police take action against pickets where the employer is motivated by some reasonable concern, such as public safety or interference with legally protected interests. See *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190, 1191 (2007). Similarly, an employer may take reasonable steps to prevent nonemployees

[64] Sanchez admitted that the Respondent has a variety of longstanding mechanisms for hearing and addressing employee problems, including: an open-door policy; employee focus groups; employee meetings; suggestion boxes; employee surveys; a complaint procedure; and a 24-hour hotline. Tr. 754–755.

[65] The Acting General Counsel voluntarily withdrew the allegation in paragraph 6(i)(3) of the complaint. See GC Posttrial Br. at 44 fn. 15.

I hereby deny the Acting General Counsel's posttrial request to amend the complaint to include a charge that Lopez threatened employees on February 19 not to sign Union membership cards. See GC Posttrial Br. at 27 fn. 10. It would not be just to permit the proposed amendment at this posttrial stage because among other things, the proposed allegation was not fully litigated. See *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171 (2006) (describing three factors to consider in determining whether it would be just to accept a proposed amendment to the complaint: whether there was lack of surprise or notice; whether the General Counsel offered a valid excuse for its delay in moving to amend; and whether the matter was fully litigated). See also Tr. 753 (Respondent asked limited questions of Sanchez about the proposed allegation). I also note that the Acting General Counsel did not offer a valid excuse for its delay in moving to amend the complaint, particularly in light of the fact that it did make several other amendments while Sanchez was on the stand and available for questioning. See Tr. 725–726, 756.

[66] Sanchez' testimony shows that Lopez' advice to call the police was more narrow than what was alleged in the complaint. As explained herein, however, Lopez' advice was still unlawful.

from trespassing onto the employer's private property. Id. On the other hand, an employer violates Section 8(a)(1) if it responds to protected union activity (such as union activity on public property located near the employer's property) by threatening to call the police. See *Walgreen Co.*, 352 NLRB 1188, 1193 (2008). After considering these guidelines from the perspective of an employee homeowner, I find that Lopez' advice to employees ran afoul of Section 8(a)(1) of the Act. Lopez offered his advice to employees regarding calling the police with no context for whether such action would be warranted by any reasonable concern or by the specific circumstances surrounding a hypothetical request that a union supporter leave an employee's home. As a result, Lopez' advice unlawfully chilled employees in the exercise of their Section 7 rights, because his advice raised the possibility that the police could be called even if a union supporter was engaged in lawful conduct while visiting an employee's home.[67]

Pavicich and Vasquez also made unlawful remarks at the employee meeting. As charged in the complaint, both Pavicich and Vazquez improperly promised benefits to the employees by asserting that the Respondent would solve all of their problems. Although the Respondent contends that it had a past practice of soliciting and addressing employee grievances (through various mechanisms that Sanchez admitted were in place before the union organizing campaign began), it is important to remember that in this instance, Pavicich and Vazquez made their promises to solve employee problems as part of a meeting that was convened on the first day of the union organizing campaign in the workplace, and that was aimed at dissuading employees from supporting the Union.[68] Indeed, to emphasize the point that the Respondent would solve the employees' concerns and problems, Pavicich asserted that by contrast, the Union would not be able to solve any employee problems. After considering the evidence in the record about the meeting, I find that both Pavicich and Vazquez each made thinly veiled promises to remedy employee grievances to dissuade employees from supporting the Union. See *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (2010) (citing *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994)) (the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances). I also find that by asserting that the Union would not be able to address employee problems, Pavicich improperly indicated to employees that it would be futile for them to support the Union as their bargaining representative. *Cf. DHL Express*, 355 NLRB 1399, 1400 (2010) (an employer may make lawful predictions of the effects of unionization if the predictions are based on objective facts and address consequences beyond an employer's control).

Finally, I agree with the Acting General Counsel that Pavicich, Skagen, and Vazquez each unlawfully threatened employees by telling them not to sign union cards. The directive not to sign a union card was particularly coercive in the context of this employee meeting, where it was accompanied by a discriminatory work rule (communicated by Lopez) that restricted Section 7 activity, an unlawful request (communicated by Lopez) that employees report union activities of coworkers to the human resources department, unlawful promises to solve employee problems (communicated by Pavicich and Vazquez), and an unlawful assertion (by Pavicich) that it would be futile for employees to select the Union as their bargaining representative. Under those circumstances, the directives to not sign a union card reasonably tended to coerce employees in the exercise of their Section 7 rights.

I find that the Respondent, through Lopez' comments on February 19, 2010, violated Section 8(a)(1) by: issuing and enforcing an overly broad and discriminatory rule that prohibited employees from speaking or listening to union supporters; asking employees to advise the Respondent of the union activities of other employees; and advising employees to call the police if union supporters refused to leave their homes after being asked to do so. (GC Exh. 2(c), par. 6(a).)

I find that the Respondent, through Pavicich's and Vazquez' comments on February 19, 2010, violated Section 8(a)(1) by: threatening employees by telling them not to sign union membership cards (Pavicich and Vazquez); promising benefits to employees to dissuade them from supporting the Union (Pavicich and Vazquez); and informing employees that it would be futile for them to support the Union as their bargaining representative (Pavicich only). (GC Exh. 2(c), pars. 6(b), (i)(1)–(2).)

I find that the Respondent, through Skagen's comments on February 19, 2010, violated Section 8(a)(1) by threatening employees by telling them not to sign union membership cards. (GC Exh. 2(c), par. 6(c).)

I recommend that the allegation in paragraph 6(i)(3) of the complaint be dismissed.

2. Wayne Brasher—complaint paragraph 6(d)

a. Sanction for subpoena noncompliance

As previously noted, I have decided to strike Wayne Brasher's testimony as a sanction for the Charging Party's subpoena noncompliance. This sanction is warranted because the late disclosure of Brasher's video interview prejudiced the Respondent's case regarding Brasher's testimony. See Section III(I)(3)–(4), supra. Since no other evidence in the record supports the allegation that Brasher addressed when he testified, I recommend that the allegation in paragraph 6(d) of the complaint be dismissed.

In the interest of making a complete record, I have made alternative findings of fact and conclusions of law that are set forth below.

[67] I have considered the fact that the scenario Lopez described (a Union supporter refusing to leave an employee's home) could raise some legitimate property interests that would reasonably lead an employee to call the police. I find, however, that Lopez' advice was unlawful because it could lead to unwarranted calls to the police that would chill permissible union activity (such as, say, a Union supporter's refusal to leave a home shared by both a pro-Union or undecided employee who authorized their visit and an anti-Union employee who asked the Union supporter to leave).

[68] Put another way, the record shows that this was not a routine meeting to gather employee input or complaints. Instead, the meeting served the explicit purpose of responding to the union organizing campaign.

b. Alternative findings of fact

Wayne Brasher wore his union button to work for the first time on February 19, 2010. In the early part of Brasher's shift as a bartender, Assistant Beverage Manager Keith Justice approached and told Brasher "That's a Union button. You're going to have to take that off." Brasher refused, asserting that he had a First Amendment right to wear the button. (Tr. 787.) Justice persisted, stating that the union button was not part of Brasher's uniform and that he would have to remove it. (Tr. 787–788.) When Brasher again refused, Justice paused, and then said "Wait, let me find out what's going on." (Tr. 788.) Justice returned after 30 minutes and told Brasher "I'm sorry, you do have the right to wear the button." (Tr. 788, 801.) No other employees were in a position to hear what was said during Brasher's confrontation with Justice. (Tr. 788, 807.)

c. Discussion and analysis of alternative findings of fact

The complaint alleges that the Respondent violated Section 8(a)(1) because Justice (on February 19, 2010) orally issued and enforced an overly broad and discriminatory rule prohibiting employees from wearing union buttons, and threatened employees by telling them that they had to remove their union buttons. (GC Exh. 2(c), par. 6(d).)

I find that the allegation covered by Brasher's testimony falls short even if I consider the merits of the allegation in the absence of any sanction. Brasher came across as a partially credible witness. Brasher was confident and direct in his testimony, but his confidence caused him to overlook the relevant detail that Justice apologized to him when he returned to confirm that Brasher could wear his union button (until that was clarified during cross-examination). (Compare Tr. 788 (no apology mentioned) with Tr. 801 (admitting that Justice apologized).) Brasher was also inconsistent regarding who might have been in a position to hear his discussion with Justice, as initially, Brasher testified that a customer was the only one present, but during redirect, Brasher testified that a cocktail waitress heard yelling and asked Brasher what the dispute was about. (Compare Tr. 788 with Tr. 807.) Nevertheless, I would credit most of Brasher's testimony because it is not disputed.

On the merits, I would find that although Justice's initial remarks to Brasher about his union button violated Section 8(a)(1) of the Act, Brasher's admissions demonstrate that the Respondent successfully repudiated Justice's misconduct. Specifically, when Justice corrected his mistake (within 30 minutes on the same day) and assured Brasher that he could wear his union button in the workplace, the Respondent satisfied the Board's standard for repudiation of unfair labor practices. See *Raysel-IDE, Inc.*, 284 NLRB at 881 (finding that an 8(a)(1) violation regarding an employee's union button was repudiated when the employer's general manager retracted his improper statements within 24 hours and assured the employee that she could wear her button); *Atlantic Forest Products*, 282 NLRB at, 855, 872 (same, where improper statements retracted within 3 hours); *Passavant Memorial Area Hospital*, 237 NLRB at 138.

Based on the foregoing analysis, I recommend that the allegation in paragraph 6(d) of the complaint be dismissed because of the sanction that I have imposed, or alternatively based on the evidentiary record and applicable case law.

3. Maria Olivas–Complaint 6(e), (f), and (g), and 15(b)

a. Sanction for subpoena noncompliance

I have also decided to strike Maria Olivas' testimony as a sanction for the Charging Party's subpoena noncompliance. This sanction is warranted because the late disclosure of Olivas' video interview prejudiced the Respondent's case regarding Olivas' testimony. See section III(I)(3)–(4), supra. Since no other evidence in the record supports the allegations that Olivas addressed when she testified, I recommend that the allegations in paragraphs 6(e), (f), and (g), and 15(b) of the complaint be dismissed.

In the interest of making a complete record, I have made alternative findings of fact and conclusions of law that are set forth below.

b. Alternative findings of fact

On February 19, 2010, Maria Olivas was in the cafeteria getting her lunch when Assistant Buffet Manager Richard Tafoya approached her and asked Olivas if she knew that she was not permitted to wear her union button. Tafoya told Olivas that she had to remove the button because it was not part of her uniform, while Olivas asserted that she had a right to wear the button and would not remove it. (Tr. 831–832.) Tafoya walked away, but shortly thereafter came to Olivas' lunch table and noted that Olivas still had not removed her union button. Olivas repeated that she was not going to remove the button, prompting Tafoya to advise Olivas that she needed to come with him to the human resources office. Olivas complied and followed Tafoya to the office. (Tr. 833.)

In the human resources office, Olivas and Tafoya met with Human Resources Specialist Tiffany Chipman and Human Resources Representative Fatima Moncada. Collectively, Tafoya, Chipman and Moncada all insisted that Olivas remove her union button, but Olivas again refused. In response, Tafoya told Olivas that if she did not remove her union button, she could be sent home or be suspended. (Tr. 834–835.) Olivas refused, and Tafoya and Chipman left to discuss the matter with managers in the upstairs office, leaving Olivas to wait in the human resources office. (Tr. 835.) After approximately 30–40 minutes, Tafoya and Chipman returned and Tafoya told Olivas "Okay, we [found] out everything. You can wear your Union button. You can go back to work." (Jt. Exh. 12, par. 2.)[69] Olivas returned to work and continued to wear her union button. (Tr. 837.)

c. Discussion and analysis of alternative findings of fact

The complaint alleges that the Respondent violated Section 8(a)(1) because Tafoya, on February 19, 2010: interrogated employees about their union membership, activities and sympathies; orally issued and enforced an overly broad and discrimi-

[69] Before February 19, Olivas had observed other coworkers wearing non-company pins and buttons without interference from management, including one employee who was permitted to wear a Cancer Association button. Tr. 835–836, 837.

natory rule prohibiting employees from wearing union buttons; and threatened employees with discipline and being sent home from work for wearing union buttons. (GC Exh. 2(c), pars. 6(e), (g).) The complaint also alleges that the Respondent violated Section 8(a)(1) and Section 8(a)(3) because on February 19, 2010 it orally issued and enforced (through Moncada and Chipman) an overly broad and discriminatory rule prohibiting employees from wearing union buttons. (GC Exh. 2(c), pars. 6(f)(1), 15(b).)[70]

I find that the allegations covered by Olivas' testimony fail on their own merits (i.e., even if no sanction were applied). Olivas was a partially credible witness. She was generally forthright and descriptive in her account of the pertinent events, but notably denied that any manager told her she could wear her union button on February 19. (See Tr. 837.) Olivas' testimony on that point was undermined by her video statement, which was not disclosed to the Respondent until 3 months after Olivas testified.[71] (See Jt. Exh. 12, par. 2.) Apart from that significant detail, I would credit Olivas' testimony because it was not rebutted.

I would recommend dismissing the allegation (in paragraph 15(b) of the complaint) that the Respondent disciplined Olivas (in violation of Section 8(a)(3) by making her report to the human resources office. The Board has held that verbal warnings, coachings and reprimands are only forms of discipline if they lay a foundation for future disciplinary action against the employee. See *Oak Park Nursing Care Center*, 351 NLRB at 28; *Promedica Health Systems*, 343 NLRB at 1351; *Progressive Transportation Services*, 340 NLRB at 1046 fn. 7. While the Respondent has stipulated that it does use coachings as part of its progressive discipline system, the record does not show that the Respondent gave Olivas a coaching or any other form of discipline when she visited the human resources office. Nor does the record show that a mere visit to the human resources office lays a foundation for future disciplinary action. Because the visit to the human resources office was not a disciplinary action and did not otherwise affect any of the terms or conditions of Olivas' employment, I recommend that the allegation in paragraph 15(b) of the complaint be dismissed. See *Lancaster Fairfield Community Hospital*, 311 NLRB at 403–404 (dismissing Section 8(a)(3) allegation because a "conference report" that the employer issued to the employee about protected activity was not part of the employer's progressive disciplinary system and did not affect any term or condition of employment within the meaning of Section 8(a)(3)).

As for Tafoya's, Chipman's and Moncada's preliminary remarks to Olivas about her union button, I would find that those remarks violated Section 8(a)(1) of the Act. However, the admissions that Olivas made in her video statement demonstrate that the Respondent successfully corrected and repudiated its misconduct. Specifically, when Tafoya notified Olivas (within 30–40 minutes on the same day) that she could wear her union button and return to work, the Respondent retracted its prior misconduct and thus satisfied the Board's standard for repudiation of unfair labor practices. See *Raysel-IDE, Inc.*, 284 NLRB at 881 (finding that a Section 8(a)(1) violation regarding an employee's union button was repudiated when the employer's general manager retracted his improper statements within 24 hours and assured the employee that she could wear her button); *Atlantic Forest Products*, 282 NLRB at 855, 872 (same, where improper statements retracted within 3 hours); *Passavant Memorial Area Hospital*, 237 NLRB at 138.

Based on the foregoing analysis, I recommend that the allegations in paragraphs 6(e), (f) and (g), and 15(b) of the complaint be dismissed because of the sanction that I have imposed, or alternatively based on the evidentiary record and applicable case law.

4. Jacob Jimenez—complaint paragraphs 6(h) and (j)

a. Findings of fact

Jacob Jimenez began wearing a union button to work on February 19, 2010. (Tr. 870–871.) That same day, Jimenez and several coworkers were called to a meeting conducted by Executive Chef Chris Dreyer. (Tr. 871.) Jimenez briefly listened to Dreyer's remarks about the Union (which included assertions that the Union told lies and only wanted the employees' money), and then turned around and left the meeting because he did not want to get involved in the conversation. (Tr. 871, 885.)

On February 23, Jimenez was working when he was informed that Dreyer wanted to see him in his office. Jimenez reported to Dreyer's office, where Dreyer and Room Chef Martin Castro were waiting. (Tr. 872.) Jimenez asked Dreyer what he wanted, and Dreyer responded "No, I need to know what you need, what do you want?" Jimenez advised Dreyer that he did not need anything; he just wanted to work. Dreyer then remarked "Oh, you've got your Union button," and asked Jimenez why he was wearing one. (Tr. 872.) Jimenez explained that he felt he needed some protection from a union, citing his concerns about the high cost of health insurance and the fact that although he had worked at the casino for 15 years, he had no money set aside for retirement. (Tr. 872–873, 887.) Dreyer responded that the company had nothing to do with that. Jimenez then noted that "this isn't anything personal," prompting Dreyer to say "I know where you're coming from. Now I know where you're going with this. Okay, that's fine. You can go now." (Tr. 872–873.) The entire conversation lasted no more than 15 minutes. (Tr. 872.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Dryer (on February 19, 2010): threatened employees by telling them not to sign union membership cards; and informing employees that it would be futile for them to support the Union as their bargaining representative. (GC Exh. 2(c), par. 6(j).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Dryer (on February 23, 2010)

[70] he Acting General Counsel voluntarily withdrew the allegation in par. 6(f)(2) of the complaint. See GC Posttrial Br. at 19 fn. 7.

[71] Although Olivas' video statement is hearsay and thus normally would only be used for impeachment, I have given substantive weight to her statement about her manager's assurance that she could wear her Union button. Olivas' video statement admission has sufficient indicia of reliability because it was akin to a statement against her legal interest, and because neither the Acting General Counsel nor the Charging Party disputes its accuracy.

interrogated employees about their union membership, activities and sympathies. (GC Exh. 2(c), par. 6(h)(2).)[72]

I found Jimenez to be a partially credible witness. Jimenez was forthright and earnest in his testimony, and did not attempt to evade the various questions that were posed to him during cross-examination. However, I did have some doubt about the reliability of Jimenez's account of the February 19 meeting. For starters, Jimenez admitted that he did not stay for all of Dreyer's remarks at that meeting. Instead, when Jimenez heard Dreyer make unflattering remarks about the Union, he immediately left the room, and thus missed the full context of Dreyer's remarks. In addition, Jimenez's testimony about Dreyer's remarks at the February 19 meeting was inconsistent, as he offered the following three different versions of what Dreyer said: (a) not to sign for this Union, that this Union was good for nothing (Tr. 871); (b) do not sign the union cards. The Union doesn't do anything good for you (Tr. 885); and (c) do not sign a union card because the Union won't be any good (Tr. 889). (See also Tr. 881) (noting that Jimenez' affidavit did not mention that Dreyer told employees not to sign a union card). Given these deficiencies and the fact that the Acting General Counsel did not call any other employee to corroborate Jimenez's account of the meeting, I find that the Acting General Counsel failed to meet its burden of proof regarding the allegations in paragraph 6(j) of the complaint.

By contrast, Jimenez' account of his February 23 meeting with Dreyer was more consistent and reliable. Jimenez spent approximately 15 minutes speaking to Dreyer, and described a set of circumstances that do support the allegation that Dreyer unlawfully interrogated him about his union membership, activities and sympathies. Specifically, Dreyer summoned Jimenez to his office, and then proceeded to question Jimenez about his reasons for supporting the Union. Although Jimenez testified that he did not personally feel threatened by the conversation (Tr. 887), that testimony is irrelevant because the test for unlawful interrogation is an objective test, rather than a subjective one. I find that the circumstances of Dreyer's questioning of Jimenez would reasonably tend to coerce an employee in the exercise of his or her Section 7 rights, since (among other things) Dreyer summoned Jimenez to his office and used the initial portion of the conversation to confront Jimenez about what he was trying to gain from supporting the Union.[73]

I find that the Respondent, through Dreyer, unlawfully interrogated Jimenez on February 23, 2010, about his union membership, activities and sympathies. (GC Exh. 2(c), par. 6(h)(2).)

I recommend dismissing the allegations in paragraphs 6(h)(1) and (j) of the complaint.

E. Fiesta Henderson Casino Hotel

1. Norma Flores and Ana Galo–Complaint paragraphs 12(a), (b), (c), (d), (e), and (h), and 15(l), (m), (o), and (p)

a. Findings of fact

(1) Flores and Galo begin their union activity

Norma Flores and Ana Galo both work in the Fiesta Henderson buffet, where Flores serves as a kitchen runner and Galo serves as cook's helper.[74] (Tr. 2494, 2659.) Both Flores and Galo began their union activities on February 18, 2010, when they each attended a union organizing meeting, received union buttons, and became union committee leaders. (Tr. 2496–2497, 2660–2661, 2663.)

(2) Incidents involving supervisor Rusty Hicks

Flores wore her union button to work for the first time on February 19. (Tr. 2659, 2661.) That same day, Buffet Room Chef Rusty Hicks called Flores into the office and offered her vacation time.[75] Hicks added that he was pleased with Flores' work, and asked Flores if she was pleased also. (Tr. 2662.) Flores said yes, but asked why her salary was $11.40 per hour when other employees earned $13.95 per hour. Hicks responded that salary raises are earned, not given. Based on that exchange, Flores formed the opinion that Hicks was treating her differently because she had begun wearing a union button. (Tr. 2663.) Flores noted that although the company had previously sought employee feedback (via employee surveys), Hicks had never before asked her about vacation time or personally asked her how she felt about the company. (Tr. 2663, 2783.)

Galo wore her union button to work for the first time on February 25, and noted that Flores was also wearing a union button. (Tr. 2498.) At the preshift meeting that day, Hicks spoke negatively about the Union, asserting that the Union was not good for anything and would not help. (Tr. 2498.) Hicks stared at Flores' and Galo's union buttons during the meeting, and after the meeting, Hicks began following Galo during her shift and would not permit Galo to speak to her coworkers. (Tr. 2499.)

On February 27, Galo was working at the buffet's American station when a coworker who was assigned to the Mexican station asked Galo to bring her some taco shells from the kitchen. (Tr. 2499.) When Galo entered the kitchen, Hicks asked her what she was doing there and asked what she needed.

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[72] The Acting General Counsel voluntarily withdrew the allegation in par. 6(h)(1) of the complaint. See GC Posttrial Br. at 44 fn. 15.

[73] I am not persuaded by the Respondent's suggestion that Jimenez' meeting with Dreyer was consistent with the Respondent's past practice of soliciting input from employees. See Tr. 888–889. Dreyer initiated the meeting with Jimenez specifically to question him about his union activities, and the evidence does not show that Dreyer was acting pursuant to any established procedure or mechanism for checking in with employees.

Nor am I persuaded by the suggestion that the questioning was not coercive because of Dreyer's remarks at the end of the conversation with Jimenez. Although Dreyer concluded the conversation by indicating that he understood where Jimenez was coming from and saying, "Okay, that's fine. You can go now," that statement did not alter the coercive nature of the conversation as a whole. Dreyer's final remarks merely served to end the conversation—they did not offer any meaningful reassurance or repudiate the unlawful interrogation that had just ended.

[74] Flores' and Galo's supervisors generally speak English. See Tr. 2802, 2813. Although both Flores and Galo testified in Spanish during the trial, I observed that both witnesses also had a functional command of English.

[75] Flores noted that in 2009, she did not receive vacation time that she requested because she lacked seniority. Tr. 2662.

Galo explained that she was getting taco shells, and continued to the area where the taco shells were stored (while Hicks watched). (Tr. 2499–2500.) While in the kitchen, Galo stopped to tell one of the cooks that she needed more corned beef for her station. (Tr. 2500, 2501.) Hicks followed Galo back to her station and began screaming at her for talking to the cook, asserting that he (Hicks) already asked Galo what she needed and thus she did not have to talk to anyone else in the kitchen. (Tr. 2501); (see also Tr. 2502) (noting that Galo normally advised the cooks when she needed refills on food). Realizing that he was screaming in front of buffet customers who were present, Hicks took Galo to the office, where he continued to scream at her for talking to the cook, and demanded to know what she was talking about. Galo asserted that she did not do anything wrong, and asked Hicks why he was pointing his finger at her and had stopped using her name since she began wearing a union button. Hicks responded that if Galo did not like it, she could leave. (Tr. 2501–2502.)

On February 28, Galo was cleaning her buffet station at the end of her shift when Flores (who had finished her own cleaning assignment) approached and offered to help. (Tr. 2503, 2663–2664.) Hicks intervened and told Flores and Galo that they could not help each other because they believed in the Union, and the Union did not believe in the concept of teamwork. (Tr. 2504, 2664.) Before this exchange, employees (including Flores and Galo) always helped each other with cleaning or other assignments because it was consistent with the casino's theme of teamwork. Id.

Galo and Hicks crossed paths again on March 10. On that day, Galo was working at the American station in the buffet, while a coworker (L.A.) was taking care of the Mexican station and was also cooking onions for Galo to use at the American station. Hicks approached and began screaming at L.A. for cooking too many onions, and Galo explained that they always prepared the onions in that manner. Hicks screamed at Galo that she did everything wrong, and Galo apologized. (Tr. 2509.) Sixty to 90 minutes later, Hicks returned and directed Galo to take the brisket at her station to the kitchen and then go on break. Galo complied, but on her way, another coworker stopped her and asked her to leave the brisket with him and deliver some fried chicken to the station. Galo delivered the chicken and then went on break. (Tr. 2510.)

When Galo returned to her station after her break, she found that a coworker (F.F.) had taken her place. F.F. told Galo that she should gather her belongings and go to see Hicks in his office. Hicks gave Galo a warning because of the problems with the onions and brisket, and prepared a written "record of counseling" that stated that the brisket was left on a back table for 2 hours, where it was not maintained at (or above) a temperature of 140 degrees (the required temperature for hot food) or cooled to a temperature at or below 40 degrees (the required temperature for cold food).[76] (Tr. 2510; GC Exhs. 45(a)–(b).) Hicks also sent Galo home at 7:00 p.m. even though her shift was not scheduled to end until 9:45 or 10:00 p.m. that night. (Tr. 2510–2511.) Galo explained that in her experience before this incident, managers handled discipline confidentially at the end of the shift, without sending the employee home. (Tr. 2511.) Hicks recorded Galo's early dismissal as a "business early out," meaning that Galo left work early at the company's direction because business was slow in the buffet. (Tr. 2556–2557; GC Exh. 45(a); R. Exh. 154 (March 10).) "Business early out" selections are determined by seniority (assuming no employee has volunteered to leave early). Of the employees who worked on March 10, Galo had more seniority than one employee (F.L.)[77] who worked the same shift and was not dismissed early. (Tr. 2558–2560; R. Exh. 154 (March 10).)

The next day (March 11), Galo complained to the human resources department about the discipline that Hicks imposed on March 10.[78] (Tr. 2512.) The human resources office investigated the issue and one week later, Galo was called to a meeting with a human resources official and Hicks, where the warning was rescinded and Galo was advised that everything was fine and the exchange with Hicks would be treated like a coaching (the first step in the casino's progressive discipline policy). (Tr. 2512; GC Exh. 45(b).) However, Galo was not given an opportunity to make up (or otherwise receive compensation for) the work hours that she lost when she was sent home early on March 10. (Tr. 2512.)

Hicks again sent Galo home early on March 14, ending her shift at 8:00 p.m. instead of at 9:45 or 10:00 p.m. as scheduled. (Tr. 2504.) Hicks told Galo that he was sending her home because the work was slow and she did not have more seniority than the other employees on her shift. (Tr. 2505); (see also R. Exh. 154) (indicating, contrary to Galo's impression, that Galo was the most junior employee on duty at the time, since F.L. completed her shift earlier in the day and employee L.H.d.G was off duty that day). Galo complied with Hicks' instructions, and was never given an opportunity to make up the work hours that she lost. (Tr. 2505.)

Notably, the time sheets that the Respondent submitted indicate that Galo finished her shift on March 14 at 9:50 p.m. I do not credit that timesheet entry, however, because the departure time for Galo appears to have been edited and thus is not reliable. (R. Exh. 154 (March 14).) I also note that unlike other occasions when the Respondent released an employee under the "business early out (BEO)" procedure in March 2010, the Respondent did not write BEO on the time sheet next to Galo's name on March 14. (Compare R. Exh. 154 (March 14) with R. Exh. 154 (March 10–Galo; March 19–employee B.L.).)

Hicks attempted to send Galo home early one additional time on or about March 20.[79] When Galo asked Hicks why she was

[76] At trial, Galo testified that she tried to explain to Hicks that she did not put the brisket in the refrigerator because it was too hot. Tr. 2514–2515. The record of counseling that Hicks prepared about the incident states that Galo reported that she was not aware that the brisket was left on the table. GC Exh. 45(b).

[77] The transcript incorrectly indicates that F.L.'s first name starts with a "D" instead of an "F." Tr. 2559.

[78] Galo explained that she did not confront Hicks directly about his decisions because she believed he was generally disrespectful to her because she wore a Union button, and because she did not want more problems to develop with Hicks. Tr. 2511.

[79] Although Galo testified that this incident occurred on March 21, I find that March 20 is the correct date. Galo and employee L.H.d.G. did not work the same shift on March 21, and thus there could not have

being sent home early, Hicks asserted that Galo had the least seniority and had to leave. In response, Galo contacted Chef Frank and asked why she was being sent home and how seniority was being determined. (Tr. 2506.) After researching the issue, Chef Frank determined that employee L.H.d.G. was junior to Galo and should be sent home instead. Galo returned to her work station and completed her shift.[80] (Tr. 2507.)

(3) Incidents involving other supervisors

On March 19, Flores advised a coworker that she was going to the restroom because she was feeling sick to her stomach. (Tr. 2664.) When Flores returned to her station, Buffet Sous Chef David Simonson approached her and told her that she could not go to the bathroom without first asking a chef for permission. Simonson added that if Flores needed something, she should ask a chef directly rather than asking one of her coworkers. (Tr. 2665.) At trial, Flores explained that before this exchange with Simonson, she always asked a coworker to cover her station (the salad bar). She was not aware of any other employees who were required to ask a chef's permission to use the bathroom or leave their station, and noted that her coworkers all could use the bathroom and ask for help from their coworkers whenever they needed to. (Tr. 2665, 2754–2755, 2760–2761.)

On April 2, Flores received a "coaching" for going to the restroom without notifying the chef on duty, and for leaving her station in disarray. (Tr. 2666, 2758; GC Exh. 48 (April 2 entry).) Records from Flores' personnel file describe the coaching as follows:

> [Flores] left assigned station to go to restroom without notifying chef on duty. Station was in disarray, jello station dirty, very low on jello, cookie platters sparse, each only 1/4 full. Witnessed by Chef Frank during evening walk through. [Flores] given coaching on station presentation requirements.

(GC Exh. 48 (April 2 entry).) Flores explained that she waited 2 hours for a chef, but no chef stopped by her station to enable her to go to the restroom or bring her items that she needed for her station. Flores noted that she did not have access to a radio to call a chef, and thus had to rely on yelling or waving her hand in the air to get a chef's attention. (Tr. 2666–2667.)

Flores received a verbal counseling on April 29 for not notifying a chef that she needed items at the dessert station. (GC Exh. 49.) The records from Flores' personnel file state as follows:

> [Flores] was assigned to [the] dessert station. [Flores'] shift started at 3:00 p.m. At 5:00 p.m., Chef Frank observed that [the] dessert station was not supplied with chocolate pudding. [Chef Frank asked Flores did she] notify [a] chef on duty that the chocolate pudding was depleted. [Flores responded] "no, I didn't." [Flores was] issued a verbal counseling.

(GC Exh. 49 (April 29 entry).)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and Section 8(a)(1) in the following ways:

1. On or about February 19, Hicks: promised employees benefits in the form of vacations to dissuade them from supporting the Union; and interrogated employees about their union membership, activities and sympathies (GC Exh. 2(c), par. 12(h)).
2. On or about February 25, Hicks engaged in surveillance of employees to discover their union activities (GC Exh. 2(c), par. 12(a)).
3. On or about February 27 Hicks: engaged in surveillance of employees to discover their union activities; interrogated employees about their union membership, activities and sympathies; and threatened employees by inviting them to quit their employment because of their support for the Union (GC Exh. 2(c), par. 12(b)).
4. On or about February 28, Hicks: punished employees for their Union support by directing that they work alone; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees who were Union supporters from assisting each other at work (GC Exh. 2(c), par. 12(c)).
5. On or about March 10, the Respondent disciplined Galo (GC Exh. 2(c), par. 15(o)).
6. On or about March 10 and 14, the Respondent denied work opportunities to employee Galo (GC Exh. 2(c); par. 15(l)).
7. On or about March 19, Simonson orally issued and enforced an overly broad and discriminatory rule prohibiting employees from going to the restroom without permission because of their Union support (GC Exh. 2(c), par. 12(d)).
8. Since or about March 19, the Respondent has imposed more onerous working conditions on Norma Flores. (GC Exh. 2(c), par. 15(m).)
9. In or about late March 2010, Simonson orally issued and enforced an overly broad and discriminatory rule prohibiting employees who were Union supporters from seeking from coworkers food items that employees needed to perform their duties (GC Exh. 2(c), par. 12(e)).

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been any discussion (as set forth herein) about which one of them should be released early from work that day. Galo and L.H.d.G. did work overlapping shifts on March 20. R. Exh. 154.

[80] The record is unclear regarding whether the Respondent in fact sent L.H.d.G. home early. The time sheets indicate that employee L.H.d.G. worked from 11:53 a.m. to 8:00 p.m. on March 20. R. Exh. 154 (March 20). I do not credit those time sheet entries for employee L.H.d.G. as accurate reflections of L.H.d.G.'s work hours because the start time appears to have been edited (by adding a "1" to change the start time from 1:53 p.m. to 11:53 a.m.—a change that ensured that L.H.d.G. received credit for a full work day instead of a truncated one). R. Exh. 154.

I note that even if I were to credit the time entries for L.H.d.G. on March 20, questions would still remain about credibility of Hicks' explanation that one employee needed to be sent home early because business was slow. If L.H.d.G. indeed worked from 11:53 a.m. to 8 p.m. as shown on the time sheet, then she left work on time after she completed a full 8-hour shift. Since the Respondent also allowed Galo to work a full shift and no other employees were released early on March 20, the logical conclusion would be that contrary to Hicks' claim, there was no need to release <u>any</u> employees under the business early out procedure on March 20, 2010.

10. On or about April 2 and 29, the Respondent disciplined Flores (GC Exh. 2(c), par. 15(p)).

I found both Flores and Galo to be credible witnesses. Galo testified in a confident manner and did not falter in her testimony despite vigorous and extensive cross-examination. Galo provided an extensive account of how Hicks treated her (and Flores) in the workplace, and much of her testimony was corroborated by documentation from the Respondent's files (including time sheets and disciplinary records).[81] Flores also testified in a forthright and poised manner. She also withstood vigorous cross-examination, and provided testimony that was corroborated by Galo and by records from the Respondent's personnel files.

(1) Analysis—incidents involving Hicks

The complaint alleges that Hicks first violated Section 8(a)(1) on February 19 when he spoke with Flores about vacation time and asked Flores if she was pleased with her work. Although this conversation occurred on the first day of the union organizing campaign (and the first day that Flores wore her union button to work), the circumstances as a whole fall short of establishing an 8(a)(1) violation. I do not find unlawful interrogation because Hicks did not question Flores about her union activities, and to the extent that Hicks asked Flores if she was pleased with her work, that question was within the scope of Hicks' duties as a supervisor and did not have a reasonable tendency to be coercive. As for the discussion of Flores' vacation time, I do not find that Hicks raised that issue with an improper motive. See *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (explaining that the test in this circumstance is motive-based, and requires the Board to determine whether the record evidence as a whole, including any proffered legitimate reason for the benefit offer to the employee, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with the employee's protected union activity). Flores experienced problems with scheduling vacation time in 2009, and the evidentiary record does not show that it was improper or unreasonable for Hicks to raise the issue of vacation time in 2010 in light of the problems that Flores experienced in the past with that issue. I therefore recommend that the allegation in paragraph 12(h) of the complaint be dismissed.

Hicks did engage in conduct that violated Section 8(a)(1) of the Act on February 25, 27 and 28. The stage was set on February 25, when Hicks conducted a staff meeting at which he spoke negatively about the Union, stared at the union buttons that Galo and Flores were wearing, and then (after the meeting) began monitoring Galo's conduct in the workplace (placing a particular interest in preventing her from speaking with her coworkers). Hicks' remarks and behavior created an unlawful impression of surveillance, because a reasonable employee would have inferred that Hicks was determined to keep a watchful eye on prounion employees (such as Galo, who was wearing her union button for the first time) to prevent them from encouraging their coworkers to support the Union. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14; *Flexsteel Industries,* 311 NLRB at 257.

The unlawful conduct continued on February 27, when Hicks confronted Galo for speaking to a cook in the kitchen, interrogated Galo about what she said to the cook, and told Galo that she could quit her job if she did not like how he was treating her. Through those statements, Hicks once again engaged in conduct that violated Section 8(a)(1), because in addition to continuing the impression of unlawful surveillance, Hicks: put Galo on notice that because she supported the Union, the unlawful monitoring would be a new condition of employment (and a condition that she could only escape by quitting her job); and more generally made statements and asked questions that would coerce a reasonable employee in the exercise of his or her Section 7 rights. See *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 8 (2011) (explaining that an employer that responds to protected protests about working conditions by inviting the employee to quit if they dislike the conditions unlawfully interferes with the Section 7 right of the employee to protest working conditions).

Any lingering doubt about Hicks' intentions towards union supporters such as Flores and Galo was resolved on February 28, when Hicks explicitly told Flores and Galo that they could not help each other at work because they supported the Union. Hicks' directive violated Section 8(a)(1) because Hicks unlawfully changed the terms and conditions of Flores' and Galo's employment because they supported the Union, and because the rule that Hicks imposed on Flores and Galo was overly broad and discriminatory insofar as but for their support of the Union, Hicks would have allowed Flores and Galo to assist each other in their work assignments.

Hicks' decision to discipline Galo on March 10 (with a coaching about the onions and brisket) is governed by the Board's standard in *Wright Line*. The Acting General Counsel presented sufficient evidence to make an initial showing that Galo's union activities were a substantial or motivating factor in Hicks' decisions to discipline her. There is no dispute that Galo engaged in union activities by becoming a committee leader and wearing a union button, nor is there any dispute that Hicks was aware of Galo's union activities or that the Respondent (through Hicks) acted with animus, as indicated by Hicks unlawful conduct (discussed above) in late February 2010.

Turning to the Respondent's affirmative defense that it would have disciplined Galo even in the absence of her union activities, the Respondent asserts that it disciplined Galo pursuant to an established practice of disciplining employees for preparing too much "product," or food, for their stations, and for failing to store food properly. The evidentiary record sup-

[81] The Respondent argues that Galo's credibility was damaged because she violated my sequestration order by speaking "about incidents about which she testified" while she was in a room with other witnesses on October 25, 2010. R. Posttrial Br. at 202. I do not find that argument to be persuasive. As a preliminary detail, I note that I did not issue a sequestration order until October 26, 2010 (and thus after the date in question). Tr. 35–36. I also note that Galo in fact denied speaking about the specific incidents underlying her testimony with other witnesses—instead, she made only general remarks about being treated badly because she was wearing a Union button. Tr. 2580–2581. Finally, I did not observe Galo's testimony to be influenced by any communications with other witnesses—to the contrary, her testimony is untainted and will be assessed on its own merits.

ports the Respondent's defense, as it includes multiple examples of employees who were disciplined for those types of infractions in 2009, before the union organizing campaign began. (See Jt. Exh. 14, tab C (employees L.O., R.O., V.P. and D.C.)); (R. Exh. 165 (Flores)).[82] Since the Acting General Counsel did not present evidence that demonstrated that the Respondent's explanation for disciplining Galo was false or pretextual, I find that the Acting General Counsel did not meet its burden of proving discrimination and I accordingly recommend that the allegation in paragraph 15(o) of the complaint be dismissed.[83]

The *Wright Line* standard leads to a different result when it is applied to the Respondent's March 10 and 14 decisions to end Galo's work shift early. As noted above, the Acting General Counsel presented sufficient evidence to make an initial showing that Galo's union activities were a substantial or motivating factor in Hicks' decisions to select her as the employee to send home early. As for its affirmative defense, the Respondent asserts that it permissibly sent Galo home early under its "business early out" procedure because work was slow and Galo lacked seniority. The Acting General Counsel, however, demonstrated that the Respondent's explanation (based on the rationale supplied by Hicks) was pretextual. First, the record establishes that on March 10, Galo should not have been selected for a "business early out" because another employee (F.L.) on that shift had less seniority. Second, Hicks' conduct on March 20 also supports a finding that Hicks was using the business early out procedure as a pretext for discrimination, because once it was established that Galo should not be sent home because she was not the most junior employee on the shift, it worked out that <u>no</u> employees were sent home without being given credit for a full shift (including employee L.H.d.G., who was the most junior employee and should have been sent home early if a business early out was truly necessary). In light of the strong evidence of pretext in this time frame (March 2010), as well as the dubious entries on Galo's March 14 time sheet, I find that Hicks' decision to send Galo home early on March 14 was also a pretext for discrimination even though Galo was the most junior employee working that night.[84] Further, I find that the Acting General Counsel met its burden of proving that the Respondent (through Hicks) denied work opportunities to Galo for discriminatory reasons in violation of Section 8(a)(3) of the Act.

(2) Analysis—incidents involving other supervisors

Finally, I find that the Acting General Counsel did not meet its burden of proof regarding the alleged Section 8(a)(3) and (1) violations that other supervisors (besides Hicks—i.e., Simonson and Chef Frank) committed against Flores. Although the work rules and working conditions that Simonson stated and enforced on March 19 regarding bathroom breaks and the procedure for obtaining food refills for the buffet (a supervisor must be notified under either circumstance) were certainly restrictive, the record falls well short of showing that Simonson imposed those rules on Flores because of her union activities. To the contrary, the record shows that the Respondent imposed rules requiring employees to notify a supervisor about restocking the buffet or about their need for an unscheduled break well before the union organizing campaign began.[85] Since the Acting General Counsel did not show that the Respondent's explanations for its actions were pretextual, I cannot find that Simonson discriminated against Flores because of her union activities. I accordingly recommend that the allegations in paragraphs 12(d) and (e), and 15(m) of the complaint be dismissed.

As for the discipline that Flores received on April 2 and 29, the Acting General Counsel did not show that Chef Frank acted with animus (as required under the *Wright Line* standard for Section 8(a)(3) allegations). Indeed, the evidence on that point was remote at best, as it was limited to the fact that the Respondent was engaged in an ongoing (and lawful) antiunion campaign,[86] and the fact that Flores wore a union button. I did not find either of those facts to be compelling given that several weeks passed between Flores' decision to wear a union button and Chef Frank's disciplinary actions, and given the lack of any evidence that Chef Frank harbored ill will towards union sup-

[82] Of the Fiesta Henderson employees that the Respondent disciplined for making too much product, R.O. received coachings on July 21, 2009 and August 22, 2009, while L.O. received a written warning on April 18, 2009. Jt. Exh. 14, tab C. Of the Fiesta Henderson employees that the Respondent disciplined for not storing food properly, V.P. received a coaching on November 28, 2009, D.C. received a coaching on December 2, 2009, and Norma Flores received a coaching on November 28, 2009. Id.; R. Exh. 165.

[83] I have considered the fact that the Respondent rescinded Galo's verbal counseling for the problems with the brisket, and instead treated the exchange between Hicks and Galo about that issue (and the problem with the onions) as a "coaching." GC Exhs. 45(a)–(b); Tr. 2512. That fact does not change the outcome here, as the evidence shows that either form of discipline (verbal counseling or coaching) would have been consistent with the disciplinary practices that the Respondent followed before the union organizing campaign began. See Jt. Exh. C (indicating that several employees received coachings for workplace mistakes such as Galo's, and one employee (L.O.) received a more severe sanction in the form of a written warning).

[84] As previously noted, the time sheets for both March 14 and March 20 appear to have been edited for the employees that were considered or selected for the business early out. See R. Exh. 154 (timesheet entries for Galo on March 14 and for L.H.d.G. on March 20).

[85] Regarding communicating with supervisors about restocking the buffet, the record shows that employee D.C. received a written warning on December 25, 2009, for not advising a chef that he was running out of shrimp cocktail. Jt. Exh. 14, tab C. Regarding unscheduled breaks or leaving the workstation, the record shows that employee E.B.'s supervisor "had a talk with" her on May 4, 2009, about leaving her work station without letting a supervisor know, and also shows that employee R.M. received a verbal counseling for taking an unauthorized 5-minute smoking break on June 16, 2009. See Jt. Exh. 14, tab D.

[86] The Board has held that "an employer's anti-union comments, while themselves lawful, may nevertheless be considered as background evidence of animus towards employees' union activities." *Tim Foley Plumbing Service*, 337 NLRB 328, 329 and fn. 5 (2001). Although the Respondent's Sound Byte campaign is covered by that standard, I do not find that evidence to be sufficient evidence of animus for the allegations discussed here.

porters.[87] Moreover, even if I found that the Acting General Counsel made an initial showing of discrimination, the Respondent demonstrated that it still would have disciplined Flores under its well-established history of disciplining employees for not keeping their buffet stations stocked.[88] Since the Acting General Counsel did not show that the Respondent's proffered explanation for disciplining Flores on April 2 and 29 was a pretext for discrimination, I cannot find that the April 2 and 29 discipline violated the Act and I therefore recommend that the allegation in paragraph 15(p) of the complaint be dismissed.

In sum, I find that the Respondent (through Hicks) violated Section 8(a)(1) by: on February 25, engaging in surveillance of employees to discover their union activities; on February 27, engaging in surveillance of employees to discover their union activities, interrogating employees about their union membership, activities and sympathies, and threatening employees by inviting them to quit their employment because of their support for the Union; and on February 28, punishing employees for their union support by directing that they work alone, and orally issuing and enforcing an overly broad and discriminatory rule prohibiting employees who were union supporters from assisting each other at work. (GC Exh. 2(c), pars. 12(a), (b), (c).) I also find that the Respondent violated Section 8(a)(3) and (1) by denying work opportunities to Galo on March 10 and 14, 2010. (GC Exh. 2(c), par. 15(l).)

For the reasons stated above, I recommend that the allegations in paragraphs 12(d), (e) and (h), 15(m), (o), and (p) of the complaint be dismissed.

2. Maria Camacho—complaint paragraphs 12(f) and 15(n)

a. Findings of fact

On March 15, 2010, Maria Camacho became a union committee leader and received a union button that she began wearing to work on the same day. (Tr. 2818–2819.) On March 19, Camacho began her shift and then was called to the office by Internal Maintenance Supervisor Connie Buyse. (Tr. 2820.) Referring to a previous shift that Camacho had worked,[89] Buyse asked Camacho what she had been doing in a work area that was not part of her assignment. (Tr. 2822.) Camacho responded that she left her broom and dustpan in the main cage (which was not part of her work area) and retrieved them later after completing her work in another part of the casino. (Tr. 2822, 2874–2875.) Buyse advised Camacho that from then on, she (Camacho) needed to call Buyse before she moved from one work assignment/station to another. No other employees had such a restriction. (Tr. 2822–2823.) The obligation to seek permission before changing her workstation made Camacho feel "bad," because she had to wait for permission to do things like go to the bathroom or use the water fountain. Supervisors were generally available when Camacho tried to reach them by radio to obtain permission, with delays only taking up to one minute if the supervisor was busy when she called. (Tr. 2826.)

In addition, when Camacho was assigned to clean the casino exterior grounds, Buyse required her to use the employee entrance to the casino, and did not permit her to use any of the guest entrances. (Tr. 2823, 2827.) No other employees had such a restriction. (Tr. 2823, 2827.) The requirement that Camacho only use the employee entrance made it more difficult for Camacho to finish her cleaning responsibilities in a timely manner, because it took her more time to reach the casino supply area if she used the employee entrance (10–12 minutes, one way) than if she used one of the guest entrances (3 minutes, one way). (Tr. 2828.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Buyse (on March 19, 2010) orally issued and enforced a rule prohibiting employees from moving to another station without permission because they had engaged in union activities. (GC Exh. 2(c), par. 12(f).) The complaint also alleges that since March 19, 2010, the Respondent violated Section 8(a)(3) and (1) by imposing more onerous working conditions on Camacho. (GC Exh. 2(c), par. 15(n).)

I found Camacho to be a credible witness. She was confident throughout her testimony despite extensive and vigorous cross-examination. Camacho's unrebutted testimony established that within days of her becoming a union committee leader and wearing a union button to work, Buyse indeed did impose new and more onerous working conditions and rules on Camacho by requiring her to obtain permission from a supervisor before moving to another work station, and by limiting her to only using the employee entrance when moving between the casino interior and exterior work areas. The new restrictions violated Section 8(a)(1) as unlawful changes to the terms and conditions of employment that had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010).

The new and onerous work conditions that Buyse imposed on Camacho also violated Section 8(a)(3) of the Act. As required by the Board's decision in *Wright Line*, Camacho's testimony established that she was engaging in union activity in an

[87] The same deficiency (insufficient evidence of animus) applies to the allegation in the complaint regarding the working conditions that Simonson imposed (par. 15(m) of the complaint, discussed above).

[88] The record shows that Flores received a verbal counseling on October 30, 2009 for not having a sufficient supply of pies and cakes at her station. R. Exh. 166. Several other employees were disciplined in 2009 for running out of food at their buffet stations, including: employee E.M.—coached on November 23, 2009 for not having mashed potatoes or gravy; employee L.O.—written warning on February 26, 2009 for not stocking the pie case; employee V.P.—coached on August 21, 2009, for running out of product; employee H.L.—coached on August 21, 2009, for not restocking the pie case; employee R.O.—coached on April 24, 2009, for running out of bacon and sausage; and employee R.C.—final written warning on April 18, 2009, for running out of certain bakery items.

[89] Through a translator, Camacho testified that Buyse asked her about a shift that she worked "one day before" or "yesterday," which would have been March 18, 2010. Tr. 2821. Employment records indicate that Camacho was off duty on March 18, 2010. Tr. 2860–2861, 2863; R. Exh. 170. Camacho maintained that although Buyse said "yesterday," Buyse was referring to the last day that Camacho worked. Tr. 2881.

open fashion in the workplace (by, at a minimum, wearing her union button to work), such that I can reasonably infer that Buyse was aware of Camacho's union activities. I also find that animus has been shown, given that Buyse imposed the new working conditions on Camacho a mere 4 days after Camacho began wearing her union button. See *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 (2006) (explaining that the timing of an adverse employment action in relation to protected concerted activity can provide strong evidence of an employer's animus), enfd. 243 Fed. Appx. 771 (4th Cir. 2007). Since the evidentiary record does not contain proof that the Respondent would have taken the same actions in the absence of Camacho's union activity, and since Buyse singled out Camacho (and only Camacho) for the new and onerous work restrictions, I find that the Acting General Counsel met its burden of proving that Buyse imposed the onerous work conditions on Camacho for discriminatory reasons in violation of Section 8(a)(3).

I find that the Respondent (through Buyse): violated Section 8(a)(1) by orally issuing and enforcing a rule that prohibited Camacho from moving to another station without permission because she had engaged in union activities (GC Exh. 2(c), par. 12(f)); and violated Section 8(a)(3) and (1) by imposing more onerous working conditions on Camacho (GC Exh. 2(c), par. 15(n)).

3. Jose Reyes—complaint paragraph 12(g)

a. Findings of fact

On April 13, 2010, Jose Reyes attended a preshift meeting conducted by sanitation supervisor Irene Trujillo. (Tr. 2593–2594.) Reyes was wearing his union button. (Tr. 2593.) Trujillo began the meeting by reading a notice about new company promotions, and then advised employees about the duties that applied to the various work assignments in their department. (Tr. 2594.) When Reyes raised his hand to make a comment (or express his opinion) about the work assignments, Trujillo said, "Not you," and instructed Reyes to speak to her in her office. Id. However, when another employee ("B.C.," who was not wearing a union button) raised his hand to ask a question, Trujillo allowed B.C. to ask his question, and Trujillo answered B.C.'s question at the meeting.[90] (Tr. 2595.)

The record shows that Reyes and his supervisors did have some history regarding speaking at preshift meetings. In Reyes' November 2008 evaluation, he was encouraged to continue speaking up at meetings to provide input. (Tr. 2597–2598; GC Exh. 47.) However, in a May 2009 evaluation, the Respondent set a goal for Reyes to be positive and constructive in preshift meetings "for a better reflection on the team." (Tr. 2619; R. Exh. 162.)

[90] After the meeting, Reyes met with Trujillo in her office and asked about the duties for employees assigned to take care of the garbage, noting that certain duties (such as putting away the ice for the salad bar) were not written in the assignment description. Trujillo told Reyes that the information would be written by the following day. Reyes thanked Trujillo for her time and left the office. Tr. 2597.

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) because Trujillo (on April 13, 2010) denied employees benefits in the form of open discussion at preshift meetings because they supported the Union. (GC Exh. 2(c), par. 12(g).)

I found Reyes to be a credible witness. He testified in a clear and forthright manner, and the very minor inconsistencies between his testimony and his prior written statements (specifically, regarding whether he told Trujillo that he wanted to make a "comment" or express his "opinion" about work assignments) did not undermine his credibility in any way.

Based on Reyes' unrebutted testimony, I find that Trujillo's remarks at the April 13 meeting did violate Section 8(a)(1). When Reyes raised his hand to speak, Trujillo immediately denied his request before Reyes made any substantive remarks, and instructed Reyes to speak to her in her office. By contrast, Trujillo permitted B.C. (who was not wearing a union button) to speak at the meeting without restriction. Trujillo's treatment of Reyes at the meeting was unlawful because Trujillo denied Reyes a benefit (the right to open discussion at preshift meetings) because, unlike employee B.C., he supported the Union. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (explaining that it is unlawful to change employee working conditions simply because they support the union); *Parts Depot, Inc.*, 332 NLRB at 673 (finding that an employer's new "open door" policy was a benefit offered to employees).[91]

I find that the Respondent, through Trujillo, violated Section 8(a)(3) and (1) of the Act by unlawfully denying Reyes benefits in the form of open discussion at preshift meetings because he supported the Union. (GC Exh. 2(c), par. 12(g).)

4. Adelina Nunez—complaint (Case 28–CA–23224) paragraph 8

a. Findings of fact

Adelina Nunez began wearing a union button to work on February 19, 2010. (Jt. Exh. 11, par. 10.) On or about May 29, Buffet Room Chef Rusty Hicks suspended Nunez pending investigation, and also verbally prohibited Nunez from discussing the disciplinary action. (Jt. Exh. 11, pars. 3–5.) As stated on the Record of Counseling that Hicks initiated, Nunez was scheduled to work on May 28, but did not show up for her scheduled shift even though the schedule was posted on May 20. (Jt. Exh. 11, tab B.)

On or about June 2, the Respondent terminated Nunez because of the May 28 "No Call/No Show." (Jt. Exh. 11, pars. 5–6 & tab C) (describing Nunez' termination as "voluntary"). The Respondent's employee handbook describes the pertinent aspects of the Respondent's "No Call/No Show" policy as follows:

[91] I have considered the evidence concerning Reyes' past work evaluations, and I do not find that the evaluations justify Trujillo's conduct in any way. Reyes' remarks were protected by the Act, and there is no evidence that Reyes engaged in any misconduct at staff meetings that justified Trujillo's decision to prohibit Reyes (and only Reyes) from speaking at the meeting.

> If a Team Member does not report for any shift, and does not personally call their Supervisor by the end of their scheduled shift to report the absence ("No Call/No Show"), the Team Member is considered to have voluntarily resigned, unless a life threatening emergency has prohibited the Team Member from notifying their Department.

(Jt. Exh. 11, par. 7.)

The Respondent has admitted that it acted inconsistently when disciplining employees who violated its No Call/No Show policy.[92] (Jt. Exh. 11, par. 8.) Before April 15, Nunez did not receive any form of discipline for failing to report to work on a scheduled work day.[93] (Jt. Exh. 11, par. 9.)

On or about March 9, 2011, the Respondent offered to reinstate Nunez to her former position, with backpay and without loss of seniority. (Jt. Exh. 11, par. 11.) Nunez accepted the Respondent's offer and was scheduled to return to work on March 14, 2011. (Jt. Exh. 11, par. 12.)

b. Discussion and analysis

The complaint alleges the Respondent, in violation of Section 8(a)(3) and (1), discriminated against Nunez because of her union activities by suspending her on or about May 28, 2010, and by discharging her on or about June 2, 2010. (GC Exh. 1(fb), par. 8.)

The facts related to this allegation are not disputed since the parties elected to work out a stipulation about Nunez' suspension and discharge. I therefore turn to the *Wright Line* framework, and find that the Acting General Counsel met its burden of proving that the Respondent discriminated against Nunez because of her union activities. The Acting General Counsel made an initial showing of discrimination insofar as Nunez engaged in union activities (by wearing a union button to work); the Respondent was aware of Nunez' union activity because she worked in close proximity to Hicks; and the Respondent acted with animus, as indicated by Hicks' efforts to prohibit Nunez from engaging in protected activity (such as discussing her suspension) and the stricter enforcement of the No Call/No Show policy against Nunez after her union activities began.[94] Since Respondent has conceded that it enforced its No Call/No Show policy in an inconsistent (and therefore arbitrary) manner, and there is no evidence of any other nondiscriminatory reason for Nunez' suspension and discharge, I find that the Acting General Counsel demonstrated that the Respondent suspended and discharged Nunez for discriminatory reasons in violation of Section 8(a)(3) and (1) of the Act.

As an affirmative defense, the Respondent did assert that it successfully repudiated Nunez' unlawful suspension and discharge when it rescinded those decisions and reinstated Nunez with full backpay and without loss of seniority. While the Respondent does deserve some credit for taking those steps, its repudiation defense fails because among other defects, the attempted repudiation was untimely because it occurred over 9 months after the unlawful suspension and discharge. In addition, there is no evidence that the Respondent expunged the unlawful suspension and discharge from Nunez' record, or that the Respondent gave Nunez any assurances that the Respondent would not interfere with employees' Section 7 rights in the future. See *Passavant Memorial Area Hospital*, 237 NLRB at 138 (outlining the elements of the repudiation defense). Accordingly, I find that the Respondent did not successfully repudiate its unlawful suspension and discharge of Nunez, and I also find that the Respondent discriminated against Nunez (on or about May 29 and June 2) in violation of Section 8(a)(3) and (1) of the Act. (GC Exh. 1(fb), par. 8.)

F. Fiesta Rancho Casino Hotel

1. Delmi Aldana–Complaint 13(a)

a. Findings of fact

On February 27, 2010, Delmi Aldana and 8 to 10 other employees attended a meeting conducted (in Spanish) by Executive Steward Maria Parga. (Tr. 2203.) Parga began her remarks by stating that employees should not worry because the casino's bankruptcy had been resolved. Parga then told the employees that they should not sign union cards because the Union was useless and that the union benefits were not as good as the Union promised. (Tr. 2204–2205.) Aldana (who wears a union button) spoke up in response, asserting that her husband works with the Union and has received helpful benefits such as insurance, a pension, and yearly wage increases. (Tr. 2205.)

At that point, Parga asserted that employees could not speak about the Union while at work. Aldana responded that she could speak about the Union during her lunch hour, prompting Parga to say, "No, because you are being paid for that hour. You can't talk about the union." (Tr. 2205.) Parga also stated employees that they were not permitted to contact coworkers at their homes to speak about the Union, and warned that she could take action against employees who did not comply with that restriction. (Tr. 2205–2206, 2217.) Parga concluded by warning employees that they should be very careful or they could lose their job. (Tr. 2217.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Parga (on February 27): orally issued and enforced an overly broad and discriminatory rule prohibiting employees from soliciting for the Union during work hours; and threatened employees with unspecified reprisals if they engaged in union activities. (GC Exh. 2(c), par. 13(a).)

I found Aldana to be a credible witness. Aldana was confident and poised in her testimony, and withstood both initial and

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[92] In describing the inconsistent enforcement of the no-call/no-show policy, the Acting General Counsel cites the example of employee J.B-R, (Aliante) who only received a coaching for a No Show/No Call violation on May 27. Jt. Exh. 14(A). There is no evidence in the record regarding whether employee J.B-R. supported or opposed the Union.

Witness Maria Camacho (Fiesta Henderson) briefly testified about her experience with the No Show/No Call policy, stating that she was terminated in July 2005 and also July 2008 for violating the policy. Tr. 2816–2817.

[93] It is not clear why the parties selected April 15, 2010, as the point of reference for past discipline, instead of another date (such as February 19 (the day that Nunez began wearing a Union button), or May 29 (the day that Nunez was suspended)).

[94] My finding of animus is also supported by Hicks' history of anti-Union remarks and conduct (directed at Norma Flores and Ana Galo), as described in Sec. V(E)(1), supra.

recall cross-examination.[95] Aldana's unrebutted testimony demonstrates that Parga's remarks at the February 27 employee meeting ran afoul of Section 8(a)(1). Indeed, Parga's remarks were explicit and unambiguous, and advised employees that they could not speak about the Union during work hours (including lunch breaks) or contact coworkers at their homes to speak about the Union.[96] Parga also told employees that they would face adverse consequences if they violated those restrictions, up to and including losing their job. Each of those directives and warnings was unlawful and violated Section 8(a)(1) of the Act. See *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1438–1439 (2010) (explaining that an employer violates 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters); *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1, 14 (2010) (explaining that an employer violates 8(a)(1) if it threatens employees with unspecified (or specified) reprisals if they support the union or engage in union activities).

I find that the Respondent, through Parga on February 27, violated Section 8(a)(1) by: orally issuing and enforcing an overly broad and discriminatory rule prohibiting employees from soliciting for the Union during work hours; and threatening employees with unspecified reprisals if they engaged in union activities. (GC Exh. 2(c), par. 13(a).)

2. Reynaldo Estrada—complaint paragraph 15(g)

a. Findings of fact

Reynaldo Estrada works as a kitchen runner at Fiesta Rancho, and generally worked from 7:00 a.m. to 3:00 p.m. (Thursday through Monday) during the relevant time period (February 2010). (Tr. 2241.) Estrada's duties as a kitchen runner included handling and distributing merchandise deliveries for the buffet. Id. Estrada also held a second job at the Aria Hotel and Casino (the Aria),[97] generally working from 4 p.m. to midnight (Tuesday through Saturday). (Tr. 2242, 2245.)

On February 19, 2010, Estrada wore his union button to work for the first time. (Tr. 2244.) When he greeted Buffet Room Chef Dennis (Denny) Lamela, Lamela responded in a manner that Estrada believed was colder than usual. Id. A few days later, Lamela called Estrada to his office and asked Estrada (in English) about the work schedule for Estrada's other job. Estrada provided his work hours at the Aria. (Tr. 2245.)

After another few days, Lamela again called Estrada to the office and (with Maria Parga translating into Spanish) advised Estrada that his work hours on Saturday would change to 9 a.m. to 4:30 p.m. (Tr. 2245–2246, 2249.) Estrada explained that the schedule change would conflict with his job at the Aria and asked if Lamela could assign him hours on Wednesday and give him Saturdays off, but Lamela could not accommodate that request.[98] (Tr. 2246.) Lamela and chef Fred Guevara also instructed Estrada to work on the buffet line (cooking at the Mexican station, although cooks and cooks assistants normally performed that assignment) for part of his Saturday shifts. (Tr. 2246, 2260–2261, 2263.) Other coworkers who wore union buttons during this time frame did not have their schedules changed (to Estrada's knowledge). (Tr. 2295.)

Estrada acknowledged at trial that in the fall of 2009, the schedule for kitchen supply deliveries at the buffet changed from daily deliveries (excluding Sunday) to deliveries only on Monday, Wednesday and Friday. (Tr. 2241, 2257–2258.) Estrada also acknowledged that because of the fall 2009 delivery schedule change: he no longer needed to devote 4 hours of his Saturday schedule to storing supplies that had been delivered (and thus worked on the buffet line instead); and the Respondent changed his days off to Tuesdays and Wednesdays (without objection from Estrada, because the change in his days off did not interfere with his schedule at the Aria).[99] (Tr. 2257, 2260–2261, 2263, 2265, 2269–2270.)

As a result of the March 2010 change to Estrada's Saturday work hours, Estrada had to use vacation time at Fiesta Rancho until the schedule conflict was resolved. The Aria also modified Estrada's work schedule to allow him to begin his shift at 5 p.m. (Tr. 2250, 2276.) Estrada's Saturday work schedule was restored to the 7 a.m. to 3 p.m. time slot on August 7. (Tr. 2247.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) because the Respondent, from on or about

[95] The Respondent recalled Aldana for cross-examination to explore questions that arose from the additional disclosures that the Charging Party made in February 2011. During the recall cross-examination, the Respondent primarily questioned Aldana about a quote that she provided for a press release (Tr. 3430–3437, 3448–3449), and about a media interview that she provided (Tr. 3437–3444). I allowed the Respondent some leeway to explore those matters because of the late disclosures, but I note that the record does not indicate that any of the late disclosures were relevant to Aldana's testimony regarding the allegations in the complaint. Accordingly, I find that no sanction is warranted as to Aldana because the Respondent's case (regarding the complaint allegations that Aldana addressed) was not prejudiced by the late disclosures. Alternatively, I find that any limited prejudice to the Respondent was cured when I permitted the Respondent to recall Aldana for further cross-examination.

I also reject the Respondent's argument that Aldana's credibility was damaged because she met with the Acting General Counsel before providing her recall testimony. The Respondent did not ask Aldana any questions during her recall testimony that relate to the allegation in the complaint that Aldana addressed in her testimony, and thus her testimony on the merits of the allegation is untainted. In addition (and perhaps more important), I did not observe any evidence of any improper coaching or influence when Aldana testified after being recalled.

[96] By prohibiting only discussions about the union, Parga implicitly indicated that employees remained free to discuss nonunion matters during their work hours or in each others homes.

[97] All references to "the area" in the transcript of Estrada's testimony should be "the Aria."

[98] Lamela did indicate that he could make Saturday one of Estrada's days off, but also indicated that he could not reassign the lost hours to another day during the week (such as Wednesday, as Estrada requested). Tr. 2246.

[99] The Respondent also changed Estrada's work schedule in December 2009, as his work shift changed from 7 a.m. to 3 p.m. to 7 a.m. to 2 p.m. on all of his work days except for Saturday. Tr. 2267–2268. Estrada resumed a 7 a.m. to 3 p.m. work schedule (excluding Saturdays) in May 2010. Tr. 2268–2269, 2270–2271.

March 13, 2010, until on or about August 7, 2010, changed Estrada's work schedule, thereby affecting his ability to hold another job. (GC Exh. 2(c), par. 15(g).)

Estrada was a credible witness. He was steady on the stand, and gave thoughtful and precise answers during extensive cross-examination. The central facts surrounding the change to his work schedule are not in dispute.

Under the framework in *Wright Line*, I find that the Acting General Counsel did not meet its burden of proving that the Respondent changed Estrada's work schedule for discriminatory reasons. Even if I were to assume, arguendo, that the Acting General Counsel made an initial showing of discrimination,[100] the Acting General Counsel's case falls short because the Respondent persuasively demonstrated that it would have changed Estrada's schedule even in the absence of his union activity. Specifically, Estrada's testimony established that it was not unusual for the Respondent to change his schedule periodically based on the staffing needs in the buffet. Indeed, in late 2009 (before Estrada began his union activity), the Respondent changed Estrada's days off (because the merchandise delivery schedule changed), and also reduced the length of his weekday shifts by 1 hour (because of reduced staffing needs). The March 2010 change to Estrada's schedule was also precipitated by staffing needs, as the lack of any merchandise deliveries on Saturdays led the Respondent to reconfigure Estrada's duties (since Estrada no longer needed to set aside 4 hours on Saturday to store merchandise that was delivered).[101] In the absence of any evidence that the Respondent's reason for changing Estrada's work schedule was a pretext for discrimination, I find that the Acting General Counsel did not meet its burden of proving discrimination.

Since the Acting General Counsel did not meet its burden of proof, I recommend that the allegation in paragraph 15(g) of the complaint be dismissed.

3. Lorena DeVilla—complaint paragraphs 13(b) and (c) and 15(f)

a. Findings of fact

Lorena DeVilla has worked as a food server in Garduno's restaurant at Fiesta Rancho for 6 years. (Tr. 2349–2350.) During that time, DeVilla attended several meetings about the restaurant's service expectations, and followed the preferred practice of advising customers that they could call a phone number written on their check if they were happy with the service or if they had any complaints. (Tr. 2394, 2398–2399, 2403; R. Exh. 143 (par. 40); R. Exh. 144 (p. 1—sample check); R. Exh. 145.) It was also normal for managers (including Garduno's Room Manager Monte Durbin) to speak to customers at the end of the meal to ask about their dining experience. (Tr. 2352, 2408; R. Exh. 143 (par. 42).) On occasions when Durbin received negative feedback or comments about a restaurant employee, he would take the employee to his office, relay the customer's comments, and instruct the employee that such comments should not happen. (Tr. 2354, 2433–2434; R. Exh. 148) (final written warning issued to DeVilla in October 2009 because of a customer complaint about service).

On or about February 16, 2010, DeVilla met with a union organizer at her home and received a union button. (Tr. 2351, 2405.) However, DeVilla was scared to wear her button, and thus did not begin wearing it to work until the end of February or the beginning of March. (Tr. 2403, 2439–2440) (noting that DeVilla wore her button sporadically after she began using it). DeVilla was the only employee at Garduno's to wear a union button. (Tr. 2387.)

Towards the end of February, DeVilla began to feel pressure from Durbin, as she observed that Durbin would approach each of DeVilla's tables to ask about the service and ask if there were any complaints. Durbin also brought a comment form to DeVilla's tables and asked the customers to write down everything that happened. (Tr. 2352–2353.)

In this same time period (starting on or about March 1), Durbin made remarks at the daily preshift meetings (a/k/a "Que Pasa" meetings) that caught DeVilla's attention. While the meetings were commonplace, Durbin began telling employees at the end of most meetings: "Don't sign the union card. Don't put your jobs in jeopardy especially when there are no jobs outside." (Tr. 2362–2363.) Durbin made similar remarks at the preshift meetings until May 2010. (Tr. 2364.)

On March 6, DeVilla took over a table from another food server (employee T.F.) because T.F. had finished his shift. (Tr. 2355.) DeVilla asked the table if everything was OK, and the customers told her yes and asked for their check. However, neither DeVilla nor T.F. advised the customers that T.F. was going off duty and thus DeVilla would be their new server. (Tr. 2355, 2413–2414.) Before the customers left the restaurant, Durbin approached them and asked about the service. Durbin also brought a comment form for the customers to complete. (Tr. 2355, 2409–2410.) After retrieving the comment form, Durbin directed both DeVilla and T.F. (who was still present) to meet with him in his office. (Tr. 2355–2356.) In Durbin's office, Durbin confronted DeVilla and T.F. about the customer comment form, and screamed at DeVilla when she tried to explain that their only mistake was not telling the customer that their server had changed. On the verge of crying, DeVilla left Durbin's office before the meeting ended. (Tr. 2356–2357, 2415); (see also Tr. 2387) (noting that Durbin yelled at both DeVilla and T.F.). Durbin apologized to DeVilla about the March 6 incident the following day. (Tr. 2420) (noting that before the apology, DeVilla spoke to the food and bev-

[100] The Acting General Counsel demonstrated that Estrada engaged in union activity, and presented sufficient evidence for me to infer that the Respondent (through Lamela) was aware of Estrada's union activity. The Acting General Counsel's proof of union animus was also sufficient for the initial stage of the *Wright Line* framework, as the union animus element was supported by the evidence about Lamela's cold affect when Estrada wore his Union button to work for the first time, and the fact that the adverse employment action (an unwanted schedule change) occurred within a few days of the Respondent becoming aware of Estrada's union activity. See *Consolidated Bus Transit, Inc.*, 350 NLRB at 1065 (outlining the elements required for an initial showing of discrimination under *Wright Line*).

[101] In this connection, I note that the Respondent made an effort to ensure that Estrada did not lose work hours when the need arose to change his Saturday work schedule. Specifically, Lamela assigned Estrada to work on the Mexican station in the buffet line for part of his Saturday shift, even though that assignment was not part of Estrada's job description as a kitchen runner.

erage director about Durbin, and the director promised to speak to Durbin).[102]

On March 8, DeVilla and T.F. contacted the Fiesta Rancho human resources department and made a complaint about Durbin's March 6 conduct. (Tr. 2375, 2380; R. Exh. 140) (DeVilla's voluntary written statement provided to the human resources department). DeVilla also advised the human resources department that on February 14, she told Durbin that if he wanted her to maintain the casino's service standards, then he should not assign her more than 10 tables. (Tr. 2376.) DeVilla observed Durbin continue to speak to the customers at DeVilla's tables in the restaurant for another 2 to 3 weeks. (Tr. 2357–2358.)

DeVilla received a performance appraisal in May 2010. The Respondent rated DeVilla's job performance as "exceeds expectations" or "meets expectations" in 15 out of the 16 categories for which DeVilla was evaluated. The appraisal did state ongoing goals of following the steps of service and treating everyone (including fellow employees, even if they complained about her) as a guest. (GC Exh. 44.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) because Durbin (in or about March 2010) solicited customer complaints against DeVilla because she supported the Union and engaged in union activities. (GC Exh. 2(c), par. 13(b), 15(f).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Durbin (from in or about March 2010, through in or about May 2010) threatened employees by telling them not to sign union membership cards, and threatened employees with job loss if they supported the Union as their bargaining representative. (GC Exh. 2(c), par. 13(c).)[103]

I found DeVilla to be a credible witness. She testified in a confident manner, and provided clear and poised responses to a variety of nuanced questions that were posed during cross-examination. Much of DeVilla's testimony was also corroborated by documentation that both the Acting General Counsel and the Respondent introduced into evidence.[104]

Based on DeVilla's unrebutted testimony, I find that Durbin's warnings at the daily preshift meetings ran afoul of Section 8(a)(1). Durbin's directive that employees not sign union cards lest they put their jobs in jeopardy had a reasonable tendency to coerce employees in the exercise of their Section 7 rights, particularly because the two statements were linked together in a manner that explicitly warned employees that job loss could result if they signed a union card. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010) (explaining that an employer violates Section 8(a)(1) if it tells employees they will jeopardize their job security if they support the union).

The Acting General Counsel did not meet its burden of proving that the Respondent (through Durbin) violated Section 8(a)(3) and (1) by soliciting customer complaints. Even if I were to assume that the Acting General Counsel made an initial showing of discrimination,[105] the Respondent presented persuasive evidence that it would have treated DeVilla in the same manner even in the absence of her union activity, and the Acting General Counsel did not demonstrate that the Respondent's explanation was a pretext for discrimination. DeVilla did not dispute that Durbin followed the Respondent's long-established practice of soliciting customer feedback and using any negative feedback as a basis for warning or disciplining employees. Indeed, DeVilla herself was on the receiving end of that type of discipline in October 2009, before her union activity began. DeVilla also did not dispute that in March 2010, Durbin cut her a break when he received a complaint related to her customer service on March 5, or that Durbin confronted both her and T.F. (who had not indicated that he supported the Union) after receiving a complaint from a customer that they both served. Based on that evidence (that shows a lack of discriminatory intent) and the record as a whole, I cannot find that Durbin solicited customer complaints because of DeVilla's union activity (for purposes of either an 8(a)(3) or an 8(a)(1) violation). To the contrary, the record indicates that Durbin and DeVilla had an ongoing dispute about customer service, and further indicates that the dispute preceded DeVilla's union activity. Accordingly, I find that Durbin did not violate the Act by soliciting customer complaints.[106]

[102] In this same time period, Durbin did not discipline DeVilla for at least one customer complaint related to her assigned tables. Specifically, on March 5, a casino employee dined at the restaurant (in part to assess the service at the restaurant in connection with the "customer shop" program) and submitted a report noting that some of DeVilla's tables were not bussed properly. Tr. 2423, 2425, 2427. Durbin did not discipline DeVilla for that incident. However, DeVilla did receive a coaching on March 10 that related to a customer who was upset because the restaurant did not have certain special items shown on the menu. Tr. 2428–2429.

[103] The Respondent asserts that the allegation in paragraph 13(c) should be dismissed because the allegation (and the testimony offered in support of it) is not sufficiently specific to afford the Respondent the opportunity to investigate and respond to the allegation. See R. Post-trial Br. at 219 (arguing that the lack of specificity violates its due process rights). I hereby deny the Respondent's request. The allegation in par. 13(c) provided the Respondent with ample notice of the nature of the remarks, the supervisor that made them, and the time frame and context in which the remarks were allegedly made. That is sufficient under the Board's requirements. See *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d at 800 (a complaint is adequate if it provides a plain statement of the alleged unfair labor practices that is sufficient to allow the respondent to put on a defense).

[104] I reject the Respondent's argument that DeVilla's credibility was damaged because she met with the Acting General Counsel before providing her recall testimony. As with Aldana (discussed above), the Respondent did not ask DeVilla any questions during her recall testimony that related to the allegations in the complaint that DeVilla addressed in her testimony, and thus her testimony on the merits of the allegations is untainted. In addition (and perhaps more important), I did not observe any evidence of any improper coaching or influence when DeVilla testified after being recalled.

[105] I note that even this assumption is debatable, given that it is not clear from DeVilla's testimony whether the evidence of animus (e.g., Durbin observing DeVilla wearing a Union button, and Durbin's warning about signing a union card) arose before or after DeVilla felt "pressure" from Durbin about the service at her tables.

[106] I emphasize that my finding is not an endorsement of Durbin's conduct or his style of communication. Instead, I have simply found

I find that through Durbin, the Respondent violated Section 8(a)(1) from March through May 2010, by threatening employees not to sign union membership cards, and by threatening employees with job loss if they supported the Union as their bargaining representative. (GC Exh. 2(c), par. 13(c).)

I recommend that the allegations in paragraphs 13(b) and 15(f) of the complaint be dismissed.

G. Green Valley Ranch Resort[107]

1. Carlos Gaitan—complaint paragraph 14(a)

a. Findings of fact

On February 19, 2010, Carlos Gaitan was starting his shift when he encountered Housekeeping Supervisor Yamile Metlige. (Tr. 3181.) Metlige noticed that Gaitan was wearing a union button, and asked Gaitan what it was. Before Gaitan had a chance to respond, Metlige asserted (in Spanish) that Gaitan could not wear his union button on his uniform because company policy prohibited employees from wearing any form of advertisement on their uniforms. Gaitan responded that he could wear his button. Metlige did not direct Gaitan to remove the button, but she did advise Gaitan to remember what she said. (Tr. 3182.)

Later that same day, Gaitan was approached by Margarita Bautista, who is his supervisor.[108] Bautista apologized to Gaitan for what Metlige said, and advised Gaitan that he could wear the union button. (Tr. 3200–3201.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Metlige (on February 19) orally issued and enforced an overly broad and discriminatory rule prohibiting employees from wearing union buttons. (GC Exh. 2(c), par. 14(a).)

I found Gaitan to be a credible witness. Throughout his testimony, Gaitan provided direct and clear responses, and was able to provide additional details when asked to do so during direct and cross-examination. Based on Gaitan's testimony, I find that Metlige's remarks to Gaitan that he could not wear his union button were indeed improper and violated Section 8(a)(1) of the Act. However, I also find that Gaitan's admissions demonstrate that the Respondent repudiated Metlige's misconduct when Bautista apologized to Gaitan (essentially on Metlige's behalf) on the same day as the violation and assured Gaitan that he could wear his union button in the workplace. See *Raysel-IDE, Inc.*, 284 NLRB at 881 (finding that an 8(a)(1) violation regarding an employee's union button was repudiated when the employer's general manager retracted his improper statements within 24 hours and assured the employee that she could wear her button); *Atlantic Forest Products*, 282 NLRB at 855, 872 (same, where improper statements retracted within 3 hours); *Passavant Memorial Area Hospital*, 237 NLRB at 138.

Since the Respondent successfully repudiated the 8(a)(1) violation that Metlige committed, I recommend that the allegation in paragraph 14(a) of the complaint be dismissed.

2. Teresa Debellonia—complaint paragraph 14(c)

a. Findings of fact

On February 24, 2010, Teresa Debellonia was working in one of the casino hotel rooms when she was approached by Housekeeping Supervisor Elizabeth Alvarez. Alvarez asked Debellonia what she thought about the Union, and Debellonia answered that she agreed with and supported the Union. Alvarez then asked Debellonia if she was aware that she would have to pay $50 or $51 in union dues per month regardless of whether she was working. Debellonia replied "What's the difference if we're not paying $35 for insurance?" The conversation (which took place in Spanish) then ended—no one else was present during the conversation. (Tr. 2999–3000.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Alvarez (on February 24) interrogated employees about their union membership, activities and sympathies, and informed employees that it would be futile for them to support the Union as their bargaining representative. (GC Exh. 2(c), par. 14(c).)

Debellonia came across as a very credible witness. She was adamant and clear about the nature of her conversation with Alvarez, and her credibility was not undermined by cross-examination.

I find sufficient evidence that Alvarez unlawfully interrogated Debellonia. Alvarez contacted Debellonia one-on-one in a room that Debellonia was cleaning for the specific purpose of ascertaining whether Debellonia supported the Union. The circumstances and nature of the conversation were unlawful because they would reasonably tend to coerce an employee in the exercise of Section 7 rights. See *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 1 (2010) (explaining that the unusual nature of a supervisor's visit to an employee heightens the coercive impact of the supervisor's statements). However, I do not find that Alvarez made any unlawful statements of futility–there is no evidence that Alvarez make a remark that could be construed as indicating that it would be futile for Debellonia to support the Union as her bargaining representative.

Accordingly, I find that the Respondent, through Alvarez, violated Section 8(a)(1) of the Act by interrogating Debellonia about her union membership, activities, and sympathies. (GC Exh. 2(c), par. 14(c)(1).) I recommend that the allegation in paragraph 14(c)(2) of the complaint be dismissed.

3. Teresa Debellonia—complaint (Case 28–CA–23434) paragraphs 6 and 7

a. Findings of fact

Teresa Debellonia testified as a witness in this case on March 2, 2011. (Tr. 2997.) On or about March 18, 2011, the Respondent suspended Debellonia, and then discharged her on

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that the evidence did not show that Durbin discriminated against DeVilla because of her union activity.

[107] The Acting General Counsel withdrew the allegation set forth in par. 14(b) of the complaint. See GC Exh. 2(c), par. 14(b).

[108] The record is unclear regarding Bautista's exact title, or how her authority at the casino compares to Metlige's authority. However, Gaitan did admit that Bautista: has the authority to discipline and discharge employees; evaluates his work; and conducts staff meetings with all guest room attendants and housekeepers. Tr. 3200.

or about March 24, 2011. (GC Exh. 1(c), pars. 5(a)–(b); GC Exh. 1(e), pars. 5(a)–(b).) The Respondent suspended and discharged Debellonia because she engaged in union activities, and because she testified in the trial in this case. (GC Exh. 1(c), pars. 5(c)–(d).) However, the Respondent subsequently rescinded and revoked Debellonia's suspension and discharge and notified her that those adverse employment actions would not be used against her for any purpose. The Respondent also reinstated Debellonia to her former job without loss of seniority and with full backpay. (GC Exh. 1(e), Affirmative Defenses 1–2.)[109]

b. Discussion and analysis

The complaint alleges that the Respondent discriminated against Debellonia (on or about March 18 and 24, 2011) in violation of Section 8(a)(3) and (1) because Debellonia engaged in union activities. (GC Exh. 1(c), par. 6.) The complaint also alleges that the Respondent discriminated against Debellonia (on or about March 18 and 24, 2011) in violation of Section 8(a)(4) and (1) because Debellonia filed charges or gave testimony under the Act. (GC Exh. 1(c), par. 7.)

As noted above, the core facts related to the allegations regarding Debellonia's suspension, discharge and reinstatement are not in dispute. Applying *Wright Line*, I find that the Respondent suspended and discharged Debellonia for discriminatory reasons in violation of Section 8(a)(4), (3), and (1) of the Act. The Respondent was aware of Debellonia's union activities (wearing a union button and testifying as a witness in this case), and animus is shown by the close proximity in time between Debellonia's appearance as a witness in this case and her subsequent suspension and discharge. Based on those undisputed facts, and the lack of any evidence suggesting that the Respondent discharged Debellonia for nondiscriminatory reasons, the Acting General Counsel met its burden of proving that the Respondent discharged Debellonia for discriminatory reasons that violate the Act.

The Respondent does maintain, however, that it successfully repudiated the unlawful suspension and discharge when it rescinded those decisions and reinstated Debellonia with full backpay. The Board has indicated that the steps that an employer must take to cure a violation depend on the nature of the violation. See *Danite Sign Co.*, 356 NLRB No. 124, slip op. at 7. In connection with that premise, the Board agreed that an employer successfully repudiated a "relatively minor" 8(a)(5) violation even though the repudiation did not completely align with the repudiation standard set forth in *Passavant Memorial Area Hospital*, 237 NLRB at 138. See *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007) (finding that given the "relatively minor" importance of the employer's decision to increase the price of employee meals by 75 cents without bargaining with the union, the employer prevailed under the *Passavant* defense even though the repudiation did not completely accord with *Passavant* regarding timeliness and lack of ambiguity).

Consistent with the Board's precedent, I find that the converse rule must also be true—that if an employer commits a violation of the Act that is significant in nature, then the steps that the employer must take to repudiate the violation must also be significant, as demonstrated by more strict adherence to the repudiation standard set forth in *Passavant*. See *Passavant Memorial Area Hospital*, 237 NLRB at 138 (stating that repudiation must be: timely; unambiguous; specific in nature to the coercive conduct; adequately publicized to the employees involved; free from other proscribed illegal conduct; and accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future). The violations at issue here, including the unlawful decision to suspend and discharge an employee because she filed charges and gave testimony under the Act, are clearly significant such that the Respondent's repudiation effort warrants detailed scrutiny. See *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) (explaining that a rule that penalized employees for filing an unfair labor practice charge with the Board would be improper because "the policy of keeping people completely free from coercion . . . against making complaints to the Board is [ ] important in the functioning of the Act as an organic whole"); *Pergament United Sales*, 296 NLRB 333, 335 (1989) (noting that "significant policies" underlie Section 8(a)(4) of the Act), enfd. 920 F.2d 130 (2d Cir. 1990)).

I find that although the Respondent deserves some credit for its efforts to repudiate Debellonia's suspension and discharge (as will be reflected in the remedy that I apply to these violations), the Respondent did not successfully repudiate its violations of the Act. First, the Respondent's attempted repudiation was ambiguous.[110] The record shows that the Respondent rescinded Debellonia's suspension and discharge, but it does not show that the Respondent advised Debellonia of its reasons for doing so (i.e., by telling her that the suspension and discharge were unlawful under the Act). Debellonia was therefore left to speculate as to the reasons why the Respondent reinstated her with full backpay. Second, the Respondent did not assure Debellonia that it would not interfere with her Section 7 rights in the future. Such assurance was warranted given the significant impression that an unlawful suspension and discharge such as the one here would make on a reasonable person. Indeed, without an employer's assurance that it will not interfere with Section 7 rights in the future, it is likely that the chill on the employee's exercise of his or her Section 7 rights would persist even though the unlawful suspension and discharge were rescinded, because the employee would reasonably be concerned

[109] The Respondent did not deny or admit to the allegations in pars. 5(c) or (d) of the complaint. I agree with the Acting General Counsel that under Board Rule 102.20, the Respondent's failure to specifically admit, deny or explain those allegations means that the allegations are deemed to be admitted.

The Acting General Counsel does not dispute the facts that the Respondent asserted in pars. 1 and 2 of the Respondent's affirmative defenses, and thus I have incorporated those facts (regarding Debellonia's reinstatement) in the factual findings stated herein.

[110] I also question the timeliness of the attempted repudiation. Although the record does not state when the Respondent offered to reinstate Debellonia, I infer that the offer of reinstatement did not occur until approximately May 2011 (when the Acting General Counsel filed the complaint in Case 28–CA–23434), several weeks after the unlawful suspension and discharge.

that his or her continued employment was subject to the whims of the employer. Accordingly, I find that the Respondent did not successfully repudiate its unlawful suspension and discharge of Debellonia, and I also find that the Respondent discriminated against Debellonia (on or about March 18 and 24, 2011) in violation of Section 8(a)(3), (4), and (1) because Debellonia engaged in union activities, filed charges and gave testimony under the Act. (GC Exh. 1(c), pars. 6–7.)

4. Michael Wagner—complaint paragraphs 14(d), (e), (f), and (g)

a. Findings of fact

Michael Wagner became a union committee leader on February 23, 2010, and wore his union button to work for the first time on February 24. (Tr. 3026–3027.) On February 24, Wagner was working the graveyard shift as a bartender when Assistant Beverage Manager (and one of Wagner's friends) Brian Tedeschi finished his shift and sat down at the bar to have a drink. (Tr. 3028, 3093.) While at the bar, Tedeschi initiated a conversation with Wagner, asking Wagner why he wanted to "go union." Wagner advised Tedeschi that he did not feel comfortable talking about it, noting that Tedeschi was off duty. Tedeschi stated that everything was okay and repeated his question (why did Wagner want to go union), prompting Wagner to respond that he felt it was his right to wear a union button and that is what he wanted to do. (Tr. 3028.) Persisting, Tedeschi acknowledged that Wagner had a right to support the Union, but asserted that he had prior experience with the Union from his time at the MGM Grand Casino. Tedeschi told Wagner that the Union was no good there, noting that the rules were tougher on employees and management and employees had a tougher time speaking with each other. Tedeschi then asserted that similar conditions would arise if the Union came to Green Valley (including tougher rules and management and employees having a tougher time communicating with each other). (Tr. 3028, 3095.)

Next, Tedeschi asked Wagner if he liked his job. Tedeschi then offered a specific example of how the rules at work would become tougher if the Union came to Green Valley, stating that if the Union came in, Wagner would no longer be given a lunch break by a service bartender during his shift. (Tr. 3029.) On the other hand, Tedeschi explained, the Respondent's owners would reward all loyal employees when the casino came out of bankruptcy and hard times. To drive the point home, Tedeschi asked, "Do you understand that?" Wagner said yes, and then reiterated that he felt uncomfortable with the conversation, and advised Tedeschi that if he wanted to continue talking about these issues, then everything would have to be on the record (i.e., that Wagner would document and keep track of what Tedeschi was saying). (Tr. 3029, 3031.) Tedeschi said that was fine. Wagner then voiced his concerns about the Respondent's practice of telling employees not to sign union cards, and stated that he respectfully disagreed with Tedeschi's point of view about the Union. (Tr. 3029–3030.) When Tedeschi got up to leave the bar, he shook Wagner's hand and said that he hoped everything turned out well for him. (Tr. 3112–3113.) The entire conversation lasted approximately 30 minutes—while other customers were present at the bar, none were close enough to hear everything that was said. (Tr. 3030–3031.)

On February 26, shortly after Wagner arrived at work, Tedeschi approached him and said that he had great news, explaining that Kevin Kelley and Frank Fertitta were on the property that day and that a key deal was reached in the bankruptcy proceedings. Tedeschi asked Wagner if he had changed his mind on anything, and Wagner answered no. (Tr. 3031.) Tedeschi then described some of the steps that the Respondent's owners (the Fertitta family) were taking to come out of bankruptcy, and asked Wagner if he was excited about the news. Wagner replied that he loved his job and loved working with his coworkers. In response, Tedeschi said "Well, okay, I just want to make sure before you make any drastic decisions."[111] (Tr. 3032.)

One hour later (at approximately 1 a.m.), Wagner called Tedeschi (who was in his office) by telephone. Referencing Tedeschi's earlier question about whether he had changed his mind, Wagner told Tedeschi that he felt uncomfortable about the union stuff Tedeschi had been telling him and stated that he did not want to keep talking about it. Tedeschi said okay and the conversation ended. (Tr. 3032, 3035.)

At 2 a.m. that same night, Wagner called Tedeschi to ask for assistance at the bar with some work. Before Tedeschi arrived, Wagner began making some notes about Tedeschi's comments from earlier in the evening. When Tedeschi arrived at the bar and noticed that Wagner was writing, he asked what Wagner was doing. Wagner replied that he was taking notes on everything that Tedeschi had been saying to him about the Union because Tedeschi's remarks made Wagner feel threatened and uncomfortable. (Tr. 3032–3033.) Tedeschi denied knowing what Wagner was talking about, prompting Wagner to remind Tedeschi of the occasions where Tedeschi: asked him if he changed his mind; told him not to make any drastic decisions; and stated that all loyal employees were going to be rewarded. Tedeschi replied that Wagner was confused, and explained that what he (Tedeschi) wanted to say was that long hard working employees will be appreciated with raises and cost of living raises when the tough times with Station Casinos and the bankruptcy are over. The following exchange occurred when Wagner summarized Tedeschi's clarifications:

> WAGNER: So you don't want to use the word reward loyal employees?
> TEDESCHI: No.
> WAGNER: You want to use the word "appreciate?"
> TEDESCHI: Yes.
> WAGNER: You want to use the words "raise" and "cost of living raises?"
> TEDESCHI: Yes.
> WAGNER: OK, I got it.
> . . . .
> WAGNER: You said the work rules are going to be tougher if the Union gets here.

[111] Two employees were nearby during this exchange, but neither was close enough to hear the entire conversation. Tr. 3032.

TEDESCHI: No, no, I didn't say that. I said there would be gray areas of work. Right now, Green Valley is flexible and gray, and if the Union comes in, it's going to be black and white.

WAGNER: So you don't want to use the words "the rules are going to be tougher," you want to use the word black and white?

TEDESCHI: Yeah.

WAGNER: Okay, so I understand this. You're telling me that the rules are gray and flexible and that they are going to be black and white if the Union gets here. That's what you want me to use instead of the word "tougher?"

TEDESCHI: Yes.

(Tr. 3034) (noting that Wagner wrote down some of Tedeschi's remarks as they spoke). Tedeschi then said there was no way to answer Wagner's questions, and said that he hoped Wagner felt better about what he was saying. Tedeschi then said, "Fuck it," threw his hands up in the air, walked to the other side of the bar and started drinking. Id.

Over the course of the week, Tedeschi told Wagner that all of the things about the Union that he was telling Wagner were "personal ideas" that he was sharing with Wagner because he cared about him as a friend. (Tr. 3117.) Wagner also spoke to Beverage Manager J.C. Mazur about Tedeschi's remarks—Mazur responded that he was not sure what Tedeschi was thinking or why Tedeschi was doing what he was doing. (Tr. 3115.)

On March 25, at approximately 8:30 p.m., Wagner arrived at the Green Valley facility and went to the parking garage to speak to employees about the Union and hand out leaflets to employees as they entered or exited the employee entrance to the casino.[112] Wagner was wearing his work uniform (a black shirt and black pants) and his union button, and stood in the parking lot next to a parked car while he waited to speak to employees. (Tr. 3042, 3044; GC Exh. 54(b).) After a period of 5 minutes, security officer Ronald Pafford approached Wagner and asked what he was doing, as well as whether he was on duty or off duty. (Tr. 3042, 3044.) Wagner advised Pafford that he was off duty, and Pafford responded that Wagner had to stop what he was doing and leave. At Wagner's request, Pafford provided his full name and also stated that he was following the instructions of Security Supervisor Winston Bouman when he directed Wagner to leave.[113] (Tr. 3044.) Wagner complied and left the property at approximately 8:40 p.m. (Tr. 3044–3045.)

Wagner also went to the parking garage to leaflet and speak to employees about the Union on June 18, at approximately 8:30 p.m., after he finished his shift at work. (Tr. 3045–3046.) Wagner was wearing his name badge and union button, and again stood in the parking lot next to a parked car (the same location that he used on March 25, 2010) while he waited to speak to employees. (Tr. 3046; GC Exh. 54(b).) After a few minutes, a female security officer approached and told Wagner that he had to stop what he was doing because the Company had a no-soliciting policy. The officer (who stated that she was the security supervisor)[114] advised Wagner that he could hand out fliers on the sidewalks that bordered the Green Valley casino property, but not at the employee entrance. Id. As Wagner began to walk towards his car to leave the property, he noticed that a second security officer arrived (on a bicycle). The officer on the bicycle followed Wagner to his car, and observed Wagner until Wagner got into his car and left the property. (Tr. 3048.)

b. Discussion and analysis

The complaint alleges that the Respondent violated the Act in the following ways:

1. On February 24, Tedeschi: interrogated employees about their Union membership, activities and sympathies; informed employees that it would be futile to support the Union as their bargaining representative; threatened employees with stricter enforcement of work rules if they selected the Union as their bargaining representative; threatened employees that the Respondent would end the ability of employees to talk to their supervisors and managers if they selected the Union as their collective-bargaining representative; and promised employees increased benefits if they refrained from union organizing activities. (GC Exh. 2(c), par. 14(d).)[115]
2. On February 26, Tedeschi: interrogated employees about their union membership, activities and sympathies; threatened employees with closer supervision and stricter enforcement of work rules if they selected the Union as their bargaining representative; and promised employees increased benefits if they refrained from union organizing activities. (GC Exh. 2(c), par. 14(e).)
3. On March 25, Pafford and Bouman orally issued and enforced an overly broad and discriminatory rule prohibiting its off duty employees from engaging in union activities in the employee parking garage of the Green Valley Ranch facility. (GC Exh. 2(c), par. 14(f).)
4. On June 18, 2010, Robarge: engaged in surveillance of its employees to discover their union activities; and orally issued and enforced an overly broad and discriminatory rule prohibiting its employees from engaging in

[112] The employee entrance to the casino from the parking garage is located approximately 30 feet away from the customer entrance. The employee entrance has closed doors that are marked "employee entrance," and an employee "swipe" badge is required to access the employee area beyond the doors. Tr. 3047–3048.

[113] Wagner was not aware of any casino policy that prohibited leafleting or passing out fliers in the parking garage, and noted that on prior occasions he had observed fliers from various businesses and restaurants that had been placed on car windshields in the parking garage. In addition, Wagner noted that he is allowed to be at the Green Valley Ranch facility when he is off duty, including to check his schedule, attend meetings, or to simply enjoy the amenities at the casino. Tr. 3045.

[114] Wagner did not identify the female security officer by last name (she declined to provide Wagner with that information), though he did refer to her as "Julie." Tr. 3046, 3053. The Respondent admitted that Assistant Security Supervisor Julie Robarge was one of its agents at the Green Valley Ranch facility during the relevant time period. GC Exh. 1(w), par. 4(n).

[115] The Acting General Counsel voluntarily withdrew the allegations in par. 14(d)(3) of the complaint. See GC Posttrial Br. at 49 fn. 18.

union activities in the employee parking garage of the Green Valley Ranch facility. (GC Exh. 2(c), par. 14(g).)

I found Wagner to be a credible witness. Wagner testified in detail about his experiences in the workplace, and was poised and earnest in his testimony. His testimony held up well despite extensive cross-examination that was conducted not only with the benefit of Wagner's affidavit, but also entries that Wagner made on a daily log that he kept about his experiences in the workplace during the union organizing campaign.

During cross-examination, Wagner did admit that he tried to memorize his affidavits.[116] (Tr. 3099–3100.) Wagner explained that although he believed his memory was reliable, he took his affidavits very seriously (having given them under oath) and reviewed them because he wanted to ensure that his trial testimony was also truthful and accurate.[117] (Tr. 3099–3100, 3160–3161.) I have considered Wagner's admission, and do not find that it harms his credibility. As a preliminary matter, the record shows that Wagner reviewed his affidavits because he was nervous while waiting to be called to the stand to testify. (Tr. 3099.) Thus, he did not review his affidavits out of any premeditated plan to provide canned testimony. Moreover, Wagner's testimony was not rote or canned—to the contrary, he responded to both attorneys in a conversational tone, and was able to both explain the relevant events in detail and identify areas of inquiry that were beyond the scope of his memory.

Turning to the complaint allegations that Wagner addressed in his testimony, I find that Tedeschi's remarks on February 24 and 26, violated Section 8(a)(1) of the Act. On both days, Tedeschi unlawfully interrogated Wagner about his support for the Union. Tedeschi was Wagner's direct supervisor, and he questioned Wagner extensively about his views of the Union, and coupled his questions with arguments (many of them unlawful in their own right, as discussed herein) for why Wagner should change his mind. For example, Tedeschi asserted that if employees selected the Union as their bargaining representative, they would suffer adverse consequences at work, including: stricter work rules (or black and white rules instead of gray and flexible rules); closer supervision; and fewer opportunities to communicate with supervisors and managers. By making those claims, Tedeschi unlawfully threatened that employees would jeopardize their current terms and conditions of employment if they supported the Union. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1.

In addition, Tedeschi made arguments that unlawfully suggested that Wagner and other employees would reap benefits from the Respondent if they refrained from supporting the Union. Specifically, Tedeschi offered that the Respondent would "reward loyal employees" and show its appreciation for long, hard-working employees after "tough times" were over. While those phrases could be lawful in other contexts, the context here demonstrates that Tedeschi was offering these phrases to Wagner to encourage him to abandon his support for the Union because the Respondent would treat such a decision favorably in the future. Indeed, Tedeschi drove that point home by repeatedly asking Wagner if he understood Tedeschi's message. By promising these benefits to Wagner to discourage him from supporting the Union, the Respondent violated Section 8(a)(1) of the Act.[118] *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21 (2010).

The evidence does not support the allegation that Tedeschi told Wagner that it would be futile to support the Union. While the evidence does show that Tedeschi asserted that the Union was "no good" when he worked at the MGM Grand casino, I do not find that Tedeschi's statement of opinion about his past experience with the Union conveyed a message that it would be futile for Station Casino's employees to support the Union. Further, Tedeschi's expression of opinion about his past experience with the Union was permissible under Section 8(c) of the Act. I therefore recommend that the allegation in paragraph 14(d)(2) of the complaint be dismissed.

As for the allegations regarding Wagner's union leafleting in the parking garage, "it is well established that an employer that operates on property it owns ordinarily violates the Act if it bars its employees from distributing union literature during their nonwork time in nonwork areas of its property. Moreover, such an employer's off duty employees have a presumptive right to return to their work site and gain access to exterior, nonwork areas for purposes of otherwise protected solicitation." *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 7 (2011). Thus, an employer that prohibits this type of activity will violate Section 8(a)(1) of the Act unless the employer can justify its rule as necessary to maintain discipline

[116] Wagner provided three affidavits to the Acting General Counsel's office, and reviewed each of them before he testified. Tr. 3098, 3132. Wagner also reviewed portions of his third affidavit (regarding the June 18, 2010 incident) in the morning on March 3, 2011, before he was recalled for further cross-examination. Tr. 3157.

[117] Upon hearing Wagner's admission, l explained that he should answer the questions posed during trial to the best of his current memory, rather than trying to match his affidavit. Tr. 3100–3101. Counsel for the Respondent then asked Wagner if he wished to correct any of his testimony in light of my instructions—Wagner responded that he could not think of any corrections that were needed. Tr. 3101–3102.

[118] In making my findings regarding Tedeschi's conduct, I have considered the fact that Wagner and Tedeschi had a friendly relationship. On the issue of friendship between supervisors and employees, the Board has held that "a supervisor's statements concerning an employee's union activities can be coercive despite the friendly relationship between the individuals and the well-intentioned nature of the statements." *Trover Clinic*, 280 NLRB 6, 6 fn. 1 (1986). Thus, the fact that Wagner and Tedeschi were friends does not preclude a finding (as I have made here) that Tedeschi's remarks were objectively coercive and violated Sec. 8(a)(1).

I have also considered the fact that Tedeschi stated that he was only telling Wagner his personal ideas about the Union. It is undisputed that Tedeschi was a supervisor as that term is defined in the Act. As the Board has stated, "an employer is bound by the acts and statements of its supervisors whether specifically authorized or not." *Grouse Mountain Lodge*, 333 NLRB 1322, 1328 fn. 7 (2001), enfd. 56 Fed. Appx. 811 (9th Cir. 2003). I also note that consistent with his role as a supervisor, Tedeschi spoke to Wagner in the workplace while Wagner was on duty, and made representations about how the Respondent would change employees' terms and conditions of employment depending on the choice that employees made regarding whether to support the Union. Accordingly, I reject the proposition that Tedeschi's remarks and conduct should not be imputed to the Respondent.

and production. *Republic Aviation Corp. v. NLRB*, 324 U.S. at 803 fn. 10.

In this case, the record is clear that the Respondent, through its security staff (specifically, Ronald Pafford and Winston Bouman on March 25, and Julie Robarge on June 18), improperly prohibited Wagner from engaging in union activities at the Green Valley facility. First, both Pafford and Robarge were aware (or should have been aware) that Wagner was a casino employee. Pafford explicitly established that Wagner was an off duty employee, and Robarge had an opportunity to observe that Wagner was wearing an identification badge and made no effort to explore Wagner's status (as an employee) further before directing him to leave the property. Second, Wagner properly selected an exterior, nonwork area (the parking garage) for his union activities—he was on nonworktime, and there is no evidence to support a theory that the Respondent needed to exclude Wagner out of necessity to maintain discipline and/or production. And third, the evidence does not support the Respondent's suggestion that it was not safe for Wagner to leaflet or speak to employees in the parking garage. To the contrary, the Respondent had permitted local restaurants and businesses to distribute fliers in the parking garage on previous occasions, and to the extent that the Respondent suggested that Wagner was placing his personal safety at risk (because of his location in the garage in areas where traffic might pass), the evidence does not support that theory or that any safety concerns warranted excluding Wagner from the property altogether (instead of, for example, merely asking him to change his location in the garage). Since the Respondent lacked a proper justification for barring Wagner from engaging in union activities in the parking garage at the Green Valley Ranch facility, I find that the Respondent violated Section 8(a)(1) of the Act.

I find that the Respondent, through Tedeschi on February 24, violated Section 8(a)(1) of the Act by: interrogating employees about their union membership, activities and sympathies; threatening employees with stricter enforcement of work rules if they selected the Union as their bargaining representative; threatening employees that the Respondent would end the ability of employees to talk to their supervisors and managers if they selected the Union as their collective-bargaining representative; and promising employees increased benefits if they refrained from union organizing activities. (GC Exh. 2(c), pars. 14(d)(1), (4), (5), and (6).)

I recommend that the allegations in paragraphs 14(d)(2) and (d)(3) be dismissed.

I find that the Respondent, through Tedeschi on February 26, violated Section 8(a)(1) of the Act by: interrogating employees about their union membership, activities and sympathies; threatening employees with closer supervision and stricter enforcement of work rules if they selected the Union as their bargaining representative; and promising employees increased benefits if they refrained from union organizing activities. (GC Exh. 2(c), par. 14(e).)

I find that the Respondent, through Pafford and Bouman on March 25, violated Section 8(a)(3) and (1) of the Act by orally issuing and enforcing an overly broad and discriminatory rule prohibiting its off-duty employees from engaging in union activities in the employee parking garage of the Green Valley Ranch facility. (GC Exh. 2(c), par. 14(f).)

I find that the Respondent, through Robarge on June 18, violated Section 8(a)(3) and (1) of the Act by orally issuing and enforcing an overly broad and discriminatory rule prohibiting its employees from engaging in union activities in the employee parking garage of the Green Valley Ranch facility. (GC Exh. 2(c), par. 14(g)(2).)

I recommend that the allegation in paragraph 14(g)(1) of the complaint be dismissed. Although the Acting General Counsel succeeded in proving that Robarge improperly prohibited Wagner from engaging in union activities in the parking garage on June 18, the Acting General Counsel did not elicit sufficient facts to support a separate theory of unlawful surveillance. The record does not include any evidence about Robarge's conduct apart from her direction that Wagner leave the property, and to the extent that Wagner testified that another security officer watched him as he walked to his car and drove away, that evidence falls short of demonstrating that the Respondent was monitoring Wagner's union activities (as opposed to simply verifying that Wagner left the property as directed).

H. Palace Station

1. Ramona Gonzalez—complaint paragraphs 7(a) and (h)

a. Findings of fact

Ramona Gonzalez attended a union organizing meeting on February 18, 2010. (Tr. 991, 1002.) After hearing a presentation at the meeting about the union organizing campaign and potential issues that could arise in the workplace during the campaign, Gonzalez formed the impression that she needed to document incidents at work because the employer might do "bad things" to employees. (Tr. 1002, 1004.) Based on that impression, Gonzalez approached staff meetings with the belief that she should keep track of instances where the employer made remarks that were bad for employees. (Tr. 1015–1016.) Gonzalez paid less attention to other remarks at meetings. Id.

On February 19, Gonzalez (along with approximately 40 coworkers) attended a staff meeting in the housekeeping department. (Tr. 992–993, 995.) Vice President Michael South spoke at the meeting (in English), while Team Member Relations Manager Elena Widlowski interpreted South's remarks from English into Spanish. (Tr. 992–994.) According to Gonzalez, South advised the employees at the meeting that everything was fine at Station Casinos, and that everything would be fixed and employee salaries would be increased. Gonzalez also testified that South advised employees that while they were free to sign union cards, they should not sign cards because the Union would simply take their money and because employees would see consequences if they signed cards. (Tr. 994–995, 1016–1017.)

On March 10, Gonzalez attended a small staff meeting (with 6 coworkers) conducted by Executive Housekeeper Mike Hickey (with Widlowski again serving as a translator). (Tr. 996.) Hickey mentioned an upcoming union rally aimed at encouraging employees to sign union cards, and also commented that employees could choose to reject union supporters

who came to visit them at their homes.[119] (Tr. 996, 1019.) Gonzalez admitted at trial that she did not remember the details of this meeting very well. (Tr. 1020.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Widlowski and South (on February 19): promised employees increased wages and unspecified benefits if they rejected the Union;[120] threatened employees with unspecified reprisals if they supported the Union as their bargaining representative; and threatened employees by telling them not to sign union membership cards. (GC Exh. 2(c), par. 7(a).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Widlowski and Hickey (on March 10): informed employees that it would be futile for them to support the Union as their bargaining representative; and directed employees to call the police if they were contacted at home by union supporters or agents. (GC Exh. 2(c), par. 7(h).)[121]

I found much of Gonzalez' testimony to be problematic and unreliable. As Gonzalez explained, because of the impressions she formed after hearing a union presentation about potential unfair labor practices, she approached her interactions with the Respondent with the aim of listening only for information that struck her as bad for employees.[122] As a result, Gonzalez did not listen to the full extent of South's and Hickey's remarks at the two meetings, thereby making it likely that she missed important context for the information that she did hear. In addition, Gonzalez' testimony did not establish a factual predicate for some of the allegations in the complaint,[123] and Gonzalez admitted that her memory was limited regarding the events of March 10. Given those deficiencies, coupled with the fact that the Acting General Counsel did not call any of Gonzalez' coworkers to corroborate her testimony about what was said at the two meetings, I find that the Acting General Counsel did not present enough reliable evidence to meet its burden of proof for the complaint allegations that Gonzalez addressed in her testimony.

Because of the shortcomings noted above, I recommend that the allegations in paragraphs 7(a) and (h) of the complaint be dismissed.

2. Antonia Gutierrez—complaint paragraphs 7(b) and 15(c)

a. Findings of fact

On February 19, 2010, Antonia Gutierrez reported to work while wearing her union button. During one of her breaks, Gutierrez spoke with her coworkers about the Union and collected union cards that some of her coworkers signed. While this was taking place, Team Member Relations Manager Elena Widlowski approached and asked if everything was okay. Gutierrez answered yes, and once the break ended, Gutierrez and her coworkers went to their workstations. (Tr. 3206–3207.)

Later that day, Widlowski approached Gutierrez at her work station and told Gutierrez that she wanted Gutierrez to meet her in her (Widlowski's) office after Gutierrez finished her shift. Gutierrez complied, reporting to Widlowski's office after she clocked out at the end of her shift. Widlowski advised Gutierrez that Gutierrez had to be very careful with what she was doing, and to make sure that the Union complied with what it was offering her, to avoid problems that could arise. Gutierrez asked Widlowski what she meant, and Widlowski did not respond further.[124] (Tr. 3207–3209.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Widlowski (on February 19, 2010) threatened employees with unspecified reprisals if they supported the Union as their bargaining representative. The complaint also al-

[119] Gonzalez offered multiple versions of Hickey's exact remarks about how employees should respond to union supporters who visited their homes. Specifically, Gonzalez attributed the following various statements to Hickey: (a) "when they come to knock on your door, don't admit them and call the police on them"; (b) "contact the police if [union supporters] wouldn't leave your homes after being asked to leave"; and (c) "if they go to your house do not receive them, call the police on them." Tr. 996, 1019.

[120] The Acting General Counsel voluntarily withdrew the allegation in paragraph 7(a)(1) of the complaint that Widlowski and South promised no more layoffs and a guaranteed work week. See GC Posttrial Br. at 53 fn. 19. The Acting General Counsel also moved to amend the complaint to allege not only that Widlowski and South promised increased wages (as originally charged), but also promised unspecified benefits. Id. I hereby grant the Acting General Counsel's posttrial request to amend par. 7(a)(1) of the complaint as stated above. It is just to permit the proposed amendment because the essence of the allegation (an unlawful promise of benefits) remains unchanged and was fully litigated. See *Stagehands Referral Service*, 347 NLRB at 1171 (describing three factors to consider in determining whether it would be just to accept a proposed amendment to the complaint: whether there was lack of surprise or notice; whether the General Counsel offered a valid excuse for its delay in moving to amend; and whether the matter was fully litigated); see also Tr. 1015–1017 (Respondent cross-examined Gonzalez about her testimony that managers promised wage increases and that everything would be fixed).

[121] I hereby deny the Acting General Counsel's request to amend the complaint to allege that on March 10 Hickey issued and enforced an overly broad and discriminatory rule prohibiting employees from speaking to union organizers and supporters at their homes. See GC Posttrial Br. at 74 fn. 26. While it is a close call as to whether it would be just to allow the proposed amendment (applying the standard in *Stagehands Referral Service*, 347 NLRB at 1171, and taking into account that the issue was litigated to some extent (see Tr. 1019–1021)), the issue is moot because I am not able to credit the testimony that Gonzalez offered in support of the proposed allegation.

[122] I do not find that Gonzalez' impressions about potential employer misconduct during union organizing campaigns were caused by any improper union conduct. Instead, the record indicates that Gonzalez latched on to certain information presented at the union meeting and decided that she should listen only for employer remarks that struck her as bad for employees.

[123] Specifically, Gonzalez did not testify that Hickey made statements that could be interpreted as informing employees that it would be futile for them to support the union (complaint par. 7(h)(1). Tr. 996, 1019–1020.

[124] Widlowski spoke to Gutierrez in Spanish. No one else was present during the meeting in Widlowski's office. Tr. 3209–3210.

leges that the Respondent violated Section 8(a)(1) and (3) because Widlowski discriminated against Gutierrez by summoning her to the human resources office because she supported the Union. (GC Exh. 2(c), pars. 7(b), 15(c).)

Gutierrez was a credible witness. She provided detailed testimony about her encounter with Widlowski, and withstood extensive cross-examination. Although the Respondent attempted to impeach her testimony by pointing out that Gutierrez's written reports to the Union did not mention the meeting in Widlowski's office (Tr. 3259–3260), Gutierrez credibly explained that she omitted that information because she erroneously believed it could not be addressed because she met with Widlowski after she ended her shift and clocked out.[125] (Tr. 3272–3273.)

I agree with the Acting General Counsel that Widlowski made inappropriate remarks to Gutierrez that violated Section 8(a)(1). First, Widlowski's directive that Gutierrez come to her office was coercive in and of itself because, given the context of the directive (which followed Widlowski's observation of Gutierrez' union activities earlier in the day), Widlowski's directive reasonably tended to coerce Gutierrez in the exercise of her Section 7 rights by creating the fear of forthcoming disciplinary action because of her union activities. Second, Widlowski's comments to Gutierrez at the meeting were unlawful because they indeed did threaten Gutierrez with unspecified reprisals if she continued to support the Union. Based on the nature of the warning (to be careful with her union activities) and the context of the meeting (in a supervisor's office, shortly after that supervisor observed Gutierrez encouraging coworkers to sign union cards), a reasonable person would have understood Widlowski's warning to suggest that Gutierrez would risk being targeted by the Respondent for unspecified reprisals if her union activities continued.

However, I do not agree that the Respondent discriminated against Gutierrez in violation of Section 8(a)(3) merely by summoning her to the human resources office (as alleged in par. 15(c) of the complaint). As the Board has held, verbal warnings, coachings and reprimands are only forms of discipline if they lay a foundation for future disciplinary action against the employee. See *Oak Park Nursing Care Center*, 351 NLRB at 28; *Promedica Health Systems*, 343 NLRB at 1351; *Progressive Transportation Services*, 340 NLRB at 1046 fn. 7. While the Respondent has stipulated that it does use coachings as part of its progressive discipline system, the record does not show that Widlowski gave Gutierrez a coaching or any other form of discipline when Gutierrez reported to Widlowski's office. Nor does the record show that a mere visit to the human resources office lays a foundation for future disciplinary action. Because the visit to Widlowski's office was not a disciplinary action and did not otherwise affect any of the terms or conditions of Gutierrez' employment, I recommend that the allegation in paragraph 15(c) of the complaint be dismissed. See *Lancaster Fairfield Community Hospital*, 311 NLRB at 403–404 (dismissing 8(a)(3) allegation because a "conference report" that the employer issued to the employee about protected activity was not part of the employer's progressive disciplinary system and did not affect any term or condition of employment within the meaning of Section 8(a)(3)).

I find that the Respondent, through Widlowski, unlawfully threatened Gutierrez with unspecified reprisals if she continued to support the Union as her bargaining representative. (GC Exh. 2(c), par. 7(b)(1).) I also find that the Respondent, through Widlowski, discriminated against Gutierrez in violation of Section 8(a)(1) by summoning her to the human resources office because she supported the Union. (GC Exh. 2(c), par. 7(b)(2).)

I recommend that the allegation in paragraph 15(c) of the complaint be dismissed.

3. Celina Ballinas—complaint paragraph 7(c)

a. Findings of fact

Celina Ballinas wore her union button to work for the first time on February 19, 2010. (Tr. 1039.) Near the end of her shift, Ballinas was in the process of signing in some equipment when Internal Maintenance Supervisor Starla Martinez approached her and physically turned Ballinas around by pulling on her left shoulder. (Tr. 1040–1041, 1046, 1060.) Martinez looked at Ballinas' union button and laughed, and then went to her office. (Tr. 1040.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Martinez (on February 19, 2010) surveilled employees to discover their union activities, and grabbed Ballinas' arm because she supported the Union. (GC Exh. 2(c), par. 7(c).)

I found Ballinas to be a credible witness. Ballinas was clear and direct in her testimony, and did not waver in her testimony despite vigorous cross-examination on a variety of topics. I also find that Ballinas' testimony established that the Respondent (through Martinez) violated Section 8(a)(1) of the Act. Martinez' act of grabbing Ballinas' shoulder to see her union button clearly was conduct that could have a reasonable tendency to interfere with an employee's exercise of his or her Section 7 rights. *Los Angeles Airport Hilton Hotel & Towers*, 354 NLRB 843 fn. 3 (2009) (employer violated Sec. 8(a)(1) when a supervisor pushed an employee away from other employees who were engaging in protected activity). In addition, since Martinez' act was aimed at determining whether (or confirming that) Ballinas was supporting the Union, Martinez created the impression that Ballinas' union activities had been placed under surveillance. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14 (explaining that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways).

Based on the foregoing analysis, I find that the Respondent, through Martinez, unlawfully engaged in surveillance of Balli-

[125] I also reject the Respondent's argument that Gutierrez's credibility was damaged because she met with the Acting General Counsel between her direct examination (on March 4, 2011) and her cross-examination (on March 21, 2011, when trial resumed). I did not observe any evidence of any improper coaching or influence when Gutierrez resumed and completed her testimony on March 21, 2011.

nas' union activities, and also (by grabbing Ballinas' arm/shoulder) acted in a manner that had a reasonable tendency to coerce Ballinas in the exercise of her Section 7 rights. (GC Exh. 2(c), par. 7(c).)

4. James Estrada–complaint paragraphs 7(d), (e), (i), (j), (k), and (l)

a. Findings of fact

James (Randy) Estrada began wearing a union button to work on February 20, 2010. (Tr. 1073.) On that same day, Estrada and several coworkers attended a preshift meeting conducted by Internal Maintenance Supervisor Starla Martinez. (Tr. 1075–1076.) At the meeting, Martinez asserted (via a Sound Byte that she read and via her own comments) that the Union was lying to employees in an effort to convince them to support the Union. Id. Estrada testified that Martinez told employees not to sign union cards, and also testified that Martinez told employees that if they did sign union cards, they might regret their choice. (Tr. 1075.) At the end of the meeting, Martinez asked Estrada to respond to any questions that employees might have about the Union. Estrada identified himself as a union committee leader and invited his coworkers to approach him during break or while off duty if they had any questions about the Union. (Tr. 1160.) Some employees immediately began asking Estrada questions about the Union, but were asked to stop (by other employees) when the meeting got out of hand. Id.

On February 21, Estrada attended a meeting conducted by Executive Housekeeper Mike Hickey. Approximately 10 to 12 employees attended the meeting. (Tr. 1077–1078.) According to Estrada, Hickey advised employees that union representatives were in the casino, and stated that the casino advised employees not to sign any union cards. Estrada also testified that Hickey promised employees that they would not lose their jobs, in contrast to workers who had been laid off by other casinos despite being represented by the Union. (Tr. 1078.)

Team Member Relations Manager Elena Widlowski spoke to employees at the February 24 preshift meeting. (Tr. 1079.) Martinez was also present at the meeting. Id. Estrada testified that Widlowski told employees that if they had already signed union cards, they could change their mind and retrieve their card. Estrada added that Widlowski invited employees to contact the human resources department if the person who had their union card refused to return it, so the human resources department could take action from that point. (Tr. 1080, 1166.) After Widlowski spoke, Estrada also spoke at the meeting, stating (among other things) that employees had the right to seek union representation without any interference from management or the human resources department. (Tr. 1167–1168.)

Widlowski addressed employees again at the March 10 preshift meeting. (Tr. 1080–1081) (noting that between 10 and 12 employees attended the meeting). Widlowski informed employees that they had the right to choose whether or not to sign a union card, but asserted that it would be better if they chose not to sign a card. (Tr. 1173.) Estrada testified that Widlowski asked employees to contact the human resources department if union supporters intimidated or harassed them about signing cards. (Tr. 1081.)

On March 31, Martinez conducted a preshift meeting attended by 10 to 12 employees. (Tr. 1081–1083.) Martinez read a Sound Byte to the employees that described efforts by the Teamsters Union to organize the receivers at Palace Station. (Tr. 1176–1177; see also GC Exh. 6(c).) When Martinez finished reading the Sound Byte, Estrada raised his hand and asked if he could reply to her remarks. (Tr. 1082.) Martinez told Estrada, "No, you cannot talk. I will have no rebuttals and no opinions from you," and gestured with her finger that Estrada should "zip [his] lip and shut up." Id. When Estrada responded that it was lawful for him to reply, Martinez paused and glared at him, and then said okay and went into the manager's office while Estrada spoke. (Tr. 1082–1083.)

At the April 10 preshift meeting, Martinez informed employees that the meetings would no longer be used as a place where employees could voice their opinions or give rebuttals. Instead, meetings would be limited to company business only, and employees would be expected to remain silent and not offer any replies to any manager remarks about company business or union activity. (Tr. 1084); (see also Tr. 1086) (noting that 10 to 12 employees were present at the meeting). Martinez added that eating, drinking and Avon sales would also be prohibited during meetings. (Tr. 1085.) When Estrada responded to another coworker's comment that the meeting rules had been changed, Martinez told Estrada that he was not allowed to talk or provide opinions or rebuttals. (Tr. 1085–1086.) However, shortly after Martinez gave her directive, an employee entered the meeting late and delivered an Avon bag to another employee who was already present at the meeting. Martinez did not stop or comment about that exchange. (Tr. 1085.)

b. Discussion and analysis

The complaint alleges that the Respondent violated the Act in the following ways:

1. On February 20, Martinez: threatened employees by telling them not to sign union cards, and by indicating that employees who supported the Union would risk unspecified reprisals (GC Exh. 2(c), par. 7(d)).
2. On February 2, Hickey: gave employees the impression that their Union activities were under surveillance; threatened employees by telling them not to sign Union cards; and promised benefits to employees (in the form of no layoffs) to dissuade them from supporting the Union (GC Exh. 2(c), par. 7(k)).
3. On February 24, Widlowski: solicited employees to retrieve their Union membership cards; offered employees the assistance of the human resources department to retrieve their Union membership cards; and asked employees to ascertain and disclose to the Respondent the union membership, activities and sympathies of other employees. (GC Exh. 2(c), par. 7(e).)
4. On March 10, Widlowski: threatened employees by telling them not to sign Union cards; and asked employees to ascertain and disclose to the Respondent the union membership, activities and sympathies of other employees. (GC Exh. 2(c), par. 7(i).)
5. On March 31, Martinez: denied its employees benefits in the form of open discussion at preshift meetings because

they supported the Union; and orally issued and enforced a discriminatory rule prohibiting employees from discussing issues of common concern, including the union organizing campaign. (GC Exh. 2(c), par. 7(j)(1)–(2).)[126]

6. On April 10, Martinez: denied its employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced a discriminatory rule prohibiting employees from discussing issues of common concern, including the union organizing campaign. (GC Exh. 2(c), par. 7(l).)

I found Estrada to have only limited credibility. Estrada was generally forthcoming in his responses to questions on both direct and cross-examination. He was also diligent in making a written record of his experiences in the workplace. However, portions of Estrada's testimony demonstrate that he periodically misinterpreted innocuous statements and conduct as personal attacks.[127] Because of that characteristic and its connection to Estrada's credibility in recounting conversations, I did not credit significant portions of Estrada's testimony, particularly where the merits of the allegation in large measure turned on the exact words that were spoken, and where the Acting General Counsel did not present any corroborating evidence (e.g., by another employee who attended the same meeting). Specifically, I did not credit Estrada's testimony about alleged remarks by: Martinez on February 20; Hickey on February 21; and Widlowski on February 24[128] and March 10 (pars. 7(d), (e), (i), and (k) of the complaint). In the absence of any other evidence that supports those allegations, I recommend that the allegations in paragraphs 7(d), (e), (i), and (k) of the complaint be dismissed.

That being said, I did find Estrada credible in one specific area. Throughout his testimony, Estrada explained that he spoke out at staff meetings in defense of the Union, including the meetings on February 20 and 24, when Martinez was present. In light of his track record of speaking at meetings (a fact that is unrebutted), I found Estrada fully credible when he testified that Martinez told him he could not respond to the remarks in the Sound Byte that Martinez read on March 31. Similarly, I credited Estrada's testimony about the April 10 meeting, at which Martinez notified all employees that they would no longer be allowed to speak or comment at preshift meetings about company policy or the Company's views about the Union. Estrada's testimony on this issue (speaking at staff meetings) was corroborated by the testimony of Corporate Vice President of Human Resources and Training Valerie Murzl, who confirmed that the Respondent initially (at the start of the union organizing campaign) allowed employees to ask questions about Sound Bytes and the Union at staff meetings, but later limited employees to only asking business-related questions. (Tr. 102–104; GC Exh. 5(w).)

Martinez' directives at the March 31 and April 10 meetings ran afoul of Section 8(a)(1). First, by prohibiting employees from discussing the Union or union-related matters in staff meetings while permitting other types of nonwork discussion or activity (such as Avon transactions), Martinez outlined an overly broad and discriminatory rule that explicitly restricted Section 7 activity (or at a minimum, could reasonably be interpreted as restricting such activity). See *NLS Group*, 352 NLRB at 745.

Second, Martinez' directives were unlawful because they denied Estrada a benefit that he previously enjoyed—the right to open discussion (on union topics and beyond) at preshift meetings—because he supported the Union. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (explaining that it is unlawful to change employee working conditions simply because they support the Union); *Parts Depot, Inc.*, 332 NLRB at 673 (finding that an employer's new "open door" policy was a benefit offered to employees).[129]

In sum, I find that the Respondent, through Martinez on March 31 and April 10, violated Section 8(a)(3) and (1) of the Act by: denying employees benefits in the form of open discus-

[126] The Acting General Counsel voluntarily withdrew the allegation in par. 7(j)(3) of the complaint. See GC Posttrial Br. at 86 fn. 28.

[127] For example, after the February 20 meeting, Estrada was asked to clean up water that spilled on the floor in two of the restrooms to which he was assigned. Without foundation, Estrada believed that Martinez or one of her associates spilled the water on the floor because of his union activities. Tr. 1161. Similarly, on February 21, Estrada believed that when Hickey suggested that employees ask union representatives to "show me the beef" (as in show me the proof that the Union will be beneficial), Estrada believed that Hickey was attempting to provoke him by making a veiled reference to his weight. Tr. 1162; see also Tr. 1164 (Hickey remarked that "this little union thing will pass away," and Estrada interpreted that remark as a threat that his job would "pass away" because he supported the union); Tr. 1170–1171 (after the February 24, 2010 preshift meeting, the human resources director ran down the hallway to ask Widlowski if she missed the meeting—based on that exchange, Estrada formed the belief that the meeting was intended to provoke him).

[128] In connection with Widlowski's alleged remarks on February 24 regarding how an employee might retrieve his or her signed membership card from the union, I note that the record does include a March 12 email from Valerie Murzl (the Respondent's corporate vice president of human resources and training) on the subject. Murzl advised her human resources team that if employees came to human resources and expressed a desire to retrieve their Union card, the staff should provide them with the Union's mailing address and suggest that the employees send a letter to the Union about the issue via registered mail. GC Exh. 5(o); see also *Perdue Farms*, 323 NLRB 345, 348 (1997) (noting that while an employer may not solicit an employee to revoke his or her union authorization card, an employer may lawfully assist an employee in revoking his or her union authorization card if the employee initiates the idea and has the option of continuing or stopping the revocation process without the employer's interference or knowledge), enfd. in pertinent part 144 F.3d 830 (D.C. Cir. 1998). Although Murzl's email provides some support for the proposition that the Respondent's human resources staff may have dealt with the issue of employees retrieving union cards during the organizing campaign, it does not corroborate Estrada's testimony about the specific remarks that Widlowski made at the February 24 meeting.

[129] I do not find that the Respondent repudiated the 8(a)(1) violation on March 31, 2010, when Martinez said, "okay" and allowed Estrada to speak. By saying "okay" without further comment (and while engaging in conduct that expressed her displeasure with Estrada), Martinez said nothing to assure employees that the Respondent would not interfere with their Sec. 7 rights, or to confirm that Estrada was within his rights to speak at the meeting. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978).

sion at preshift meetings because they supported the Union; and orally issuing and enforcing an overly broad and discriminatory rule that prohibited its employees from discussing issues of common concern (such as the union organizing campaign) at preshift meetings. (GC Exh. 2(c), pars. 7(j)(1)–(2), (l).)

I find that the Acting General Counsel did not meet its burden of proving the allegations in paragraphs 7(d), (e), (i), and (k) of the complaint by a preponderance of the evidence. Based on that finding and the Acting General Counsel's request to withdraw the allegation in paragraph 7(j)(3) of the complaint, I recommend that the allegations in paragraphs 7(d), (e), (i), (j)(3), and (k) of the complaint be dismissed.

5. Maria Guadalupe Escoto and Gloria Escoto—complaint paragraphs 7(f) and (g)

a. Findings of fact

On March 1, 2010, Maria Guadalupe Escoto and her mother, Gloria Escoto (collectively, the Escotos), went to Palace Station to speak to employees and encourage them to sign union cards. (Tr. 907, 949–950.) Although the Escotos were also Palace Station employees, they both were off duty on March 1, and were wearing street clothes (rather than uniforms). (Tr. 929, 976.) The Escotos were also wearing their union buttons. (Tr. 953.)

Initially, the Escotos went to the employee parking garage. (Tr. 907, 910, 949.) At that location, they were approached by security officer Arthur Grunden, who asked the Escotos if they worked for the Union. (Tr. 908–909, 929, 950, 973–974.) The Escotos answered, "yes," and at Grunden's request, provided Grunden with a copy of one of the union cards they were asking employees to sign. (Tr. 908, 950.) Grunden instructed the Escotos that they had to move to the sidewalk. (Tr. 908, 910, 950.)

The Escotos complied with Grunden's instruction, but instead of moving to a public sidewalk, the Escotos moved to a sidewalk that bordered one of the driveways on Palace Station property. (Tr. 931, 951, 952–953, 971–972.) After a few minutes at their new location, security officer Phil Trares approached the Escotos in a pickup truck. Trares told the Escotos that they could not be on the sidewalk where they were because it was private property. The Escotos apologized and left the area. (Tr. 909, 910, 953.) The Escotos did not tell either Grunden or Trares that they were off duty Palace Station employees. (Tr. 929, 975.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) on March 1, because Grunden prohibited the Escotos from engaging in union activities at Palace Station, and because Trares prohibited the Escotos from engaging in union activities on a public sidewalk at Palace Station. (GC Exh. 2(c), pars. 7(f), (g).)

I found both Maria Escoto and Gloria Escoto to be credible witnesses. Both offered clear and confident testimony, and were willing to admit to facts that were favorable to the Respondent. However, the testimony that the Escotos provided falls short of proving a violation of the Act. The case law on leafleting is instructive, because as noted above, the Supreme Court has recognized a distinction between the right of employees to leaflet on the employer's property, and the right of nonemployee union organizers to leaflet on the employer's property. Specifically, while an employer must allow an employee to leaflet on the employer's property (as long as the employee adheres to certain parameters), an employer may prohibit a nonemployee union organizer from leafleting on the employer's property. See section IV(B)(4), supra.

There is no dispute that the Escotos were Palace Station employees. However, the record is also clear that on March 1, the Escotos told Grunden that they worked for the Union. The Escotos were also wearing street clothes, and did not advise either Grunden or Trares that they were off duty employees. Thus, Grunden and Trares reasonably believed that the Escotos were nonemployee union organizers who could be prohibited from leafleting (or approaching employees to garner support for the Union) while on the Palace Station property.[130] *St. Clair Memorial Hospital*, 309 NLRB 738, 739 (1992) (no 8(a)(1) violation where security guard informed an individual that he believed was a nonemployee that it was illegal to solicit on the employee's property).

Because the evidence demonstrates that Grunden and Trares reasonably believed that the Escotos were not Palace Station employees, they were within their rights (as the Respondent's representatives) to prohibit the Escotos from engaging in union activities while on Palace Station property. Cf. *Chinese Daily News*, 346 NLRB 906, 945–946 (2006) (noting that an employer may show that an adverse employment action was not discriminatory by presenting evidence that it had a reasonable or good faith belief that the employee engaged in misconduct, even if the employer's belief was erroneous), enfd. 224 Fed. Appx. 6 (D.C. Cir. 2007). Accordingly, I recommend that the allegations in paragraphs 7(f) and 7(g) of the complaint be dismissed.

I. Red Rock Casino Resort[131]

1. Maria Gutierrez—complaint paragraph 8(a)

a. Findings of fact

On February 19, 2010, Maria Gutierrez attended a staff meeting conducted by Sanitation Supervisor Maria Murillo. (Tr. 1212.) Between 7 and 10 employees attended the meeting, which was conducted in the hallway near the sanitation office. (Tr. 1212, 1263.) Murillo, who appeared to read an excerpt of a Sound Byte that she was holding in her hand,[132] warned em-

[130] The only evidence to the contrary is that Maria Escoto testified that she recognized Grunden from having seen him in the workplace. Tr. 930; see also Tr. 975–976 (Gloria Escoto). However, Maria Escoto added that she did not believe Grunden recognized her when he spoke to her on March 1. Tr. 930. That limited testimony is insufficient evidence that Grunden or Trares recognized the Escotos as Palace Station employees on March 1.

[131] The Acting General Counsel withdrew the allegation set forth in par. 8(m) of the complaint. See GC Exh. 2(c), par. 8(m).

[132] Gutierrez did not have an opportunity to see the paper that Murillo was holding. Tr. 1230. During cross-examination, the Respondent (with the interpreter's assistance) read the following Sound Byte to see if Gutierrez recognized it as what Murillo read:

ployees that anyone who signed union cards would be fired and would not be able to obtain unemployment benefits. (Tr. 1212, 1253–1254, 1257–1258.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Murillo threatened employees with discharge if they engaged in union activities. (GC Exh. 2(c), par. 8(a).)

Gutierrez was a poised and credible witness. She withstood extensive and vigorous cross-examination, and gave thoughtful answers to a variety of detailed and nuanced questions. Based on Gutierrez' unrebutted testimony, I find that Murillo did make remarks at the February 19 meeting that violated Section 8(a)(1) of the Act. Specifically, Gutierrez' testimony establishes that although Murillo had a Sound Byte at her disposal, she did not read the entire statement. Instead, Murillo ad libbed by paraphrasing an excerpt from the Sound Byte, such that she delivered the stark message that any employees who signed union cards would be fired and would not be entitled to unemployment benefits.[133] Murillo's threat of job loss for employees who engaged in union activities ran afoul of Section 8(a)(1) of the Act. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (2010).

I find that the Respondent, through Murillo on February 19, violated Section 8(a)(1) by threatening employees with discharge if they engaged in union activities. (GC Exh. 2(c), par. 8(a).)

> Many Team Members have brought to our attention today that there is a lot of conversation at our properties about signing union cards. Apparently, the union is promising that they can protect people's jobs through the bankruptcy and guaranteeing that everyone will have a job and hours.
>
> How stupid do they think we are? There is no job security for the 10,000+ union members who have been layed off from all of the union casinos on the Strip. These members had union contracts and it didn't stop them from getting layed off. These union members had seniority and it didn't stop them from getting layed off. These union members continue to be unemployed with no pay and no benefits and are facing threats of eviction, foreclosure and no more unemployment benefits.
>
> How can the union protect Station Casinos' Team Members when they can't even protect their own members who pay them monthly for protection? The union likes to lie and make promises that they obviously haven't kept for their own members. Don't be fooled into thinking they're going to treat you any better.
>
> Let's continue to pull together, do our best, and "Just Say No" to the union's empty promises and menacing threats.

Tr. 1254–1255; GC Exh. 6(f); see also GC Exh. 6(e) (English version of GC Exh. 6(f)). Gutierrez was adamant that Murillo did not read the entire Sound Byte, but did read "the part in which they knew that the Union was trying to get cards signed, and whomever would sign the cards would be fired without unemployment benefits." Tr. 1257–1258. I have credited Murillo's unrebutted testimony on this point.

[133] I note that the plausibility of Gutierrez' description of Murillo's comments is supported by the fact that Murillo made her remarks on the first day of the union organizing campaign (and the responsive Sound Byte campaign), and without the benefit of any guidance or instructions about how to use the Sound Bytes. Tr. 90, 106–107.

2. Leonardo Calderon, Ramon Dieguez, Jesus Hernandez, and Gabino Solis (Cabo Restaurant)—complaint paragraphs 8(b), (d), (i), (j), (q), and (r)

a. Findings of fact

On February 19, 2010, Jesus Hernandez, Leonardo Calderon, and Gabino Solis reported to work in Cabo Restaurant. Hernandez, Calderon and Solis were wearing their union buttons to work for the first time, and were the only employees in the restaurant with union buttons. (Tr. 1330, 1454, 1677.) Near the end of their shift, Hernandez, Calderon, and Solis were called into a meeting (in a liquor storage room) by Specialty Room Chef Mario Valencia and Assistant Room Chef Saul Bohorquez.[134] (Tr. 1331, 1454.) During the meeting, Valencia read two Sound Bytes about the Union. (Tr. 1455, 1509; GC Exhs. 6(m), (t).) The Sound Bytes state as follows:

> The union has absolutely no involvement or influence in the restructuring that our Company is working on. The union is not going to bring business in the doors of Station Casinos' properties or any other casinos for that matter. The union is not going to change the economy. They have no power to create jobs. Why in these difficult times, would you want to further reduce your paycheck by paying complete strangers monthly dues for nothing in return. Don't sign up for nothing.

(GC Exh. 6(m).)

> The economy is in shambles. Businesses have closed and relatives, friends and neighbors have lost their jobs, homes, sense of security and confidence. Station Casinos has been hard hit by this lousy economy like all industries all over the country. Our options are to surrender and fail right now or fight and succeed. The choice is obvious. We choose to fight through these tough times and succeed. But fighting is not easy and the path to success is demanding. It means considering our operations and adjusting to today's reality. For some, unfortunately, that means leaving the Station family. But for those who remain, it means a better chance that the sacrifice will prove to be worth the pain.
>
> The Union has no sense and no heart. The Union is shameless. Surely it sees the lousy economy and the disaster on the horizon. Rather than recognizing and applauding our tough decisions and sacrifice, the Union criticizes. The Union knows Station Casinos is making the right decision for these tough times. The Union simply would like you to believe otherwise. So many of you have shared with us that the Union is aggressively knocking on your doors at home trying to convince you to sign Union cards. Why are they being so aggressive, maybe because 10,000+ of their union members are unemployed as a result of this lousy economy. The Union is losing money everyday because they have lost so many union members to unemployment. Don't be fooled into thinking they really care about you, they really care about getting money from you to supplement their financial losses. Unfor-

[134] Cabo Restaurant employees did not have meetings with supervisors before February 19—instead, instructions were communicated to employees on an ad hoc basis while employees worked at their stations. Tr. 1466–1467.

> tunately for the Union, Station Casinos Team Members have the sense and heart the Union lacks. Thank you for your understanding and support through these tough times. We will do all in our power not to let you down.

(GC Exh. 6(t).) Once Valencia finished reading, he asked the employees (Hernandez, Calderon, and Solis) what they thought about the Union. None of the employees responded. (Tr. 1336, 1455, 1514, 1678.)

Ramon Dieguez was also called into a meeting on February 19, but separately from Calderon, Hernandez, and Solis.[135] Dieguez testified that Valencia read a Sound Byte at the meeting, and then asked the employees (Dieguez and 2 other employees) for their opinion. Dieguez also testified that he replied that he was going to keep his opinion to himself; the other two employees did not respond to Valencia. (Tr. 1524–1525.)

On February 21, Supervisor Chad Tretiak visited the restaurant, and asked 5 employees (including Dieguez, Hernandez, and Solis) to speak with him in the back of the restaurant. Of the 5 employees that Tretiak called into the meeting, 4 of them were wearing union buttons. Tretiak asked the employees why they were not happy, and also asked what types of problems existed in the restaurant. After hearing some responses from employees, Tretiak gave each of the employees a business card and encouraged the employees to call him if they wished to talk further. (Tr. 1456–1457, 1526–1527); (GC Exh. 31) (business card of Executive Chef Brian Dillon, with Tretiak's name and telephone number handwritten on the back). Tretiak had never approached any of the five employees in this manner before February 21. (Tr. 1457, 1528.)

Later on February 21, Tretiak returned to the restaurant and spoke with Bohorquez. Hernandez saw Tretiak hand Bohorquez a piece of paper. Shortly thereafter, Bohorquez pulled Hernandez aside and gave him a $50 gift card and a piece of paper stating that he was a finalist for a "Rock Star" award. (Tr. 1458–1458, 1529.) Hernandez had never heard of this award before, and was not aware of any employees at the restaurant who had received the award in the past. (Tr. 1458–1459.)

On February 23, Calderon was working in the restaurant and was also wearing his union button. (Tr. 1336–1337.) Executive Chef Brian Dillon arrived at the restaurant and exchanged his usual greeting with Calderon. Dillon then asked Calderon how he was feeling, and gave Calderon his business card while telling Calderon to call him if he had any problems or needed something. (Tr. 1337; GC Exh. 27.) Dillon had never before approached Calderon to ask about his concerns in the workplace.[136] (Tr. 1337.)

On or about June 4, Hernandez, Calderon, Solis, and Dieguez attended a meeting conducted by Supervisor Javier Fazzia-Rojas. (Tr. 1460–1461.) Fazzia-Rojas read the following Sound Byte at the meeting, but translated it from English to Spanish:

> The Union has a funny way of spinning a story. Here is the truth:
>
> > The Union filed Charges without merit or basis, and withdrew the charges to avoid the public humiliation of having the US government dismiss the charges.
> >
> > We have posted the notices of withdrawal for all to see.
> >
> > The Union withdrew every allegation that Station Casinos would have won at this stage in the proceeding.
> >
> > The Union knows how to work the system, and left only the allegations that may be decided during the next stage in the process, after the government issues a complaint.
>
> So stay tuned and be wary of the Union's spin. Here is more truth:
>
> > Station Casinos has at all times complied with the law and respected Team Members' rights and wishes. The Union would admit this if only the Union would be honest.
> >
> > The Union's goal is to cheat Team Members out of their right to a vote in a secret ballot election. Don't be fooled and don't be cheated.
> >
> > If asked to sign a Union card, just say no!

(GC Exh. 6(d); Tr. 1461–1462, 1464–1465, 1727–1728.) Employees left the meeting with conflicting memories of precisely how Fazzia-Rojas translated the final sentence of the Sound Byte (If asked to sign a union card, just say no!).[137]

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) in the following ways:

1. On or about February 19, Bohorquez and Valencia interrogated employees [Calderon, Hernandez, and Solis] about their union membership, activities and sympathies (GC Exh. 2(c), par. 8(b)).

[135] Dieguez was not wearing a union button at work on February 19, 2010. After his shift ended, Dieguez met with a union organizer and became a union committee leader. He then began wearing a union button on February 20, 2010. Tr. 1517–1518.

[136] Calderon agreed that as a general matter, the Respondent did use various mechanisms to communicate with employees and ask about their concerns, including newsletters, internet communications, bulletin boards, mailings, flyers, suggestion boxes, public announcements, staff meetings, and employee focus groups. Tr. 1400–1406.

[137] During trial, the witnesses attributed several conflicting translations to Fazzia-Rojas for the final sentence of the Sound Byte, including the following: (a) "If asked to sign a Union card, just say no!" and "Not to tell our coworkers to sign the Union cards anymore" (Tr. 1462, 1465—Hernandez); (b) "For us not to sign the cards" (Tr. 1342–1344—Calderon); (c) "Not to sign up any more of our coworkers" and "Not to organize any more of our coworkers and not to collect any more of the signatures" (Tr. 1532—Dieguez); and (d) "Don't keep signing cards with your coworkers" and "Don't keep signing your coworkers cards" (Tr. 1680, 1682–1683—Solis). Solis also admitted that in his affidavit, he stated that Fazzia-Rojas (and Valencia) "never told us that we should not solicit Union cards from our peers." Tr. 1700–1701.

2. On or about February 19, Valencia interrogated employees [Dieguez] about their union membership, activities and sympathies (GC Exh. 2(c), par. 8(d)).
3. On or about February 21, Tretiak solicited complaints and grievances from employees [Dieguez, Hernandez, and Solis], and thereby promised increased benefits and improved terms and conditions of employment if employees refrained from union organizing activities (GC Exh. 2(c), par. 8(i)).
4. On or about February 21, Bohorquez granted employees [Hernandez] benefits in the form of a certificate and gift card to dissuade them from supporting the Union (GC Exh. 2(c), par. 8(j)).
5. On or about February 23, Dillon solicited complaints and grievances from employees [Calderon], and thereby promised increased benefits and improved terms and conditions of employment if employees refrained from union organizing activities (GC Exh. 2(c), par. 8(r)).
6. On or about June 4, Valencia and Fazzia-Rojas threatened employees [Hernandez, Calderon, Solis and Dieguez] by telling them not to sign Union membership cards (GC Exh. 2(c), par. 8(q)).

I found Calderon and Hernandez to be credible witnesses. Although each of them stumbled occasionally during cross-examination, I observed that they were both forthright and earnest in their demeanor. In addition, much of the testimony that Calderon and Hernandez offered was corroborated by the testimony of other witnesses, as well as by documents that were admitted into evidence. I did not find that their missteps during cross-examination were the product of poor credibility–instead, the missteps resulted from innocent misrecollection of certain details and the occasional failure to grasp nuances in some questions posed during cross-examination.

I did not find Dieguez and Solis to be as reliable. While both of those witnesses came across as trustworthy, their testimony raised questions about their ability to remember the disputed incidents with sufficient clarity. I therefore have credited their testimony primarily where it was corroborated by other credible evidence (such as documentation or testimony offered by Calderon or Hernandez).

Turning to the allegations in the complaint, I begin with the alleged interrogation that occurred at the two staff meetings on February 19. (See GC Exh. 2(c), pars. 8(b), (d).) After considering all of the circumstances, I find that Bohorquez and Valencia did subject Calderon, Hernandez, and Solis to unlawful interrogation, particularly when one considers the place and manner of the questioning. Specifically, on the first day of the union campaign, Bohorquez and Valencia pulled Calderon, Hernandez, and Solis (the only employees in the restaurant who were wearing union buttons that day) into an impromptu meeting with supervisors in a private room. Valencia read the three employees two Sound Bytes, and then prodded them to respond with their own opinions. When viewed as a whole, that sequence of events (and the question that Valencia posed at the end of the meeting) would reasonably tend to interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

By contrast, the Acting General Counsel's proof regarding the meeting that Dieguez attended fell short. Dieguez' testimony was not sufficiently reliable standing on its own (for the reasons stated above), and it was not corroborated by the testimony of any other witness (such as testimony from one of the other employees who attended Dieguez' meeting). Since the Acting General Counsel's evidence did not sufficiently pin down the nature and circumstances of the meeting that Dieguez attended, I recommend that this allegation in the complaint (par. 8(d)) be dismissed.

As for the complaint allegations (pars. 8(i) and (r)) that Supervisors Tretiak and Dillon solicited employee grievances and promised improved benefits and terms and conditions of employment to discourage employees from engaging in union activity, I find that the Acting General Counsel met its burden of proof. I also find that the Acting General Counsel demonstrated that Bohorquez granted benefits to Hernandez to discourage him from engaging in union activity (as alleged in par. 8(j)). The facts demonstrate that within days of the start of the union organizing campaign, both Tretiak and Dillon visited Cabo Restaurant and took the unusual steps of personally contacting employees (including Calderon, Hernandez, Dieguez, and Solis, each of whom wore Union buttons) to ask about their concerns and invite employees to contact them if they wished to discuss any problems in the workplace. As the Board has explained, the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 19 (2010) (citing *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994)); see also *Bally's Atlantic City*, 355 NLRB 1319, 1326 (2010). Moreover, Tretiak delivered on his promise on the same day that he met with Hernandez, as Tretiak returned to the restaurant later on February 21 and provided Bohorquez with benefits (a gift card, and a notice that Hernandez had been selected to receive a Rock Star award) that Bohorquez presented to Hernandez.[138] Through these acts, the Respondent (in violation of Sec. 8(a)(1)) communicated to employees that they did not need to support the Union because the Respondent would improve employee benefits and working conditions on its own.

Finally, I find that the Acting General Counsel did not prove that the comments that Fazzia-Rojas made on or about June 4, violated the Act. Although multiple witnesses testified about the meeting, the only consistent information that came out about Fazzia-Rojas's remarks was that he read a Sound Byte that, as it is written (in English), concluded with the sentence "If asked to sign a Union card, just say no!" (GC Exh. 6(d).) That sentence, when viewed in the context of the Sound Byte as a whole, was not coercive because a reasonable employee would have understood that the Respondent was making an argument (as permitted under Sec. 8(c) of the Act) against supporting the Union based on the fact that the Union decided to withdraw some of the unfair labor practice charges that it filed.

[138] None of these events was part of the Respondent's past practices in Cabo Restaurant. Tretiak and Dillon had never before solicited employee grievances, and Hernandez was the first employee in Cabo Restaurant to receive a Rock Star award and gift card.

The Acting General Counsel did not prove its theory that Fazzia-Rojas translated the final sentence of the Sound Byte (from English to Spanish) in a manner that was coercive, because the witnesses offered a variety of conflicting translations that were not reliable.

In sum, I find that the Respondent violated Section 8(a)(1) of the Act by: interrogating employees (through Bohorquez and Valencia) about their union membership, activities and sympathies (GC Exh. 2(c), par. 8(b)); soliciting complaints and grievances from employees (through Tretiak and Dillon) and thereby promising increased benefits and improved terms and conditions of employment if employees refrained from union organizing activities (GC Exh. 2(c), pars. 8(i) and (r)); and granting (through Bohorquez, with Tretiak's assistance) Hernandez benefits in the form of a certificate and gift card to dissuade him from supporting the Union (GC Exh. 2(c), par. 8(j)).

I find that the Acting General Counsel did not meet its burden of proving the allegations in paragraphs 8(d) and (q) of the complaint by a preponderance of the evidence. Accordingly, I recommend that those allegations of the complaint be dismissed.

3. Isabel Perez—complaint paragraphs 8(c) and (o)

a. Findings of fact

On February 19, 2010, Isabel Perez reported to work while wearing her Union button. During her shift, Perez and five to seven other employees participated in a meeting with Executive Steward (banquets) Victor Hernandez Landa. Much of the meeting addressed job-related issues, but at one point, Landa asked the employees how many people had signed union cards. Perez replied that she did not know. No other employee responded to Landa. (Tr. 2314.)

On March 11, Perez and her coworkers participated in another staff meeting with Landa. Landa showed the employees a piece of paper from the Union, and asserted that employees should not support the Union. Landa added that if employees wanted to sign union cards, they needed to do so discreetly and be careful about it.[139] (Tr. 2315.)

b. Discussion and analysis

The complaint alleges that on or about February 19, 2010, the Respondent (through Landa) interrogated employees about their union membership, activities, and sympathies. (GC Exh. 2(c), par. 8(c).) The complaint also alleges that on or about March 11, 2010, the Respondent (through Landa) threatened its employees with unspecified reprisals if they signed union membership cards. (GC Exh. 2(c), par. 8(o).)

I found Perez to be a credible witness. Her testimony was direct and to the point, and she was generally steady during cross-examination. I did not find that Perez' credibility was damaged by the minor inconsistencies (regarding the collateral issue of when Perez contacted her Union representative about the February 19 incident) or minor impeachment (regarding an omission from Perez' affidavit) that arose during cross-examination.

[139] Landa was not reading from a document when he made his remarks. Tr. 2315.

I also find that Landa's comments to employees on February 19 and March 11 violated Section 8(a)(1) of the Act. Landa's question (on February 19) to employees about how many employees had signed union cards had a reasonable tendency to coerce or interfere with the employees' exercise of their Section 7 rights. Landa (a supervisor) posed his question on the first day of the union organizing campaign, and gave employees no assurances about his inquiry. Thus, while the issue is a close one, a reasonable employee could have inferred that their union activities were being monitored and that the Respondent might view any union activity unfavorably.

Landa's statements on March 11 were even more direct and coercive, as he warned employees to be discreet and careful if they chose to sign union cards. In making that statement, Landa again warned employees that their union activities might be monitored, and also implied that employees who signed union cards risked unspecified reprisals. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1, 14 (2010). Those warnings had a reasonable tendency to coerce or restrain employees in the exercise of their Section 7 rights.

Accordingly, I find that the Respondent, through Landa, violated Section 8(a)(1) of the Act by: interrogating employees about their union membership, activities, and sympathies; and threatening employees with unspecified reprisals if they signed union membership cards. (GC Exh. 2(c), pars. 8(c), (o).)

4. Hilda Sanchez—complaint paragraph 8(e)

a. Findings of fact

Hilda Sanchez began wearing a union button to work on February 19, 2010. (Tr. 1278.) On the following day, February 20, Sanchez attended a preshift meeting conducted by Assistant Executive Housekeeper Desiree Carrasco. (Tr. 1279.) Carrasco asserted that the Union was not good, promised things that it could not give, and only wanted money from the employees (dues of $50 or more every 2 weeks). Id.

Later that same day, Sanchez was cleaning one of the hotel rooms when Carrasco came to the room, accompanied by Housekeeping Manager Alyssa Shima. (Tr. 1279.) Sanchez was surprised by Carrasco's and Shima's visit because in the 4 years that she had worked at the Red Rock facility, no manager had ever visited her floor. (Tr. 1310.) Carrasco and Shima asked Sanchez what she thought about the Union and the Company. Sanchez stated that she did not have any comment or opinion. (Tr. 1279.) Carrasco then asked Sanchez about her daughter, but after a brief exchange on that topic, Shima interrupted and again asked Sanchez if she had anything to say or any opinion about the Union. (Tr. 1279–1280.) Sanchez repeated that she had nothing to say about that issue, and then Carrasco and Shima left the room. (Tr. 1280.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Carrasco and Shima interrogated employees about their union membership and activities. (GC Exh. 2(c), par. 8(e).)

Sanchez was a credible witness. She testified in a poised and confident manner, and provided ample detail about the interaction that she had with Carrasco and Shima. As for the merits, I

find sufficient evidence that Carrasco and Shima subjected Sanchez to unlawful interrogation that would reasonably tend to coerce an employee in the exercise of Section 7 rights. In essence, Carrasco and Shima made a surprise visit to the room Sanchez was cleaning to question her about supporting the Union as a followup to the antiunion remarks that Carrasco made at the preshift meeting that morning. That scenario constituted unlawful interrogation in violation of the Act. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (explaining that the unusual nature of a supervisor's visit to an employee heightens the coercive impact of the supervisor's statements). I therefore find that the Respondent, through Carrasco and Shima, violated Section 8(a)(1) of the Act by interrogating Sanchez about her union membership, activities and sympathies. (GC Exh. 2(c), par. 8(e).)

5. Maria Rodriguez—complaint paragraphs 8(f) and (l)

a. Findings of fact

Maria Rodriguez testified that on February 20, 2010, she (along with 30 coworkers) attended a staff meeting conducted by Internal Maintenance Supervisors Genelud (Gene) Generillo and Aubrey (Butch) Greenwade Jr. According to Rodriguez, Generillo stated that employees could not wear union buttons on their uniforms, and specifically told Rodriguez that she could not wear her union button on her collar. (Tr. 3341.) Further testifying, Rodriguez stated that she told Generillo she was protected by Federal law in wearing the button. She also asserted that an hour after the meeting, Generillo apologized to her for not respecting her about being able to wear her union button. (Tr. 3342.)

Rodriguez also testified about a February 22 staff meeting (also attended by 30 coworkers), stating that Greenwade showed employees a union card and said that the cards could not be used during breaks or work hours at the casino because the Union was not coming to the casino. (Tr. 3343.) However, Rodriguez also stated that Greenwade read the following Sound Byte (in English) at the meeting:

> Many Team Members have brought to our attention today that there is a lot of conversation at our properties about signing union cards. Apparently, the union is promising that they can protect people's jobs through the bankruptcy and guaranteeing that everyone will have a job and hours.
>
> How stupid do they think we are? There is no job security for the 10,000+ union members who have been layed off from all of the union casinos on the Strip. These members had union contracts and it didn't stop them from getting layed off. These union members had seniority and it didn't stop them from getting layed off. These union members continue to be unemployed with no pay and no benefits and are facing threats of eviction, foreclosure and no more unemployment benefits.
>
> How can the union protect Station Casinos' Team Members when they can't even protect their own members who pay them monthly for protection? The union likes to lie and make promises that they obviously haven't kept for their own members. Don't be fooled into thinking they're going to treat you any better.
>
> Let's continue to pull together, do our best, and "Just Say No" to the union's empty promises and menacing threats.

(Tr. 3401–3402; GC Exh. 6(e).)

b. Discussion and analysis

The complaint alleges that on or about February 20, the Respondent (through Generillo) orally issued and enforced an overly broad and discriminatory rule that prohibited employees from wearing union buttons. (GC Exh. 2(c), par. 8(f).) The complaint also alleges that on or about February 22, 2010, the Respondent (through Greenwade): orally issued and enforced an overly broad and discriminatory rule that prohibited employees from soliciting and signing union cards at the Respondent's Red Rock Facility; and informed employees that it would be futile for them to support the Union as their bargaining representative. (GC Exh. 2(c), par. 8(l).)

Although Rodriguez came across as an earnest witness, I cannot credit her testimony. As a preliminary matter, Rodriguez admitted to having a poor memory for events that occurred a few months or more in the past. (Tr. 3366, 3391.) That admission implicated the reliability of her trial testimony, which addressed events that occurred over a year before she testified. In addition, Rodriguez' testimony included material inconsistencies, including her testimony that February 20 (the day of one of the alleged violations) was in fact her day off. (Tr. 3403–3404); (compare Tr. 3341) (stating that she worked on February 20). (See also Tr. 3401–3402) (admitting that Greenwade merely read a Sound Byte (GC Exh. 6(e)) at the February 22 meeting); (compare Tr. 3343) (attributing other remarks to Greenwade). Finally, although both of the meetings were attended by 30 employees, the Acting General Counsel did not call any of those employees as witnesses to corroborate Rodriguez' testimony.

As I cannot credit Rodriguez' testimony, and the Acting General Counsel did not offer other evidence sufficient to meet its burden of proof for these allegations, I recommend that the allegations in paragraphs 8(f) and (l) be dismissed.

6. Queen Ruiz—complaint paragraph 8(g)

a. Findings of fact

Queen Ruiz became a union committee leader on February 18, 2010, and thereafter began speaking to her coworkers periodically about the Union. (Tr. 1749.) On February 20, Ruiz went to the Red Rock casino at approximately 5 p.m. to speak with her coworkers about the Union. Ruiz was off duty (and not wearing her uniform), and sat on a bench near the employee parking lot (and near a driveway where employees are dropped off or picked up before or after their shifts). (Tr. 1751, 1761–1762, 1777; R. Exhs. 97–98.) While at that location, Ruiz remained seated on the bench and spoke to two employees about the benefits of joining the Union. (Tr. 1751, 1778.) She was then approached by two security officers who asked if she worked for the Union or was a hotel employee. (Tr. 1752.) Ruiz provided the security officers with her employee punch-in card. The security officers inspected the card, returned the card to Ruiz, and then left the area. (Tr. 1752–1753.)

Approximately 10 minutes later, the security officers returned and advised Ruiz that they could not find her employee information in the system. (Tr. 1753.) The officers asked to see Ruiz' employee card again, and Ruiz complied. The officers then made a radio call to determine whether Ruiz was an employee. (Tr. 1753–1754.) After completing the call, the officers told Ruiz that she could not campaign for the Union on her days off, and that she could only campaign in the employee dining room during her lunch hour.[140] (Tr. 1754.) The officers instructed Ruiz to leave, and Ruiz complied. Id.

Ruiz admitted that she did not know the names of the officers and could not identify them by their photographs (explaining that she was nervous during the event and did not look at the officers' faces). (Tr. 1754–1755, 1763.) She did observe, however, that one of the officers was riding a bicycle and wore a yellow shirt that bicycle security officers use at the casino. Ruiz also observed that the other security officer was dressed in black and wore a belt buckle that said "security" on it. (Tr. 1755.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) because two of its security officers (identified in the complaint as Eric Smith and Justin Dawes): engaged in surveillance to discover Ruiz' union activities; orally issued and enforced an overly broad and discriminatory rule prohibiting off duty employees from engaging in union activities at the Red Rock facility; and prohibited its off duty employees access to the Red Rock facility. (GC Exh. 2(c), par. 8(g).)

I found Ruiz to be a credible witness. Ruiz was clear and precise in her testimony, and was candid about the limits of her memory when she explained that she could not identify the security officers by name or photograph. Her testimony was also corroborated by the photographs of the location where she was waiting for employees, which showed two benches on a sidewalk next to a driveway that would be suitable for dropping off or picking up employees before or after their shifts. (R Exhs. 97–98.)

I have considered the fact that Ruiz was not able to identify the two security officers by name. Board precedent establishes that such a deficiency is not fatal, particularly if the circumstantial evidence nonetheless shows that the perpetrators of the violation are indeed agents of the Respondent. See *Ladies Garment Workers*, 146 NLRB 559, 569 (1964) (unlike in a criminal trial, circumstantial evidence can be used in Board proceedings to show that the respondent is responsible for the perpetrators of the disputed acts, even if the perpetrators are unidentified). Here, the Acting General Counsel met that burden—Ruiz described the 2 security officers' uniforms, and also described their behavior, which included inspecting her employee card and using a radio to verify that she was indeed an employee. That evidence, which was not rebutted, established that the two security officers were the Respondent's agents.[141]

On the issue of surveillance, the Respondent argues that the security officers' actions were permissible because Ruiz was not wearing a uniform and the officers needed to ascertain whether she was an employee. (See R. Posttrial Br. at 127–128.) I am not persuaded by that argument, and find that the officers' actions were coercive because their communications with Ruiz were out of the ordinary. It is undisputed that the Respondent permits off duty employees to visit the casino. It is also undisputed that the location where Ruiz was sitting is commonly used as a pick up and drop off point for employees (and thus is a location where off duty employees and individuals who drive them to and from work may congregate). In light of those circumstances, it was out of the ordinary for security officers to monitor and approach Ruiz and question her about her status as an employee and her union activities. Thus, the security officers indeed did engage in unlawful surveillance, and compounded their misconduct by improperly stating and enforcing an overly broad and discriminatory rule that prohibited Ruiz from engaging in union activities at the casino, and directing Ruiz to leave the casino property even though they were aware (from her employee badge) that she was an off duty employee. I therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 8(g) of the complaint.

7. Robert Brescia—complaint paragraphs 8(h) and (s)

a. Findings of fact

On February 21, 2010, banquet bartender Robert Brescia began wearing a union button to work. (Tr. 1637.) That same day, Brescia was assigned to work as a bartender at a function in the Red Rock casino bowling alley. Brescia was setting up his bar for the function when Assistant Banquet Manager Eric Ball approached him and observed Brescia's union button. (Tr. 1637.) No other individuals were present at the time. (Tr. 1639.) Ball asked Brescia, "What, you want to join a union?" Brescia responded that he could not talk about the issue, prompting Ball to assert (while banging on a table) that "this company's been nonunion for 30 years and it's been that way for a reason. Be very careful who you listen to." (Tr. 1637–1638.)

Brescia repeated that he could not discuss the issue. In response, Ball stated, "What? You can't discuss it? You can join a union but you can't discuss it? Why do you want to join a union, just because everybody else is?" When Brescia again refused to talk about the Union, Ball stared at Brescia and then repeated, "be very careful who you listen to" before walking away. (Tr. 1638–1639.)

[140] Based on this sequence and the remarks that the security officers made to Ruiz after the radio call, I infer that the security officers did confirm that Ruiz was an off duty hotel employee.

[141] Technically, the Acting General Counsel should have amended the complaint to replace the names Eric Smith and Justin Dawes with "two unidentified security officers" or words to that effect. That oversight is excusable, however, because the complaint did provide the Respondent with sufficient information to respond to the allegation, and the relevant issues were fully litigated. Specifically, the complaint accurately specified the date, location and nature of the incident (to the point where the Respondent was able to bring in its own photographs of the location to use when it cross-examined Ruiz). See *Pergament United Sales*, 296 NLRB at 335.

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Assistant Banquet Manager Eric Ball interrogated employees about their union membership and activities, and threatened employees with unspecified reprisals if they supported the Union as their bargaining representative. (GC Exh. 2(c), pars. 8(h), (s).)

I found Brescia to be a credible witness. Brescia demonstrated good recall for the events in question, and did not waver in his testimony despite vigorous cross-examination. Brescia's testimony also established that Ball subjected him to unlawful interrogation about his union membership and activities, and threatened him with unspecified reprisals for supporting the Union. Ball confronted Brescia directly about his decision to support the Union, and coupled his interrogation with two warnings that Brescia should be careful about who he listened to. Ball's remarks had a reasonable tendency to restrain, interfere with or coerce Brescia's union activities, and also served as a warning to Brescia that he indeed was risking unspecified reprisals because of his decision to support (or listen to) the Union.

Accordingly, I find that the Respondent, through Ball, violated Section 8(a)(1) of the Act by interrogating Brescia about his union membership and activities, and by threatening Brescia with unspecified reprisals because he supported the Union as his bargaining representative. (GC Exh. 2(c), pars. 8(h), (s).)

8. Fermina Medina—complaint paragraph 8(k)

a. Findings of fact

On or about February 21, 2010, Fermina Medina was gathering cleaning supplies when she was approached by Internal Maintenance Supervisor Genelud (Gene) Generillo. (Tr. 1788.) Medina was wearing a Union button that she received after becoming a union committee leader on the preceding day. (Tr. 1786–1787.) Generillo told Medina that she was not authorized to wear a union button during her work hours, and asserted that if she wished to use the button, she could do so outside of the workplace. (Tr. 1788.) Medina responded that the button represented her rights and her respect for herself. As Generillo left, he stated, "Okay, okay, okay," with a sarcastic tone and facial expression. (Tr. 1788–1789, 1793.)

Later during Medina's shift, Generillo returned and apologized, stating that he did not know what he was thinking and that he had spoken very badly. (Tr. 1793.) Medina told Generillo that it was okay, and that she would not say anything about the incident. (Tr. 1823–1824.) However, Generillo did not say (during this conversation or otherwise) that Medina could wear her union button. (Tr. 1789.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Generillo orally issued and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons. (GC Exh. 2(c), par. 8(k).)

Medina was a credible witness. She described her interaction with Generillo in detail, and held up under vigorous cross-examination. Medina was also forthright when questioned about Generillo's apology, and displayed a poised and confident demeanor throughout her testimony. I do not assign any significant weight to Medina's testimony that union agents instructed her to keep her written incident report to the Union vague. (See Tr. 1844.) Medina answered, "correct" to a series of leading questions about the information that she included in her report, and I have concluded that during the somewhat rapid-fire questioning she simply did not grasp the nature of the question that the Respondent posed about keeping her report vague.[142]

Generillo's statement to Medina that she could not wear her union button at work clearly ran afoul of Section 8(a)(1). He explicitly told Medina that she could not wear her union button, and the Respondent did not offer any rationale that might have supported the rule that Generillo articulated. See *Stabilus Inc.*, 355 NLRB 836, 838 (2010) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)) (employees have a Sec. 7 right to wear union insignia (such as union buttons) on their employer's premises, which may not be infringed, absent a showing of special circumstances).

I also find that Generillo's apology to Medina fell short of repudiating the violation. Although Generillo apologized for how he spoke, Generillo's apology was ambiguous because he did not mention Medina's right to wear her union button. Generillo also did not assure Medina that she would be permitted to wear her union button in the workplace without interference.[143] Instead, the record shows that Generillo merely offered Medina a general apology that did not address her Section 7 rights—consequently, his apology did not satisfy the standard for repudiating violations of the Act. See *Passavant Memorial Area Hospital*, 237 NLRB at 138.

I find that the Respondent, through Generillo, violated Section 8(a)(1) of the Act by orally issuing and enforcing an overly broad and discriminatory rule prohibiting its employees from wearing union buttons. (GC Exh. 2(c), par. 8(k).)

9. William Fountain—complaint paragraphs 8(n) and (t)

a. Findings of fact

William Fountain became a union committee leader on February 18, 2010, and wore his union button to work for the first time on February 22. (Tr. 1867.) Fountain testified that in the morning on February 22, he attended a preshift meeting at which Vice President/General Manager Ronan O'Gorman told 30 to 40 employees (including Fountain) not to sign union cards. Fountain also testified that when he asserted that there was nothing wrong with the Union, O'Gorman responded that he did not like the Union because the Union laid people off. (Tr. 1868–1870.)

Continuing with his testimony, Fountain stated that later on February 22, he was working on one of his assigned floors when Assistant Housekeeper Patricia Grayson approached and

[142] I do not suggest that the Respondent's questions to Medina during cross-examination were improper. Instead, I only find that Medina's statement that she was told to keep her report vague carries little weight in light of her overall credibility and the nature of the questioning that led to the testimony I have discussed here.

[143] Because of these deficiencies, the Board's decision in *Raysel-IDE, Inc.*, 284 NLRB at 881 (regarding repudiation of an unlawful directive to not wear a union button) is distinguishable.

told Fountain to take off his union button. Fountain testified that he responded by telling Grayson that he had a right under Federal law to organize a union and talk to employees, to which Grayson responded, "okay" and walked away. (Tr. 1870–1871.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because O'Gorman threatened employees by telling them not to sign union cards. (GC Exh. 2(c), par. 8(t).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Grayson orally issued and enforced an overly broad and discriminatory rule prohibiting its employees from wearing union buttons. (GC Exh. 2(c), par. 8(n).)

I did not find Fountain's testimony to be sufficiently reliable to sustain the Acting General Counsel's burden of proof. Fountain admitted to having a poor memory for events that occurred nearly 1 year before he testified (see Tr. 1905), and demonstrated some difficulty with providing details when asked various questions during cross-examination. In addition, although several employees attended the February 22 meeting at which O'Gorman spoke, the Acting General Counsel did not call any of those witnesses to corroborate Fountain's testimony about O'Gorman's remarks.

Since I am not able to credit Fountain's testimony, and the Acting General Counsel did not present any other evidence in support of the allegations in the complaint that Fountain addressed, I recommend that the allegations in paragraphs 8(n) and (t) of the complaint be dismissed.[144]

10. Esperanza Sanchez—complaint paragraph 8(p)

a. Findings of fact

Esperanza Sanchez did not become a union committee leader until March 18, 2010, and did not begin wearing a union button to work until March 19. (Tr. 1615.) However, before that time, Sanchez did sign a union card and encourage several coworkers to support the Union. (Tr. 1618–1619.)

On March 13, (before she became a committee leader or began wearing a union button), Sanchez was signing in to begin her shift when Room Chef Victor Cardenas called her into his office. (Tr. 1615–1616.) Cardenas greeted Sanchez and asked how she was doing, and then asked if Sanchez remembered all of the favors that he had done for her. Sanchez answered yes and thanked Cardenas. Cardenas then asked Sanchez why she was stirring people up. When Sanchez asked Cardenas what he was talking about, Cardenas insisted that she knew what he was talking about, and touched the left side of his chest. Sanchez asked, "Are you talking to me about the Union button?" Cardenas responded, "If you did it, that's fine, but don't go stirring up my people." Sanchez replied that she did not have a union button and was not yet a committee leader. Cardenas replied, "That's fine, go to work, and I don't want any problems." (Tr. 1616.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Cardenas interrogated employees about their union membership and activities, and threatened employees with the loss of benefits because of union support. (GC Exh. 2(c), pars. 8(p).)

Sanchez was a credible witness who provided clear testimony that was not affected by cross-examination. I also find that her testimony establishes that the Respondent violated Section 8(a)(1) of the Act. A reasonable employee would have concluded that Cardenas was warning Sanchez to stop speaking to her coworkers about supporting the Union, and also would have understood that if Sanchez disregarded the warning, she risked losing out on any future "favors" or largesse that Cardenas might be in a position to provide. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1, 14. Each of those messages had a reasonable tendency to coerce, interfere with or restrain the exercise of Section 7 rights.

I find that the Respondent, through Cardenas, violated Section 8(a)(1) of the Act by interrogating Sanchez about her union membership and activities, and threatening Sanchez employees with the loss of benefits because she supported the Union. (GC Exh. 2(c), par. 8(p).)

J. Santa Fe Station

1. Damian Villa and Janette Blazquez—complaint paragraphs 9(a) and (b)

a. Findings of fact

On February 19, 2010, buffet cooks Damian Villa and Janette Blazquez each reported to work at the buffet while wearing their union buttons. (Tr. 116–118, 202–203.) In the morning as Villa prepared for his shift, Sous Chef Judy Nichols (Villa's supervisor) approached him in the hallway, pointed at Villa's union button, and asked (in English) what it was. (Tr. 118, 129.) Nichols then directed Villa to take the union button off, and Villa, who understands a bit of English, complied (though he resumed wearing the button about 15 minutes later). (Tr. 118, 120, 129.)

Separately, Executive Chef George Jaquez approached Blazquez while she was working at a buffet carving station, and directed her (in Spanish) to take off her union button. Blazquez complied with Jaquez' directive. No one else was present during this conversation. (Tr. 204.)

After approximately 20 minutes, Jaquez returned to the buffet floor and called both Villa and Blazquez into his office. Jaquez (who is one of Nichols' supervisors) apologized to both Villa and Blazquez, and advised them that they could wear their union buttons and return to work. (Tr. 130, 205, 250.) Blazquez resumed wearing her union button after the meeting. (Tr. 253.) During the next break, Blazquez' coworkers asked her what happened in Jaquez' office and asked if she was going

[144] As previously noted, I struck the testimony of four witnesses for whom the Charging Party failed to disclose video statements to the Respondent in a timely manner. Although Fountain's video statements were also disclosed belatedly, I did not strike his testimony because any limited prejudice to the Respondent was cured when I provided the Respondent with the opportunity to recall Fountain for further cross-examination. See sec. III(J)(3)–(4), supra. I also note that the question of whether I should strike Fountain's testimony as a sanction for subpoena noncompliance is moot since I have determined Fountain's testimony to be unreliable for other reasons and have recommended dismissing the allegations covered by his testimony.

to be fired, and Blazquez advised them that everything was fine. (Tr. 252–253.) Villa did not speak to his coworkers about the meeting with Jaquez. (Tr. 154.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Nichols interrogated Villa about his union membership, activities, and sympathies. (GC Exh. 2(c), par. 9(a).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Nichols and Jaquez prohibited Villa and Blazquez (respectively) from wearing their union buttons in the workplace. (GC Exh. 2(c), par. 9(b).)

I have credited both Villa and Blazquez in their testimony, as the circumstances that they described largely corroborate each other (apart from minor inconsistencies that are not material). Further, each witness withstood vigorous cross-examination that covered a broad range of topics. And, most of the facts outlined above are not in dispute, as the Respondent does not contest the basic premise that both Villa and Blazquez were (at least initially) directed to remove their union buttons. Given that foundation, the Acting General Counsel established that the Respondent ran afoul of Section 8(a)(1) when Nichols interrogated[145] Villa about his Union button and directed him to remove it, and when Jaquez directed Blazquez to remove her union button.

The Respondent does argue, however, that it avoids liability for these alleged violations because through the meeting in Jaquez' office it repudiated the unlawful conduct. I agree with the Respondent that it repudiated the 8(a)(1) violations charged in paragraphs 9(a) and (b) of the complaint. Both Villa and Blazquez were told to remove their union buttons when no other employees were present (similarly, no employees were present when Nichols interrogated Villa about his union button). Jaquez repudiated the violations later that same day when he apologized to Villa and Blazquez and confirmed that they could wear their union buttons at work.[146] As a result, the Respondent satisfied the standard for repudiating unlawful conduct. See *Passavant Memorial Area Hospital*, 237 NLRB at 138; *Raysel-IDE, Inc.*, 284 NLRB at 881 (respondent violated Sec. 8(a)(1) when its general manager told an employee to remove her union button and never again wear it at the plant, but repudiated the violation when, 24 hours later, the general manager retracted his statement, apologized to the employee, and assured the employee that she could wear her union button at the plant whenever she pleased); *Atlantic Forest Products*, 282 NLRB at 855, 872 (same, where improper statements retracted within 3 hours).

I recommend that the allegations in paragraphs 9(a) and (b) of the complaint be dismissed, because the evidence shows that the Respondent repudiated the violations alleged in those paragraphs of the complaint.

2. Dolores Quezada—complaint paragraph 9(c)

a. Findings of fact

On February 19, 2010, Dolores Quezada reported to work while wearing her union button on her uniform. (Tr. 265.) When she arrived, she greeted Internal Maintenance Supervisor Ron Lera. Lera pointed at Quezada's union button and asked (in English), "Who gave you that?" In response, Quezada simply shrugged her shoulders. Lera then said "It's okay, it's not my business," and Quezada then left and went to work. (Tr. 266–267.) Lera never spoke to Quezada again about her union button, nor did he discipline her for wearing the button. (Tr. 267.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Lera interrogated Quezada about her union membership, activities, and sympathies. (GC Exh. 2(c), par. 9(c).) I have credited Quezada's account of the conversation because it is unrebutted.

I have considered the circumstances of the questioning that Quezada described, and I find that the Acting General Counsel failed to prove that the questioning reasonably tended to interfere with, restrain or coerce the exercise of Section 7 rights. Lera's questioning of Quezada was limited to asking who gave her the union button, and immediately after posing that question, Lera told Quezada that it was okay and that it was none of his business how she obtained the button. Quezada then went to work and continued to wear her union button without incident. Thus, the brief conversation did not convey an element of interference or coercion—to the contrary, Lera conveyed the message that he would <u>not</u> interfere if Quezada chose to wear her union button in the workplace. See *Gray Drugs*, 272 NLRB 1389, 1389 (1984) (finding that an isolated offhand remark to a single employee that was immediately retracted was not coercive, and therefore did not violate Sec. 8(a)(1)).

In the absence of any other evidence that Lera's statement had a tendency to be coercive, I recommend dismissing the allegations in paragraph 9(c) of the complaint.

3. Jose Alonzo and Justina Ciriaco—complaint paragraphs 9(d), (f), and (o)[147]

a. Findings of fact

Jose Alonzo and Justina Ciriaco work as kitchen workers on the graveyard shift at Sante Fe Station. (Tr. 314–315, 406.) On February 19, 2010, Alonzo reported to work while wearing his union button for the first time, and attended (along with several coworkers, including Ciriaco) a preshift meeting conducted by Sanitation Supervisor Gilberto Rodriguez. (Tr. 316–317, 407.) Rodriguez initially advised the employees at the meeting about

[145] Although Nichols' interrogation of Villa was limited to asking what Villa's button was, she immediately followed up on her question with the improper directive that Villa remove the button. Viewing the exchange as a whole, Nichol's interrogation of Villa reasonably tended to interfere with, restrain, or coerce Villa in the exercise of his Sec. 7 rights.

[146] I have considered the fact that Blazquez' coworkers were aware that Jaquez called her into his office for a meeting (the meeting in which Jaquez apologized). The fact remains, however, that no employees besides Villa and Blazquez were present when the actual violations occurred, and thus it was appropriate for the Respondent to only notify Villa and Blazquez of the repudiation.

[147] Ciriaco's testimony addressed complaint pars. 9(d) and (f) only.

new company promotions and new cleaning standards that had to be met. (Tr. 317–318, 324.) Rodriguez then stated that based on the new items that employees were wearing (i.e., union buttons), he did not know what might happen at the company, and further indicated that the company might cut back work hours or possibly eliminate the entire night shift. (Tr. 318, 365, 407.)

On February 24, Alonzo (and 12 to 14 other kitchen and oven workers, including Ciriaco) attended another preshift meeting conducted in part by Team Member Relations Manager Lilia Salazar. (Tr. 318–319, 408.) Salazar spoke at length about the Union, advising employees that her husband had a bad experience with the Union, and asserting that prior attempts to bring a union to Santa Fe Station had not been successful.[148] Salazar added0 that Station Casinos would not allow the Union to come in, and maintained that the Union would not help employees and could not solve any problems at Station Casinos. (Tr. 320, 398, 400, 408.)[149]

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Rodriguez threatened employees with reduced work hours and the loss of the graveyard shift because of their union activities. (GC Exh. 2(c), par. 9(d).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Salazar informed employees that it would be futile for them to support the Union as their bargaining representative. (GC Exh. 2(c), par. 9(f).)[150]

I have credited Alonzo's testimony for the findings of fact set forth above. Alonzo was a poised witness who provided extensive detail about the events in dispute, and also held up well under extensive and vigorous cross-examination. He answered all questions in a thoughtful and deliberate manner, and generally demonstrated solid recall of the events in question. I have credited Ciriaco's testimony only to the extent that it was corroborated by Alonzo's testimony. Ciriaco offered her testimony in a tentative manner, and she did not provide specificity about dates and other details when she testified. While her testimony was truthful to the best of her memory, the content of her testimony was not as reliable as the testimony provided by Alonzo.

Alonzo's testimony regarding paragraph 9(d) of the complaint established that Rodriguez threatened employees with reduced work hours and the loss of the graveyard shift because of their union activities. Rodriguez implicitly linked his warnings about reduced work hours and the loss of the graveyard shift to the "new" union buttons that employees were wearing, thereby committing a classic 8(a)(1) violation by essentially threatening employees with adverse changes to their working conditions because of their union activities.

Alonzo's testimony also demonstrates that the Respondent violated Section 8(a)(1) when Salazar told employees (on February 24) that it would be futile to support the Union. (GC Exh. 2(c), par. 9(f).) Despite extensive cross-examination, Alonzo consistently explained that Salazar told employees that the Respondent would not allow the Union to come in to the workplace as the employees' representative. Alonzo distinguished Salazar's remark about futility from other remarks that she made that were similar to Sound Bytes that the Respondent prepared, thus making it clear that Salazar added additional remarks (beyond the Sound Bytes) that violated the Act.

I find that the Respondent, through Rodriguez' comments on February 19, violated Section 8(a)(1) by threatening employees with reduced work hours and the loss of the graveyard shift because they engaged in union activities. (GC Exh. 2(c), par. 9(d).)

I also find that the Respondent, through Salazar's comments on February 24, violated Section 8(a)(1) by telling employees that it would be futile for them to support the Union as their bargaining representative. (GC Exh. 2(c), par. 9(f).)

I recommend that the allegations in paragraph 9(o) of the complaint be dismissed.

4. Juan Gonzalez—complaint paragraphs 9(e) and (s)

a. Findings of fact

On February 19, 2010, Juan Gonzalez was working as a cleaner at Santa Fe Station when he was asked to attend a meeting being conducted by Internal Maintenance Supervisor Ron Lera. Gonzalez arrived while the meeting was in progress, and observed Lera (who was speaking in English with no Spanish translation offered) pounding on his desk and talking about the Union. (Tr. 417.) Gonzalez was somewhat intimidated by Lera's tone of voice, but admitted that Lera was reading a Sound Byte from the computer that read as follows:

> It has been brought to my attention that the Culinary Union continues to lie to our team members. They are now saying that Station Casinos is in negotiations with them to get a union contract for our team members. That is an absolute lie. Why would we want to have a third party in between our

[148] The Respondent asked Alonzo if Salazar's comments were essentially the same as the language found in three Sound Bytes that the Respondent prepared for its managers. Alonzo explained that while aspects of the Sound Bytes were similar to what Salazar said, the documents fell short of capturing the full extent of her remarks. Tr. 396–397 (discussing GC Exhs. 6(f), (g), and (m)).

[149] Ciriaco's testimony did not mention Salazar's statement that the Respondent would not allow the union to come in. Tr. 408. As noted below, however, I have credited Alonzo's account of the meeting.

[150] The Acting General Counsel voluntarily withdrew the allegations in par. 9(o) of the complaint. See GC Posttrial Br. at 44 fn. 15, 86 fn. 28.

I hereby deny the Acting General Counsel's posttrial request to amend the complaint to include a charge that Salazar threatened employees on February 24 not to sign union membership cards. See GC Posttrial Br. at 24 fn. 9. It would not be just to permit the proposed amendment at this posttrial stage because among other things, the proposed allegation was not fully litigated. See *Stagehands Referral Service, LLC*, 347 NLRB at 1171 (describing three factors to consider in determining whether it would be just to accept a proposed amendment to the complaint: whether there was lack of surprise or notice; whether the General Counsel offered a valid excuse for its delay in moving to amend; and whether the matter was fully litigated). See also Tr. 397 (Respondent asked limited questions of Alonzo about the proposed allegation); Tr. 409 (Respondent did not cross examine Ciriaco). I also note that the Acting General Counsel did not offer a valid excuse for its delay in moving to amend the complaint.

> team members and management, when we have been so successful for the past thirty-plus years, communicating directly with you? Anyone who has to lie, cheat, and bully our team members to get them to sign a card are up to no good. Do not be tricked by these people who don't know you and don't care about you.

(Tr. 428–430; GC Exh. 6(g).)

On February 22, Gonzalez attended a preshift meeting led by Internal Maintenance Manager Shameen McClellan, who (like Lera) conducted the meeting in English without translation. (Tr. 417–418.) McClellan made a remark about employees signing Union cards, but Gonzalez was not able to recall or testify about the specific nature of her remark. (Tr. 418–419, 430.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because McClellan asked employees to ascertain and disclose the union activities of other employees to the Respondent. (GC Exh. 2(c), par. 9(e).) The complaint also alleges that the Respondent violated Section 8(a)(1) because Lera discouraged employees from supporting the Union by telling them they were stupid for supporting the Union (and thereby disparaging the Union). (GC Exh. 2(c), par. 9(s).)

Gonzalez' testimony regarding both allegations in the complaint was significantly limited by the fact that he has trouble understanding English, and thus had trouble understanding precisely what Lera and McClellan said in their respective meetings. As to Lera, Gonzalez testified that Lera told employees at the meeting that they were stupid for supporting the Union, but I do not credit that testimony. Gonzalez admittedly arrived at the meeting while it was in progress, and also had difficulty understanding Lera's remarks, which were in English. Because of those obstacles, I find that Gonzalez' testimony about Lera's remarks is unreliable and insufficient to meet the Acting General Counsel's burden of proof, as it is more likely than not that he misunderstood the context of Lera's remarks (even if one assumes, arguendo, that Lera used the word "stupid" in his commentary about the Union).

As to McClellan, Gonzalez had trouble articulating the exact nature of her comments, even though he was given the opportunity to do so in both Spanish and English. Gonzalez attempted to repeat McClellan's statement in English, saying: "She say anybody bother you by the sign [ ] card, let me know to do something to the people doing something to one of the people of the Union." (Tr. 430.) Little specificity was added when Gonzalez attempted to summarize McClellan's statement with the assistance of an interpreter, as Gonzalez stated that McClellan "just said to us—tell us whether they were being asked to sign cards," and "that she was going to call us in order to—if we were bothering them, in order to, you know, I don't know, give us a warning or something. I don't know." (Tr. 418–419.) I find that Gonzalez' uncorroborated and vague testimony is insufficient to carry the Acting General Counsel's burden of proof on its allegation that McClellan made remarks that violated Section 8(a)(1).

Since Gonzalez' testimony was not reliable and did not establish a violation of Section 8(a)(1), and since the Acting General Counsel offered no other evidence to prove the allegations, I recommend that the allegations in paragraphs 9(e) and (s) of the complaint be dismissed.

5. Lisa Knutson—complaint paragraphs 9(g), (k), (p), (q), and (r)

a. Findings of fact

Lisa Knutson began wearing a Union button to work on February 19, 2010. (Tr. 434.) As part of her union activities, Knutson spoke to her coworkers about the Union, and also engaged in leafleting by passing out or showing Union literature and newspaper articles to coworkers in the employee dining room, the parking garage and other areas. (Tr. 435–438); (GC Exhs. 13–19) (examples of documents that Knutson used when leafleting).

On March 17, Knutson went to the fourth level of the parking garage (the part of the garage designated for casino employees) at approximately 4:00 p.m. before she began her shift. (Tr. 440.) Knutson leafleted for 15–30 minutes, generally providing the employees that she contacted with an information sheet about union organizing rights, as well as one of the Union's flyers. (Tr. 441; GC Exhs. 13–14.)

The following day (March 18), Knutson reported to work and was picking up her uniform when Director of Security Jason Hudson approached Knutson and asked her to meet with him in his office. (Tr. 441.) Hudson told Knutson that he was getting complaints from employees that Knutson was handing out literature and harassing them. Citing a company "no soliciting" policy, Hudson told Knutson that she could not leaflet in the parking garage, and must confine any leafleting to the employee dining room or smoking area. (Tr. 442.)

On March 31, Knutson and 3–4 of her coworkers attended a preshift meeting[151] conducted by Beverage Director Luann Gambuto. Gambuto announced that open discussion would no longer be permitted at preshift meetings. Instead, Gambuto would speak on behalf of the casino (including reading Sound Bytes and commenting about the Union), and if any employees had questions or wished to talk, they could do so one-on-one with a manager after the meeting. (Tr. 443, 451.) Gambuto explained that she was putting the new meeting guidelines in place because things got "out of hand" in previous meetings (including an incident the week before when a coworker "verbally attacked" Knutson after Knutson spoke in support of the Union). (Tr. 444, 467.) The new rules were in place for 1–2 weeks, and then employees resumed asking questions and speaking at preshift meetings. (Tr. 444.)

Knutson returned to the fourth floor of the parking garage to leaflet on June 9.[152] (Tr. 445; GC Exh. 19.) When Knutson began leafleting, a security bicycle officer who was nearby

[151] As with the Respondent's other casino locations, managers used preshift meetings to advise employees about work issues, assignments, promotions and other company announcements. Knutson explained that in her experience, employees were permitted to speak at these meetings on a variety of topics, including current events and family matters. Tr. 433–434.

[152] Knutson resumed leafleting on this date in part because she was emboldened by the fact that the complaint in this case had been filed. Tr. 445–446; GC Exh. 19.

made a radio call, and then approached Knutson and told her that she could not leaflet in the garage.[153] (Tr. 446.) Knutson asserted that she had a right to leaflet, asked to speak to a supervisor. Shift Supervisor Ed Schmitz responded to the scene (Hudson was not available) and told Knutson that she could leaflet in the street, the employee dining room or a designated break area, but not in the parking garage since it was against company policy. Knutson complied with Schmitz' instructions and went to the employee dining room to distribute her materials. (Tr. 447.)

On June 17, Knutson attended a preshift meeting conducted by Assistant Beverage Manager Krzysztof Olender.[154] Knutson spoke at the meeting to tell employees about a newspaper article about the casino and the possibility that the facility could be sold to another gaming company. (Tr. 448–449; GC Exhs. 17–18.) After the meeting, Olender approached Knutson and said: "Lisa, I wish you would not speak in [the] huddle anymore. Last time someone spoke, Dawn [Vaseur] spoke in the huddle, I got in trouble from management. If management finds out I let you speak, I am going to be in trouble." (Tr. 449.) Knutson responded that she was not talking about the Union, but rather was talking about where the company is headed. Olender repeated that Knutson could not talk about anything. (Tr. 449–450.)

Olender and Knutson spoke again on June 26 as Knutson was ending her shift. Olender reminded Knutson that she needed to close out of her register, and then asked Knutson if she knew anything about an upcoming stoppage of work. Knutson told Olender that she did not know what he was talking about. Olender explained that management had warned that the Union was planning a work stoppage. Knutson repeated that she did not know what Olender was talking about, and the conversation ended. (Tr. 450.)

b. Discussion and analysis

The complaint alleges that the Respondent violated the Act in the following ways:

1. On or about March 18, Hudson: orally issued and enforced an overly broad and discriminatory rule prohibiting employees from engaging in union activities in the parking garage of the Respondent's Santa Fe facility (GC Exh. 2(c), par. 9(g)).
2. On or about March 31, Gambuto denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern (including but not limited to the union organizing campaign) and requiring discussions about the Union to be one-on-one with management (GC Exh. 2(c), par. 9(k)).
3. On or about June 9, Schmitz and Caesar Carranza: engaged in surveillance of employees to discover their union activities; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from engaging in union activities at the Respondent's Santa Fe facility (GC Exh. 2(c), par. 9(p)).
4. On or about June 17, Olender: denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern (including but not limited to the union organizing campaign); and threatened employees with unspecified reprisals if they engaged in union activities (GC Exh. 2(c), par. 9(q)).
5. On or about June 26, Olender interrogated employees about their union membership, activities and sympathies (GC Exh. 2(c), par. 9(r).

I found Knutson to be a credible witness. She provided detailed testimony about each incident, and much of her testimony was corroborated by documentation such as the actual documents that Knutson used when she was leafleting. Knutson did stumble during cross-examination when, in an effort to explain a factual omission in one of her written incident reports to the Union, Knutson stated that "they [union organizers] said to make [her report] very vague." (Tr. 471.) Knutson clarified, however, that no union organizer gave her such an instruction—instead, the Union organizers told her to write down what happened, and she simply omitted certain details when she wrote her description. (Tr. 471–473.) I observed Knutson's demeanor during this portion of cross-examination, and her deflated affect was consistent with that of a witness who made an honest mistake in her testimony that required clarification. Knutson's remark about making her Union report "vague" therefore did not undermine her overall believability as a witness, and based on her overall demeanor, I credit Knutson's account of her experiences at the Santa Fe facility.

Knutson's testimony establishes that the Respondent violated Section 8(a)(3) and (1) of the Act when its security personnel interfered with her leafleting on March 18 and June 9. It is well established that an employer may not bar employees (even if off duty) from leafleting in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. See *Republic Aviation Corp. v. NLRB*, 324 U.S. at 803 fn. 10; *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 7. Knutson's leafleting activities were consistent with the Board's parameters, and the Respondent did not demonstrate that its security officers were justified in preventing Knutson from leafleting in the parking garage.[155] Moreover, through the uni-

[153] During trial, Knutson gave a physical description of the security officer, but did not identify him by name. Tr. 446.

[154] Olender was not as strict as Gambuto regarding allowing employees to speak at staff meetings. Tr. 444–445.

[155] During cross-examination, the Respondent elicited testimony that Hudson received complaints from employees that Knutson was "harassing" them when she was leafleting in the parking garage. Even if Hudson did receive complaints of that nature, that would not justify prohibiting Knutson from leafleting, because the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited. See *Ryder Transportation Services*, 341 NLRB 761, 761 (2004), enfd. 401 F.3d 815 (7th Cir.

dentified security officer's conduct on June 9, the Respondent engaged in unlawful surveillance of Knutson's union activities because the security officer's actions clearly put Knutson on notice that the casino was monitoring her union activities. I therefore find that the Respondent violated Section 8(a)(3) and (1) as alleged in paragraphs 9(g) and (p) of the complaint.[156]

The Acting General Counsel also demonstrated that Olender's conduct on June 17 and June 26 ran afoul of Section 8(a)(1). On June 17, Olender singled out Knutson after the preshift meeting and put her on notice that her comments (and only her comments) about the company and the Union were not welcome at the meetings. Although Olender conveyed his message to Knutson in relatively cordial terms, I find that Olender's message was coupled with an implied warning that further unwelcome comments would put Knutson at risk of reprisal, particularly since Olender explicitly stated that he himself would face reprisal from management if Knutson's comments continued. As for June 26, Olender explicitly asked Knutson for information about a union work stoppage that he believed was forthcoming. Although Knutson was not aware of any such contemplated work stoppage, Olender's inquiry was coercive because it again conveyed the message that union activities were being monitored and if implemented, would be viewed negatively by the Respondent. I therefore find that the Respondent violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 9(q) of the complaint, and violated Section 8(a)(1) as alleged in paragraph 9(r) of the complaint.

Finally, the Acting General Counsel fell short of demonstrating that the Gambuto's actions on March 31 regarding preshift meeting guidelines violated the Act. Gambuto essentially called for a temporary (1–2 week) moratorium on employee comments at preshift meetings, and offered the alternative of speaking to managers one-on-one if they had any questions. There is no evidence, however, that Gambuto enforced that new rule in a discriminatory manner (e.g., against employees that supported the Union, but not other employees), because Gambuto prohibited all employee input, regardless of whether it was related to protected activity or union activity. As applied, therefore, the temporary ban on employee comments was a nondiscriminatory response to a verbal altercation between employees that occurred at a preshift meeting 1 week earlier. I therefore recommend that the allegation in paragraph 9(k) be dismissed.

In sum, I find that the Respondent (through its security officers) committed the following violations: engaging in surveillance of employees (on June 9) to discover their union activities (in violation of Section 8(a)(1)); and orally issuing and enforcing an overly broad and discriminatory rule (on March 18 and June 9) prohibiting employees from engaging in union activities in the parking garage at the Respondent's Santa Fe facility (in violation of Sec. 8(a)(3) and (1)). (GC Exh. 2(c), pars. 9(g), (p).)

I also find that the Respondent (through Olender) violated the Act by: denying Knutson (on June 17) benefits in the form of open discussion at preshift meetings because she supported the Union (in violation of Sec. 8(a)(3) and (1)); orally issuing and enforcing (on June 17) an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern (including but not limited to the union organizing campaign) (in violation of Sec. 8(a)(3) and (1)); threatening Knutson (on June 17) with unspecified reprisals if she engaged in union activities ((in violation of Sec. 8(a)(1)); and interrogating Knutson (on June 26) about her union membership, activities and sympathies (in violation of Sec. 8(a)(1)). (GC Exh. 2(c), pars. 9(q), (r).)

For the reasons stated above, I recommend that the allegations in paragraph 9(k) of the complaint be dismissed.

6. Dawn Vaseur—complaint paragraphs 9(h), (i), (j), (m), and (n)

a. Sanction for subpoena noncompliance

As previously noted, I have decided to strike Dawn Vaseur's testimony as a sanction for the Charging Party's subpoena noncompliance. This sanction is warranted because the late disclosure of Vaseur's video statements prejudiced the Respondent's case regarding Vaseur's testimony. See section III(I)(3)–(4), supra. Since no other evidence in the record supports the allegations that Vaseur addressed when she testified, I recommend that the allegations in paragraphs 9(h), (i), (m), and (n) of the complaint be dismissed.

In the interest of making a complete record, I have made alternative findings of fact and conclusions of law that are set forth below.

b. Alternative findings of fact

Dawn Vaseur began wearing a Union button to work on February 19, 2010. (Tr. 486–487.) On March 25 at approximately 8:45 am, Vaseur went to the employee parking lot of the Santa Fe facility to pass out flyers. She was off duty and dressed in street clothes, and was wearing her Union button. (Tr. 487–488; GC Exh. 15.) While Vaseur was leafleting, an unidentified female security officer approached her and asked Vaseur to identify herself and state what she was doing. (Tr. 488.) Vaseur provided her name, showed the officer her employee badge, and explained that she worked at the casino. The security officer stated that she did not think Vaseur could leaflet, but left the area. (Tr. 488.) Later, Director of Security Jason

2005); *Tawas Industries*, 336 NLRB 318, 322 (2001). I am also not persuaded by the Respondent's suggestion that its security officers restricted Knutson's leafleting out of concern for her safety. Tr. 469. Although Knutson testified that she used a security escort when going to the parking garage at night, there is no evidence that Knutson was required to use such an escort, and there is no evidence that the Respondent followed a rule that prohibited employees from being alone in the parking garage for any purpose.

[156] Technically, the Acting General Counsel should have amended paragraph 9(p) of the complaint to: delete Carranza's name and instead refer to him as an unidentified security officer; and specify that the Respondent only prohibited union activities in the parking garage (instead of the entire Santa Fe facility). Neither of those technical defects prejudiced the Respondent, however, and thus the allegations (and my findings herein) stand. See *Pergament United Sales*, 296 NLRB at 335 (upholding the ALJ's findings regarding a violation that was not alleged in the complaint because it was closely related to other violations that were specified in the complaint, and because the facts relating to the uncharged violation were fully litigated).

Hudson (along with another female security officer) approached Vaseur, leading to the following discussion:

> HUDSON: You can't be here, you have to leave. You're soliciting.
>
> VASEUR: No, I'm not. I have a right to be here. I'm in the employee parking lot and by the rules it said that I can be here passing out flyers.
>
> HUDSON: No you're not. You're soliciting. Get down in the street—that's where you belong.

(Tr. 488–489.) Vaseur obtained Hudson's name, and then complied with his instruction and left the parking lot. (Tr. 489.)

On March 26, Vaseur and 8 of her coworkers attended a preshift meeting at which supervisor Michele Cox read a Sound Byte that made unflattering remarks about the Union. (Tr. 490, 523.) When Cox ended her remarks by asking the employees if they had any questions, Vaseur raised her hand, saying "I do." The following exchange then occurred with Vice President/Assistant General Manager Robert Risdon:

> RISDON: No you don't. You have nothing to say. This is not a platform for you.
>
> VASEUR: Yes it is. I have a right to speak, I have a right to talk.
>
> RISDON: No you don't. You have nothing to say and you're not talking.
>
> VASEUR: I have a right to speak to these people and tell them what's going on—they need to know what's happening here and they have a right to know.
>
> VASEUR [to employees]: If we stick together, we can do this. You don't have to be afraid.
>
> RISDON: When you get your facts straight, then you can open up your mouth and talk.

(Tr. 490–491; see also Tr. 527–528.)[157]

During Vaseur's March 28 shift as a cocktail waitress, Vaseur noticed that Assistant Shift Supervisor (and security officer) Kimberly Ortiz visited Vaseur's work area several times and stared at her. Specifically, on three separate occasions when Vaseur went to the bar to order drinks for customers, Ortiz stood at the bar and stared at Vaseur (at one point from a distance of 3 feet). (Tr. 491–492.) While it was common for security officers to engage in some surveillance at the casino, Ortiz' conduct was not consistent with Vaseur's impression of the normal practices of security officers. (Tr. 492, 530.) Vaseur added that she often had 4–5 security officers in her area who watched her (Vaseur implied that this was because of her union activities). (Tr. 493).

On May 7, Vaseur and 2 other employees attended a preshift meeting conducted by Beverage Director Luann Gambuto. Gambuto read a statement, and then asked if anyone had anything to say. Vaseur said she would like to say something, and began speaking about a bankruptcy hearing (regarding the casino) that she attended on May 4 and 5. When Vaseur said she was at the hearing as a union representative, Gambuto told Vaseur, "You have to stop right now. I can't let you go on." (Tr. 493–494.) Vaseur complied and stopped talking, but prepared a handwritten flyer that she photocopied and passed out to her coworkers. (Tr. 494; GC Exh. 20.)

One week later, on or about May 14, Vaseur and some of her coworkers attended a preshift meeting conducted by Assistant Beverage Manager Krzysztof (Chris) Olender. (Tr. 494–495.) At the meeting, Olender asked Vaseur some questions about the bankruptcy hearing, and Vaseur briefly described what happened at the hearing. The preshift meeting concluded without incident and Vaseur began her shift. (Tr. 495.) After 30 minutes, however, Olender approached Vaseur and told her that "we're in trouble" because Gambuto heard them talking about the bankruptcy hearing and Vaseur's flyer from May 7. Olender warned Vaseur that Gambuto was going to speak with her, but ultimately no such meeting occurred. (Tr. 495–496.)

c. Discussion and analysis of alternative findings of fact

The complaint alleges that the Respondent violated the Act in the following ways:

1. On or about March 25, Hudson: orally issued and enforced an overly broad and discriminatory rule prohibiting off duty employees from engaging in union activities in the parking garage of the Respondent's Santa Fe facility; and prohibited its off duty employees from accessing the Respondent's facility (GC Exh. 2(c), par. 9(h)).
2. On or about March 26, Risdon: denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern (including but not limited to the union organizing campaign) and requiring discussions about the Union to be one-on-one with management (GC Exh. 2(c), par. 9(i)).
3. On or about March 28, Ortiz engaged in surveillance of employees to discover their union activities (GC Exh. 2(c), par. 9(j)).
4. On or about May 7, Gambuto: denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern (GC Exh. 2(c), par. 9(m)).
5. On or about May 14, Olender threatened employees with unspecified reprisals if they engaged in union activities (GC Exh. 2(c), par. 9(n).

In the absence of any sanction, I would find that Vaseur was a credible witness. She provided extensive and detailed testimony about her experiences at the casino, including clear descriptions of several conversations or debates that she had with managers during the relevant time period.

[157] The Respondent elicited some testimony that Vaseur had heard about an incident between two employees at a March 25 preshift meeting. Tr. 528–530. I have not given any weight to this testimony because it is hearsay, and because there is no evidentiary nexus between the hearsay incident and any actions taken by Risdon (on March 26) or Gambuto (on May 7).

Based on Vaseur's testimony, I would find that the Respondent violated Section 8(a)(3) and (1) of the Act when its security personnel interfered with her leafleting on March 25. (See GC Exh. 2(c), par. 9(h).) As previously noted, an employer may not bar off duty employees from leafleting in nonworking areas of its property during nonworking time unless the employer can justify its rule as necessary to maintain discipline and production. See *Republic Aviation Corp. v. NLRB*, 324 U.S. at 803 fn. 10; *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 7. The Respondent violated those rules when its security officers prohibited Vaseur from leafleting in the employee parking lot without proper justification.[158]

I would also find that the Respondent unlawfully prohibited Vaseur from speaking at the preshift meetings held on March 26 and May 7, as alleged in paragraphs 9(i) and (m) of the complaint.[159] The evidence shows that both Risdon (on March 26) and Gambuto (on May 7) prohibited Vaseur from expressing support for the Union at preshift meetings while remaining open to other types of employee comments. By cutting off Vaseur from expressing her views, both Risdon and Gambuto denied Vaseur a benefit that she had previously enjoyed (open discussion at preshift meetings) and enforced an overly broad and discriminatory rule that restricted Section 7 activity such as employee discussions about issues of common concern. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (it is unlawful to change employee working conditions simply because they support the union); *NLS Group*, 352 NLRB at 745; *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1438–1439 (an employer violates Section 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters); *Parts Depot, Inc.*, 332 NLRB at 673 (finding that an employer's new "open door" policy was a benefit offered to employees).[160]

The allegation regarding Ortiz is unusual because Ortiz' conduct as Vaseur described it (essentially hovering near Vaseur and repeatedly staring at her during her shift on March 28) was simultaneously brazen and bizarre. At the same time, however, I am reminded that truth can be stranger than fiction. More to the point, I would find that Vaseur's account of her interaction with Ortiz was credible, and did indeed prove the allegation that the Respondent engaged in unlawful surveillance. (See GC Exh. 2(c), par. 9(j).) A reasonable employee would infer from Ortiz' conduct that Ortiz was sending a message that Vaseur was under increased scrutiny because of her union activities. That unspoken message violated Section 8(a)(1) of the Act. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 14; *Flexsteel Industries,* 311 NLRB at 257.

Last, I would find that Olender unlawfully threatened Vaseur with unspecified reprisals on May 14. (See GC Exh. 2(c), par. 9(n).) Olender's warning to Vaseur was explicit—that because Vaseur spoke about the Union's concerns about the bankruptcy hearing at a preshift meeting, she was in trouble and would be hearing from Gambuto. Although Gambuto did not carry out the threat conveyed by Olender, Olender's warning violated Section 8(a)(1) because it put Vaseur on notice that her union activities could result in disciplinary action. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1.

Based on the foregoing analysis, I recommend that the allegations in paragraphs 9(h), (i), (j), (m), and (n) of the complaint be dismissed because of the sanction that I have imposed.

If no sanction were imposed and I were to rely on my analysis of the alternative findings of fact, I would find that the Respondent violated Section 8(a)(3) and (1) as alleged in paragraphs 9(h), (i), and (m) of the complaint, and also violated Section 8(a)(1) as alleged in paragraphs 9(j) and (n) of the complaint.

7. Maria Martir—complaint paragraph 9(l)

a. Findings of fact

Casino porter Maria Martir began wearing a union button to work on February 19, 2010, the day after she attended a union organizing meeting. (Tr. 534.) Thereafter, Martir began speaking to employees about the Union in the team member dining room during lunchtime and during breaks. (Tr. 544.)

On April 9, Martir forgot to wear her union button. (Tr. 543–544.) When she entered the dining room that day, Security Officer Eric Hensley spoke to Martir in English. (Tr. 536.) Martir, who is more comfortable understanding Spanish than English, testified that Hensley said "no speak nothing about

[158] Vaseur was not merely "soliciting" as the security officers alleged, but rather was engaging in union activity that is protected by the Act. I also note that to the extent that the Respondent presented the theory that it might be unsafe for employees to be in the parking lot, there is no evidence that the Respondent prohibited employees from being in that area. Instead, employees were free to use the employee parking lot by simply swiping their badge to gain access. See Tr. 487.

The Respondent also argues that Hudson was not aware that Vaseur was an employee. See R. Posttrial Br. at 254 (citing Tr. 522, where Vaseur discussed a summary that she wrote about the incident). I would reject the Respondent's argument because Vaseur provided unrebutted testimony that she notified the Respondent of her status as an employee when she showed the first security officer her employee badge. Tr. 488. To the extent that the first security officer may have failed to communicate that information to Hudson, that failure is chargeable to the Respondent.

[159] The Acting General Counsel did not prove that Risdon "required discussions about the Union to be one-on-one with management." See GC Exh. 2(c), par. 9(i)(2). That defect is not fatal to the allegation in par. 9(i)(2), however, because I would find that the Acting General Counsel did prove the remainder of the allegation in that paragraph with evidence that is sufficient to find a violation of Sec. 8(a)(1).

[160] I do not find that Vaseur engaged in misconduct that removed her actions from the protection of the Act. As the Board has explained, an employee's intemperate conduct during the course of engaging in protected activity at a captive audience meeting is permitted some leeway without losing the Act's protection. *Beverly California Corp.*, 326 NLRB 232, 233 fn. 5, 277–278 (1998), enfd. in pertinent part 227 F.3d 817 (7th Cir. 2000). Vaseur's conduct was not unduly disruptive, and her attempts to speak at the meeting were fully consistent with the Respondent's past practice of permitting (and indeed encouraging) employee input at preshift meetings and in other settings. See id. (employee who repeatedly interrupted a supervisor during a 3–5-minute period during a staff meeting and expressed her desire to ask a question did not lose the Act's protection).

union in here."[161] (Tr. 543.) Martir admitted that she thought Hensley's comment was strange, since she had been permitted to discuss the Union in the dining room on prior occasions, and since she was not wearing her union button on the day that Hensley spoke to her. (Tr. 543–544.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Hensley verbally issued and enforced a discriminatory rule that prohibited Martir from discussing the Union. (GC Exh. 2(c), par. 9(l).)

I have credited portions of Martir's testimony, but I do not credit her testimony about the specific content of Hensley's remarks to her because her limited comprehension of English makes her testimony unreliable on that pivotal point. Indeed, as Martir admitted, the scenario that she described is strange insofar as it is somewhat implausible that Hensley would have directed her not to speak about the Union on the day that she forgot to wear her union button (while permitting her to speak about the Union on other days).[162]

In the absence of any corroboration, I find that Martir's testimony falls short of proving the alleged violation of Section 8(a)(1) by a preponderance of the evidence. Accordingly, I recommend that the allegation in paragraph 9(l) of the complaint be dismissed.

K. Sunset Station Hotel and Casino[163]

1. Christine [last name unknown]—complaint paragraph 10(i)

a. Findings of fact

In February 2010, Corporate Vice President of Human Resources and Training Valerie Murzl assigned a member of her staff to monitor the union website periodically to enable the Respondent to be "aware of what the [Union] is saying about us and so that we have an opportunity to correct the continuous lies and misrepresentations that are cited." (Tr. 73–74; GC Exh. 5(a).) Murzl was aware of the Union's efforts to organize the employees at Station Casinos at the time. (Tr. 72–73; GC Exh. 5(a), p. 1.)

Through its monitoring, the Respondent noted that an employee (Christine, last name unknown) posted a comment on the Union website. In the comment, Christine objected to mandatory training that she believed was scheduled at inconvenient times that could require employees to find and pay for childcare. (GC Exh. 5(a), p. 2.) By an email dated February 17, Murzl stated that Christine's concern (if accurate) needed to be considered, and accordingly asked her managers to identify the property, department and manager involved with the training. Id. at p. 1. Murzl added that the Respondent should do everything in its power to stop employees from "feeling that the only venue is writing in to the Union with this type of stuff." Id. Managers at Sunset Station followed up on Murzl's instructions by contacting Christine (on February 17–18) to respond to her concerns about the mandatory training schedule and her unhappiness with the work shift that she selected through an earlier bid procedure. (GC Exh. 5(a), pp. 3–6.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) by responding to its employees' complaints and grievances, and thereby promising employees increased benefits and improved terms and conditions of employment to dissuade its employees from supporting the Union. (GC Exh. 2(c), par. 10(i).)

The testimony presented in support of this allegation was limited to that of Murzl, who was called by the Acting General Counsel and questioned as a witness covered by Rule 611(c) of the Federal Rules of Evidence. Murzl's testimony was unrebutted, and the emails cited above were not disputed. Credibility is therefore not at issue for this allegation.

The facts establish that the Respondent did not address Christine's grievances based on a past policy or practice, but rather in direct response to the forthcoming union organizing campaign. Indeed, Christine did not bring her grievance to the Respondent—instead, the Respondent noticed Christine's posting on the Union's website and then set out to demonstrate that the Respondent could address her concerns without the Union's input or assistance.

Based on those facts, I find that the Respondent promised Christine increased benefits and improved terms and conditions of employment with the motive of dissuading her (and other employees) from supporting the Union. *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21 (noting that employer motive is relevant to allegations that benefits were promised for the purpose of influencing Section 7 rights). I also find that in making those promises, the Respondent ran afoul of Section 8(a)(1) because its promises had a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

2. Jose Omar Mendoza—complaint paragraphs 10(a), (c), (d), and (h), and 15(d) and (e)

a. Findings of fact

Jose Omar Mendoza (Omar or Mendoza) began working as a server in the Feast buffet at Sunset Station casino in 1997. (Tr. 2054–2055.) During his tenure at the casino, Mendoza received training on the casino's customer service guidelines, which stress the importance of providing a positive experience to casino guests. (Tr. 2130, 2133–2134; R. Exh. 129 at p. 3) (noting that hospitality at a restaurant includes not only the quality of the meal itself, but also the atmosphere, décor, and staff attitudes).

[161] As previously noted, the transcript is incorrect on p. 537 regarding Martir's testimony about what Hensley said to her in English. The phrasing quoted herein (and also stated in one of the Respondent's questions to Martir) is an accurate version of Martir's testimony about what Hensley said to her on the day in question.

[162] By way of illustration, it is entirely plausible that Hensley, upon seeing that Martir was not wearing her union button, merely posed the innocuous question, "You aren't going to speak about the union today?" An individual with limited fluency in English could easily misinterpret such a question as a directive not to speak about the Union.

[163] The Acting General Counsel withdrew the allegation set forth in par. 10(b) of the complaint. See GC Exh. 2(c), par. 10(b).

Mendoza began wearing a union button to work on February 21, 2010. (Tr. 2057.) That same day, a buffet customer submitted the following complaint about the service in the buffet:

> Your staff has changed in the last month. When we arrived tonight the cashier [employee J.M.] was talking to the manager and ignored us. We were [seated] in Omar's section by the desserts. About halfway through our dinner Omar began to explain to the next table how he was [going to] bring the union into Sunset Station. He explained to everyone who would listen that the management is "terrible here" and "treats us bad" and that he should not have his hours cut when he has worked for the company for 12 years. He stated that he has even convinced the manager, Frank, to assist him in fixing the problem. Never in my life had I experienced such an uncomfortable situation for an employee to express his anger with the customers. I came to eat and have a nice time, not to hear about your internal politics. You really need to fix this problem!

(GC Exh. 39(e).)[164]

On February 22, Assistant Beverage Manager Frank Lopiccolo spoke to employees at the daily preshift meeting and stated that a server had made a comment about bringing the Union to Station Casinos.[165] Lopiccolo added that the server's name would be sent to "corporate." Tr. 2058. Mendoza had never heard an announcement of that nature at any previous preshift meeting. (Tr. 2059.)

On February 23, Buffet Manager John Beagle called Mendoza to his office after the preshift meeting. Food and Beverage Director Andre Teixeira and Assistant Buffet Manager Jack Hawes also attended the meeting in Beagle's office. (Tr. 2060.) Mendoza received a coaching and was instructed not to talk to guests "about his personal life or any problems that he has" because the guests come to the casino to enjoy themselves.[166] (Tr. 2144; GC Exh. 39(a)); (see also GC Exh. 39(b)) (stating that Mendoza received a coaching because of the customer complaint).

At the preshift meeting held on the following day (February 24), Beagle read a Sound Byte that asserted, among other things, that the Union lies and makes empty promises about the job security that can provide to its members.[167] (Tr. 2156–2157; GC Exh. 6(e).) While Beagle was reading the Sound Byte, Mendoza raised his hand because he wished to ask a question about a section of the casino that was closed. (Tr. 2062–2063.) Although employees had been permitted to speak at preshift meetings before, Beagle told Mendoza that he could not speak at that moment and would need to wait until after the meeting. (Tr. 2056, 2062–2063.) After the meeting, Beagle gave Mendoza a coaching, stating that, "Omar interrupted [the preshift meeting] 3 times after I asked him to please let me finish." (Tr. 2158; GC Exh. 39(a).)

On February 25, Teixeira attended the preshift meeting and read the same Sound Byte that Beagle read at the February 24 meeting. (Tr. 2157, 2159, 2178–2179.) Mendoza again raised his hand and spoke up to make a comment, but was told that he was not allowed to make any comments. (Tr. 2064–2065.) After the meeting, Beagle called Mendoza to his office and told Mendoza that he should not interrupt during preshift meetings. Mendoza asked if he could just raise his hand if he had an opinion or wished to say something, and was told by Beagle that he could not. (Tr. 2065–2066.) Beagle gave Mendoza a verbal counseling that stated:

> Omar interrupted our preshift numerous times on 2/24/10 and 2/25/10. Omar has been asked numerous times to not interrupt but has not obliged.
>
> Omar needs to be courteous to all of his fellow Team Members at all times and failure to do so can and will result in further corrective counseling.

(GC Exh. 38) (also noting that the "counseling session is confidential and should only be discussed with management or Human Resources"); (see also GC Exh. 39(a).)[168]

After the meeting with Beagle, Mendoza went to his assigned buffet station, where a coworker (employee N.) was also present. Employee N. asked Mendoza what happened in his meeting with Beagle, and asked why Mendoza was being written up. Although no customers were present and no work tasks were being neglected while N. and Mendoza spoke, Hawes approached and directed them to break up their conversation and not talk about anything. Hawes added that if Mendoza continued to talk with N., he would writeup Mendoza again and Mendoza could be terminated. Mendoza and N. complied with Hawes' directive and stopped talking.[169] (Tr. 2067–2068.)

On June 3, Mendoza attended a preshift meeting at which either Beagle or Lopiccolo read the following Sound Byte:

> Union kicked to the curb. Read all about it in the Review Journal.
>
> Finally, the truth prevails. The Union has been lying and lying and lying about the bankruptcy process to anyone who

[164] Mendoza did not recall making the remarks outlined in the customer complaint. Tr. 2061. I have credited the customer complaint here because there is no dispute that the Respondent received and relied on the customer complaint, and because the customer complaint contains background information (such as the length of Mendoza's employment with the casino, and the name of one of Mendoza's managers) that is corroborated by Mendoza's testimony.

[165] Given Lopiccolo's reference to a "server" and the customer complaint that the Respondent received the day before the meeting, I infer that Lopiccolo communicated to employees that the server's comment was made in the presence of customers.

[166] Employee J.M. also received a coaching based on the customer complaint. GC Exh. 39(c). The record does not indicate whether J.M. supported the union or engaged in union activities.

[167] During a different part of the meeting, Mendoza received a "Star" card because a buffet customer made good comments about his service. Tr. 2063; GC Exh. 37. Mendoza also received a Star card in January 2010. Tr. 2153.

[168] The February 25 verbal counseling remained in effect until September 2010, when the Respondent notified Mendoza that the verbal counseling would be "revoked, rescinded and would not be used against you in any way." GC Exh. 40; see also Tr. 2079, 2165. The Respondent did not notify Mendoza's coworkers that the February 25 verbal counseling was rescinded. Tr. 2069–2070.

[169] It was not unusual for Hawes, in his capacity as the assistant buffet manager, to walk around the buffet to monitor the work of their employees and to give instructions. Tr. 2160–2161, 2176–2177.

> would listen for a year. Well today, Judge Zive set the Culinary Union straight: He said: "you have no basis to participate in these reorganization proceedings." The judge also said he believed the 12,000 employees (Team Members) were protected in the bankruptcy proceedings because both sides, the company and the creditors, were taking steps to keep the casinos open and the Team Members working. So there, Culinary Union! We have tried to set the record straight and now you have it straight from the person who matters most in the bankruptcy proceedings, the judge! The Culinary Union should get a life and stop lying, frightening, threatening and bullying all of our loyal Team Members. We shall prevail on our own without any third party interference—that's you, Culinary Union! Don't sign a card with this corrupt union!

(Tr. 2069, 2161–2162; GC Exh. 6(b).) The contents of the Sound Byte were the only union-related remarks made at the June 3 preshift meeting.[170] (Tr. 2179.)

b. Discussion and analysis

The complaint alleges that the Respondent violated the Act in the following ways:

1. On or about February 22, Lopiccolo threatened employees with adverse employment action for speaking about the Union in front of customers (GC Exh. 2(c), par. 10(a)).
2. On or about February 23, the Respondent disciplined Mendoza (GC Exh. 2(c), par. 15(d).
3. On or about February 25, Teixeira denied employees benefits in the form of open discussion at preshift meetings because they supported the Union, and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern, including, but not limited to, the union organizing campaign (GC Exh. 2(c), par. 10(c)).
4. On or about February 25, the Respondent disciplined Mendoza (GC Exh. 2(c), par. 15(e).
5. On or about February 25, Hawes orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing verbal counselings issued by the Respondent, and engaged in surveillance of employees to discover if they were violating that rule (prohibiting discussion of verbal counselings) (GC Exh. 2(c), par. 10(d)).[171]
6. On or about June 3, Beagle and Lopiccolo informed employees that it would be futile to support the Union as their bargaining representative (GC Exh. 2(c), par. 10(h)).[172]

I found Mendoza to be a credible witness. While Mendoza's memory occasionally failed him (as indicated in the findings of fact), he generally provided confident and detailed testimony.[173] Indeed, much of Mendoza's testimony was corroborated by documentation from his personnel file, including disciplinary records that relate to the events of February 23, 24, and 25. I have therefore credited Mendoza's unrebutted testimony except as noted above in the findings of fact.

The Acting General Counsel's allegations regarding February 22 and 23 relate to the customer complaint that the Respondent received about the service that J.M. and Mendoza provided in the buffet. (See GC Exh. 2(c), pars. 10(a), 15(d).) I find that the Respondent clearly ran afoul of Section 8(a)(1) of the Act when Lopiccolo (in connection with the customer complaint) told employees on February 22 that a server who spoke with customers about the possibility of bring the Union to Station Casinos was going to be referred to corporate. Lopiccolo's comment was a rather ominous warning to employees that union talk with customers would not be tolerated, and could lead to adverse employment action. As such, Lopiccolo's comment had a reasonable tendency to coerce employees in the exercise of their Section 7 rights, and therefore violated Section 8(a)(1) of the Act.[174]

The Acting General Counsel also demonstrated that the Respondent disciplined Mendoza in a discriminatory manner on February 23. There is no dispute that the Respondent coached Mendoza because of the remarks that he made regarding the

[170] I have not credited Mendoza's testimony that Lopiccolo stated that the Union would not be coming to Station Casinos. Tr. 2068. Mendoza expressed some difficulty with remembering what was said at the June 3 meeting, and as indicated above, during cross-examination he agreed that the only union-related remarks made at the meeting were the remarks in the Sound Byte. Tr. 2068, 2179.

[171] The complaint contains a typographical error insofar as it states that the Respondent engaged in surveillance of employees to discover if they were violating the rule described in par. 10(c)(1) of the complaint (regarding whether employees may speak at preshift meetings) . Based on the testimony offered and the manner in which the complaint was amended (a new par. 10(c) was added to the complaint) I have inferred that the Acting General Counsel intended to refer to the rule described in par. 10(d)(1) of the complaint, regarding a rule that allegedly prohibited employees from discussing verbal counselings. See GC Exh. 2(c), pars. 10(c)–(d).

[172] I hereby grant the Acting General Counsel's posttrial request to amend par. 10(h) of the complaint to allege that both Lopiccolo and Beagle (instead of Beagle alone, as originally alleged) informed employees on or about June 3, 2010, that it would be futile to support the Union as their bargaining representative. See GC Posttrial Br. at 47 fn. 16. It is just to allow the proposed amendment because the allegation was fully litigated (see Tr. 2068–2069, 2161–2162, 2179), and the addition of Lopiccolo does not come as a surprise given the testimony that Mendoza offered. See *Stagehands Referral Service*, 347 NLRB at 1171 (describing three factors to consider in determining whether it would be just to accept a proposed amendment to the complaint: whether there was lack of surprise or notice; whether the General Counsel offered a valid excuse for its delay in moving to amend; and whether the matter was fully litigated). I note, however, that the issue is ultimately moot, because as described below, I have recommended dismissing the allegation in par. 10(h) of the complaint.

[173] During his testimony, Mendoza used a calendar to refresh his memory about the dates that various incidents occurred. Mendoza's references to the calendar did not undermine his overall credibility

[174] Employee remarks to third parties (including customers who may be addressed directly or are within earshot) generally qualify as protected activity under the Act. See, e.g., *Sacramento Union*, 291 NLRB 540, 549 (1988) (letter written to the employer's advertisers seeking help in a labor dispute was protected activity under the Act), enfd. 889 F.2d 210 (9th Cir. 1989); *Saddle West Restaurant*, 269 NLRB 1027, 1041–1043 (1984).

Union and the casino that were overheard by a nearby customer and reported in a complaint to the casino. Mendoza's remarks, however, were protected activity. As the Board has explained, activities such as Mendoza's (prounion statements made in the presence of customers) are protected unless they are grossly or seriously disruptive and therefore reasonably likely to disturb the retail customer-salesperson relationship.[175] *Thalassa Restaurant*, 356 NLRB No. 129, slip op. at 1 fn. 3, 19–20 (2011); *Saddle West Restaurant*, 269 NLRB at 1042. Mendoza's comments remain protected because they were not grossly disruptive as those terms have been interpreted by the Board—to the contrary, while Mendoza's remarks mildly portrayed the Respondent in a negative light, there is no evidence that Mendoza used profanity, raised his voice, enlisted a group of people to join him in his conduct, or otherwise engaged in conduct that was grossly or seriously disruptive. Compare *Thalassa Restaurant*, 356 NLRB No. 129, slip op. at 1 fn. 3, 19–20 (employee who came to restaurant with 20–25 people to deliver a letter engaged in protected activity—group behaved in an orderly manner and conduct was not seriously disruptive); *Saddle West Restaurant*, 269 NLRB at 1042 (employee's brief confrontation with coworkers about supporting the union was not seriously disruptive, even if it was made within earshot of customers) with *Restaurant Horikawa*, 260 NLRB 197, 198 (1982) (employee engaged in seriously disruptive conduct by entering the restaurant with 30 demonstrators during peak hours and staging a boisterous protest—activity was therefore not protected). And, since Mendoza's activity was protected, the Respondent violated Section 8(a)(3) and (1) when it disciplined Mendoza on February 23 for the remarks that were reported in the customer complaint.[176]

Turning to the February 25 allegations, I find that the Respondent violated the Act when it prohibited Mendoza from speaking at the February 25 preshift meeting, and when it disciplined Mendoza for attempting to speak at the February 24 and 25 preshift meetings. The evidentiary record shows that a few days after Mendoza began his union activities, the Respondent (through Beagle and Teixeira) began barring him from speaking at preshift meetings. Although the Respondent asserted that Mendoza "interrupted" the meetings, I am not persuaded by that explanation because the Respondent's actions (barring Mendoza from speaking at the meeting altogether, instead of, for example, simply giving him a chance to speak after the manager finished reading the Sound Byte) are more consistent with the belief that Mendoza's prounion comments simply were not welcome. By denying Mendoza a benefit that he previously enjoyed (the right to open discussion at preshift meetings) because he supported the Union, and by announcing and enforcing an overly broad and discriminatory rule that prohibited employees from discussing issues of common concern (such as the union organizing campaign), the Respondent violated Section 8(a)(3) and (1) of the Act.. See *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1 (explaining that it is unlawful to change employee working conditions simply because they support the union); *NLS Group*, 352 NLRB at 745 (noting that work rules that explicitly restrict protected activity, or can be reasonably construed as restricting protected activity, are unlawful); *Parts Depot, Inc.*, 332 NLRB at 673 (finding that an employer's new "open door" policy was a benefit offered to employees); (see also GC Exh. 2(c), par. 10(c).)

I also find that the Respondent violated Section 8(a)(3) and (1) of the Act when it gave Mendoza a verbal counseling (a form of discipline) on February 25 for interrupting the February 24 and 25 preshift meetings. The *Wright Line* framework does not apply to this allegation because the Respondent explicitly disciplined Mendoza for engaging in protected activity (in the form of questioning the Respondent about antiunion Sound Bytes that were read at preshift meetings). Under that circumstance, the only issue is whether Mendoza's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB at 510. Specifically, when an employee is disciplined for conduct that is part of the res gestae of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Co. of America*, 338 NLRB 20 (2002). In making this determination, the Board examines the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Stanford Hotel*, 344 NLRB at 558 (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

The *Atlantic Steel* factors support Mendoza. Mendoza attempted to speak at a preshift meeting, a forum in which the Respondent had customarily permitted employees to make comments. The subject matter was also appropriate, as Mendoza merely attempted to respond to the antiunion sentiments in a Sound Byte that the Respondent read at the meetings. And, the nature of Mendoza's "outburst" was very mild (if it can be characterized as an outburst at all), as the evidentiary record shows that he raised his hand during the meeting and tried to speak in response to the Sound Byte. While Mendoza's "outburst" was not provoked by an unfair labor practice, the circumstances as a whole show that Mendoza did not engage in egregious conduct sufficient to remove it from the Act's protection. Thus, the Respondent violated Section 8(a)(3) and (1) when it disciplined Mendoza for engaging in protected activity

[175] The Board has recognized that in some circumstances (particularly in a commercial setting such as a restaurant), there is some inherent tension between an employee's interest in exercising rights that presumptively are protected by Sec. 7 of the Act, and the employer's interest in maintaining discipline and operating an efficient and profitable business. See, e.g., *Saddle West Restaurant*, 269 NLRB at 1042. The standard that I have stated above (that activity is protected unless it is seriously disruptive) reflects the balance that the Board has struck between the competing interests.

[176] Put another way, Mendoza did not engage in conduct that was so egregious as to remove it from the protection of the Act. While the location of Mendoza's remarks may not have been ideal given the proximity of customers, the nature and subject matter of his remarks were not so out of line as to render his remarks unprotected. See *Stanford Hotel*, 344 NLRB at 558, 558 (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

at the February 24 and 25 preshift meetings.[177] (See GC Exh. 2(c), par. 15(e).) I also find that the Respondent did not successfully repudiate the violation when it rescinded the discipline in September 2010. At a minimum, the attempted repudiation was not timely, as the discipline remained in effect for over six months before it was rescinded. See *Passavant Memorial Area Hospital*, 237 NLRB at 138 (explaining that timeliness is a factor that is relevant to whether repudiation is effective).

The Acting General Counsel did miss the mark with one of its allegations regarding February 25, as it did not meet its burden of proving that Hawes unlawfully engaged in surveillance and prohibited employees from discussing verbal counselings issued by the Respondent. (See GC Exh. 2(c), par. 10(d).) While the Acting General Counsel presented evidence that Hawes directed Mendoza and his coworker to stop talking, the evidence did not show that Hawes' directive was aimed at protected activity (such as a discussion about discipline) as opposed to a simple directive to stop talking altogether and focus on the work at hand. See *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1439 (noting that an employer may tell employees who have stopped work to talk to get back to work). Further, Mendoza admitted that it was not unusual for managers such as Hawes to walk around the buffet and give work-related instructions to employees. Hawes' conduct on February 25 was consistent with that past practice. Because of these deficiencies, I cannot find that Hawes unlawfully prohibited employees from discussing verbal counselings, nor can I find that he engaged in unlawful surveillance to enforce such a prohibition. Accordingly, I recommend that the allegations in paragraph 10(d) of the complaint be dismissed.[178]

Finally, I recommend that the allegations in paragraph 10(h) of the complaint be dismissed. The Acting General Counsel alleged that the Respondent informed employees (on June 3) that it would be futile to support the Union as their bargaining representative, but Mendoza's testimony did not bear that out. As Mendoza admitted, Beagle only read a Sound Byte on June 3, and I find that nothing in that Sound Byte conveyed a message that it would be futile for employees to support the Union. Given the lack of any other evidence, the Acting General Counsel did not meet its burden of proof for the allegation in paragraph 10(h) of the complaint.

In sum, I find that the Respondent violated Section 8(a)(1) of the Act by threatening employees (through Lopiccolo on February 22) with adverse employment action for speaking about the Union in front of customers. (GC Exh. 2(c), par. 10(a).) I additionally find that the Respondent violated Section 8(a)(3) and (1) of the Act by denying employees (through Teixeira on February 25) benefits in the form of open discussion at preshift meetings because they supported the Union, and orally issuing and enforcing an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern, including, but not limited to, the union organizing campaign. (GC Exh. 2(c), par. 10(c).)

I also find that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Mendoza on February 23 for engaging in protected activity within earshot of customers, and by disciplining Mendoza on February 25 for engaging in protected activity at preshift meetings. (GC Exh. 2(c), pars. 15(d), (e).)

I recommend that the allegations in paragraphs 10(d) and 10(h) of the complaint be dismissed.

3. Hilda Griffin—complaint paragraphs 10(e), (f) and (j), and 15(k)

a. Findings of fact

Hilda Griffin, who works as a casino porter at Sunset Station, began wearing a Union button to work on February 19, 2010. (Tr. 1941–1942.) On February 27, Griffin had just begun a scheduled break when Internal Maintenance Supervisor Dragan Buljugija called and advised Griffin that one of the bathrooms she was assigned to clean was dirty and needed attention after her break. (Tr. 1943); (see also GC Exhs. 36(j), (l)) (noting that Buljugija was following up on a customer complaint that initially was made to Rewards Center Supervisor Joyce Faulkner). When Griffin inspected the bathroom after her break, she only saw three–four paper towels that had been thrown on the sink counter. (Tr. 1943; GC Exh. 36(l).)

On March 3, the next day that Griffin was at work,[179] Buljugija called her to his office for a meeting. (Tr. 1944.) Buljugija told Griffin that she was "acting like a boss" and not working since she began wearing a union button. Griffin began crying and responded that she had worked too hard for Buljugija to tell her that, and added that she thought everything was happening because of her union button. Buljugija told Griffin to take her button off, and Griffin refused. Buljugija then gave Griffin a verbal counseling for not keeping the bathroom up to the Respondent's cleanliness standards on February 27.[180] Griffin refused to sign the warning. (Tr. 1945; GC Exh. 34.)

[177] The Board's analysis in *Beverly California Corp.* supports my conclusion. In that case, the Board explained that an employee's intemperate conduct during the course of engaging in protected activity at a captive audience meeting is permitted some leeway without losing the Act's protection. 326 NLRB 232, 233 fn. 5, 277–278 (1998). Mendoza's conduct was not unduly disruptive, and his attempts to speak at the meeting do not constitute insubordination in light of the Respondent's past practice of permitting (and indeed encouraging) employee input at preshift meetings and in other settings. See id. (employee who repeatedly interrupted a supervisor during a 3–5-minute period during a staff meeting and expressed her desire to ask a question did not lose the Act's protection).

[178] The Acting General Counsel does not allege that Hawes was attempting to enforce the written language in the verbal counseling form that employees should only discuss counseling sessions with management or human resources, and thus I have not considered that issue here. See GC Exh. 38. However, I note that the Acting General Counsel did challenge the record of counseling language in par. 7 of the complaint in Case 28–CA–23224. My analysis of that allegation can be found, supra, at sec. V(B)(2).

[179] Griffin was not at work from February 28 through March 2. Tr. 1964–1965; R. Exh. 119.

[180] The verbal counseling stated as follows: "On February 27th, 2010, at 8:50 pm only 5 minutes after Hilda went on her break I received a call from PBX of Guest complaint about [the Feast buffet] Ladies room not being clean. After inspection it was determined that Hilda's restroom was not up to the Company's Cleanliness Standards." GC Exh. 34.

The next day (March 4), Griffin contacted Human Resources Representative Stephanie Riga and contested the verbal counseling that she received from Buljugija. (Tr. 1945–1946; GC Exhs. 36(l)–(m).) Griffin asserted that she works hard and that she not received any complaints about her job performance in the 2–3 years that she had worked at the casino. (Tr. 1946; GC Exh. 36(l).) Griffin added that she had been working harder that ever since she began wearing her union button, and noted that Buljugija asked her to take off her union button even though she had a right to wear it. (Tr. 1946; GC Exh. 36(m).)

Riga followed up on Griffin's concerns by speaking to Faulkner about the condition of the bathroom when she inspected it on February 27. Faulkner reported that she observed a lollipop stick on the bathroom floor, and noted that it smelled bad in the bathroom. Riga consulted with another supervisor about the matter, and concluded that based on Faulkner's observations, there was not enough to justify the verbal counseling. (GC Exh. 36(m).) Accordingly, on March 5 (at Riga's direction), Buljugija apologized to Griffin and rescinded the March 3 verbal counseling. (Tr. 1946; GC Exhs. 36(d), (m).)

On March 14, Buljugija called Griffin and again told her that one of her bathrooms needed attention.[181] (Tr. 1947.) When Griffin arrived at the bathroom, she noticed that Faulkner was present and asked Faulkner if she thought the bathroom was dirty and asked if Faulkner knew who might have complained to Buljugija. (Tr. 1947; GC Exh. 36(h).) Griffin asked Faulkner to help her by telling Buljugija that the bathrooms were clean, noting that she recently received a warning from Buljugija. (Tr. 1947.) According to Faulkner, Griffin spoke to her when casino guests were present; Griffin testified that no one else was present when she spoke to Faulkner. (Tr. 1993; GC Exhs. 36(g), (h).) After the exchange with Griffin, Faulkner called Buljugija (and also prepared a written statement) to complain that Griffin, while guests were present, accused her of making a complaint about the bathroom. (GC Exh. 36(g).)

Later in the evening, Buljugija called Griffin to his office. (Tr. 1947.) Buljugija gave Griffin a verbal counseling for interpersonal relations, stating that "Griffin engaged in a verbal confrontation with another Team Member [Faulkner] in front of the Guests. This is unacceptable behavior." (Tr. 1947; GC Exh. 36(c).) Buljugija added that if Riga rescinded the warning, he would just give Griffin another one because he had plenty of paper. (Tr. 1947.) Griffin asked Buljugija if the warning was because of her Union button or for personal reasons, prompting Buljugija to tell Griffin to take her button off. Griffin refused, and went home. (Tr. 1948.)

On March 15, Griffin contacted Riga about the March 14 warning. (Tr. 1948; GC Exh. 36(h).) Riga spoke with Faulkner, and Faulkner reiterated that she was upset that Griffin, in front of casino guests, accused her of complaining about the bathroom. (GC. Exh. 36(h).) Riga then notified Griffin that the verbal warning would be upheld. (Tr. 1948; GC Exhs. 36(h)–(i).)

[181] Buljugija received a complaint from the casino cage manager that the bathroom needed attention because two toilets needed to be flushed, the smell was unbearable, and she had overhead two casino guests commenting about how disgusted they were. GC Exh. 36(f).

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) because Buljugija (on or about March 3, 2010) orally issued and enforced an overly broad and discriminatory rule prohibiting employees from wearing Union buttons. (GC Exh. 2(c), par. 10(e).) The complaint also alleges that on or about March 14, 2010, the Respondent disciplined Griffin, and Buljugija threatened employees with further discipline because of their union support. (GC Exh. 2(c), pars. 10(f), (j); 15(k)); (see also Tr. 1951).[182]

I found Griffin to be a credible witness. Griffin was assertive and detailed in her testimony, and held up despite extensive and vigorous cross-examination. I have considered the fact that Griffin failed to mention Buljugija's remarks about her Union button in her affidavit and in her two reports to the Union (see Tr. 1971) (report to Union regarding March 3 discipline); (Tr. 1985) (report to Union regarding March 14 discipline); (Tr. 2030–2031) (Board affidavit, regarding March 14 discipline). (See also Tr. 1982) (stating that Riga's writeup of Griffin's concerns about the March 3 warning was complete, even though the writeup did not mention any comments that Buljugija made about Griffin's union button). While those omissions are relevant to the issue of credibility, I have given more weight to Griffin's demeanor on the stand and the fact that Griffin was reluctant to approach the Union about Buljugija's conduct. Specifically, Griffin prepared an incident report for the Union about the March 3 warning, but she refused to turn the report in until March 16, after she received the March 14 verbal counseling. (Tr. 2009–2010.) I find that Griffin's conduct and demeanor did not suggest in any way that she fabricated her testimony about Buljugija's remarks about her union activity.

Turning to the 8(a)(1) allegations, the Acting General Counsel alleged that the Respondent orally issued and enforced an overly broad and discriminatory rule (on March 3) that prohibited employees from wearing union buttons. (GC Exh. 2(c), par. 10(e).) That allegation is inapposite, however, because the evidence shows that Buljugija did not prohibit Griffin from wearing her union button. Instead, I find that Buljugija's directive to Griffin that she take off her union button was a threat that she would risk further discipline unless she removed the button, as alleged in paragraph 10(f) of the complaint. As Griffin testified, on both March 3 and 14, she expressed her opinion

[182] The Acting General Counsel voluntarily withdrew the allegation in par. 10(j) of the complaint because it erroneously believed that the allegation was identical to the misconduct alleged in par. 10(e). See GC Posttrial Br. at 21 fn. 8. In fact, when the Acting General Counsel amended the complaint during trial, it asserted that the alleged violation in par. 10(j) occurred on March 14, 2010. Tr. 1951. Thus, the written complaint contains a clerical error in par. 10(j) insofar as it specifies an incorrect date for the allegation (March 3 instead of March 14). See GC Exh. 2(c), par. 10(j).

I will hold the Acting General Counsel to its request to withdraw the allegation in par. 10(j), and thus recommend that the allegation in par. 10(j) be dismissed. I note, however, that the issue is moot since as described below, I have found that the Respondent committed a different Sec. 8(a)(1) violation than the one alleged in pars. 10(e) and (j)) of the complaint.

that Buljugija was disciplining her because she was wearing a union button. Buljugija's response on both days was the same—that Griffin should take her union button off.[183] By responding in that manner, Buljugija made it clear that Griffin could wear her union button, but only under the threat of further discipline for doing so.[184] I therefore find that the Respondent violated Section 8(a)(1) on both March 3 and March 14 by threatening Griffin with further discipline because of her union support (GC Exh. 2(c), par. 10(f)).[185] I also recommend that the allegation in paragraph 10(e) of the complaint be dismissed because it does not accurately describe the nature of the violation that occurred.

Regarding the allegation that the Respondent's decision to discipline Griffin on March 14 violated Section 8(a)(3) of the Act, I note as a preliminary matter that the *Wright Line* framework does not apply to this allegation because there is no dispute that the Respondent disciplined Griffin for conduct that she engaged in while attempting to defend herself against what she reasonably believed was a forthcoming unfair labor practice (specifically, another discriminatory writeup by Buljugija). Where there is no dispute that the employer took action against the employee because the employee engaged in activity that is protected under the Act, the only issue is whether the employee's conduct lost the protection of the Act because the conduct crossed over the line separating protected and unprotected activity. *Phoenix Transit System*, 337 NLRB at 510. As previously noted, the following factors are relevant: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Stanford Hotel*, 344 NLRB at 558 (citing *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979)).

The location of Griffin's exchange with Faulkner was not ideal, as it occurred in a bathroom commonly used by casino guests. However, the remaining *Atlantic Steel* factors support Griffin, even if I assume for the sake of argument that guests were in fact present during Griffin's discussion with Faulkner. The subject matter of the discussion weighs in Griffin's favor because Griffin reasonably feared that Buljugija was going use the complaint about the bathroom as a pretext for disciplining her because she continued to wear a union button. Understandably, Griffin approached Faulkner with the hope that Faulkner could assure Buljugija that the bathroom was clean (or alternatively serve as a witness in the event that Buljugija sought to discipline Griffin because of the bathroom). As for the nature of Griffin's conduct, there is no evidence that Griffin had an "outburst" of any real significance—to be sure, Faulkner did not like being confronted when guests were present, but there is no evidence that Griffin made any offensive or inflammatory remarks to Faulkner. And finally, Griffin's conduct was provoked by the unfair labor practice that the Respondent (through Buljugija) committed on March 3—Buljugija had already threatened Griffin with future discipline, and thus he provoked Griffin's conduct on March 14 when Griffin reasonably became concerned that Buljugija was in the process of making good on his earlier threat. Having considered the relevant factors, I find that Griffin did not engage in conduct on March 14 that was sufficiently egregious so as to remove it from the protection of the Act, and I find that the Respondent violated Section 8(a)(3) of the Act by disciplining Griffin for engaging in protected activity (in the form of protesting discriminatory discipline that Griffin reasonably anticipated).[186]

In sum, I find that the Respondent (through Buljugija) violated Section 8(a)(1) because Buljugija (on March 3 and 14) threatened Griffin with further discipline because of her Union support. (See GC Exh. 2(c), par. 10(f).) I also find that the Respondent violated Section 8(a)(3) and (1) by disciplining Griffin on March 14. (GC Exh. 2(c), par. 15(k).)

I recommend that the allegations in paragraphs 10(e) and 10(j) of the complaint be dismissed.

4. Dionicia Barraza—complaint paragraph 10(g)

a. Findings of fact

Dionicia Barraza testified about remarks that Executive Housekeeper Lynn Dunn allegedly made at an April 7, 2010 staff meeting. On direct examination, Barraza testified that Dunn: told employees not to sign union cards; stated that the Union was useless; and prohibited Barraza from speaking at the meeting (although according to Barraza, employees were similarly prohibited from speaking at meetings before Barraza began wearing a union button in February 2010). (Tr. 2042–2044.)

During cross-examination, however, Barraza agreed that her April 7 written report accurately described what transpired at the April 7 staff meeting (and was more reliable than her testimony). Barraza's report stated that: since she began wearing a Union button, the Respondent was looking at her more closely; employees were not allowed to talk at the staff meeting; and the Respondent planned to appeal if the workers "win over the union." (Tr. 2046–2048.)

[183] On March 14, of course, Buljugija added that if Griffin convinced the human resources department to rescind the warning he issued that day, he would simply give her another one because he had plenty of paper.

[184] The Respondent did not repudiate the March 3 violation when Buljugija apologized to Griffin and rescinded the verbal counseling on March 5. There is no evidence that Buljugija addressed his threat of future discipline when he apologized, and thus at best Griffin was left to speculate about whether she could wear her union button without risking further disciplinary action.

[185] The complaint only alleged that the unlawful threat of future discipline occurred on March 14. Because the issue of the threat was fully litigated and the events of March 3 and 14 are closely connected, I have found that the unlawful threat occurred on both dates. See *Pergament United Sales*, 296 NLRB at 335 ("It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.").

[186] The Respondent did present evidence that it coached Griffin for interpersonal relations before she began her union activities. See Tr. 1960; GC Exhs. 36(b), (k). As the Board has explained, however, that evidence of similar treatment is beside the point because the complaint allegation here is not governed by the *Wright Line* standard. *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010).

b. Discussion and analysis

The complaint alleges that the Respondent violated the Act because Dunn: informed employees that it would be futile for them to support the Union as their bargaining representative; threatened employees by telling them not to sign union membership cards; denied employees benefits in the form of open discussion at preshift meetings because they supported the Union; and orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing issues of common concern, including, but not limited to, the union organizing campaign. (GC Exh. 2(c), par. 10(g).)

I find that Barraza's admissions during cross-examination render her testimony unreliable, since Barraza essentially provided two distinctly different accounts of what was said at the April 7 meeting.[187] Because I cannot credit Barraza's testimony and no other evidence was offered in support of the allegations that Barraza attempted to address in her testimony, I recommend that the allegations in paragraph 10(g) of the complaint be dismissed.

L. Texas Station

1. Ignacio Martinez–complaint paragraphs 11(a), (b), (c), (d), and (e)

a. Findings of fact

On February 19, 2010, Ignacio Martinez and 9 of his coworkers were called into a mandatory meeting by Director of Facilities Joe Painter. (Tr. 3278–3279.) Martinez was the only employee at the meeting who was wearing a Union button. (Tr. 3291.) At the meeting, Painter spoke (in English) about the union organizing campaign. (Tr. 3327.) Some of his remarks were drawn from a Sound Byte, which reads as follows:

> Many Team Members have brought to our attention today that there is a lot of conversation at our properties about signing union cards. Apparently, the union is promising that they can protect people's jobs through the bankruptcy and guaranteeing that everyone will have a job and hours.
>
> How stupid do they think we are? There is no job security for the 10,000+ union members who have been layed off from all of the union casinos on the Strip. These members had union contracts and it didn't stop them from getting layed off. These union members had seniority and it didn't stop them from getting layed off. These union members continue to be unemployed with no pay and no benefits and are facing threats of eviction, foreclosure and no more unemployment benefits.
>
> How can the union protect Station Casinos' Team Members when they can't even protect their own members who pay them monthly for protection? The union likes to lie and make promises that they obviously haven't kept for their own members. Don't be fooled into thinking they're going to treat you any better.
>
> Let's continue to pull together, do our best, and "Just Say No" to the union's empty promises and menacing threats.

(Tr. 3279, 3328–3329; GC Exh. 6(e).)

Painter also added his own remarks about the union organizing campaign. For example, Painter asserted that his father had been in the Union and had not had a good experience. Painter also stated that he did not want there to be any talk about the Union in or out of the hotel, and said that if the Union came in, he and the other executives would quit. (Tr. 3279–3280.) Painter then pointed at Martinez and said that the Union was not going to have any success no matter how many buttons its supporters had. While laughing, Painter added that he was going to watching over Martinez and that he wanted to talk to Martinez after the meeting. (Tr. 3280) (noting that Painter did not followup on his statement that he wanted to talk with Martinez).

On March 1, Martinez and 8 other employees attended a meeting conducted by Housekeeping Manager Rosa Furtaw. (Tr. 3281.) Furtaw stated that the Union was not good, citing the problems that she had with the Union when she worked at the Monte Carlo casino. Furtaw also asserted that the Union desperately needed money, and would charge employees between $50 and $60 if they signed a union card. Furtaw added that the Union had been trying to organize the Respondent's employees for 20–25 years and had never succeeded—therefore she did not think that the Union would succeed this time around. (Tr. 3282.)

On May 12, Martinez and 8 other employees attended a meeting at which the following supervisors spoke: Director of Human Resources Joseph Hernandez; Team Member Relations Manager Nancy Lobato; Director of Security Randy McPherson; Painter; and General Manager Carol Thompson. (Tr. 3282.) Thompson stated that she was aware of the ongoing union organizing campaign. Thompson added that she did not want employees to sign union cards or listen to the Union, and would not tolerate the efforts by some employees to convince others to support the Union. (Tr. 3283.)

b. Discussion and analysis

The complaint alleges that the Respondent violated Section 8(a)(1) in the following ways:

1. On February 19, Painter: created an impression among employees that their union activities were under surveillance by the Respondent; orally issued and enforced an overly broad and discriminatory rule prohibiting employees from discussing the Union; threatened its employees with unspecified reprisals if they supported the Union as their bargaining representative; and threatened employees that the Respondent would engage in surveillance of their union activities. (GC Exh. 2(c), par. 11(a).)
2. On March 1, Furtaw threatened employees with unspecified reprisals if they supported the Union as their bargaining representative (GC Exh. 2(c), par. 11(b)).

[187] At most, the only consistent claim that Barraza made was that Dunn did not permit employees to speak at the preshift meeting. However, Barraza testified that Dunn followed the same rule before the union organizing campaign began, thereby admitting that Dunn did not impose the rule because of employees' union activity.

3. On May 12, Thompson threatened employees with unspecified reprisals if they supported the Union as their bargaining representative (GC Exh. 2(c), par. 11(d)).[188]

I found Martinez to be a credible witness. Martinez was clear and assertive in his testimony, and although he expressed some frustration with the length and persistence of cross-examination, he did not waver in the content of his testimony.

Initially, I note that I do not find that Painter created an impression that employee union activities were already under surveillance. The evidence in support of that theory is limited to the Sound Byte (GC Exh. 6(e)), which states that the Respondent learned of union activities (employees signing union cards) because it was notified of that fact by some employees. That evidence falls short of showing that Painter created an impression that the Respondent itself had placed union activities under surveillance. I therefore will recommend that paragraph 11(a)(1) be dismissed.

However, I find that other aspects of Painter's February 19 remarks indeed did violate the Act. Painter expressly told employees that they should refrain from talking about the Union in or outside of the casino. That statement violated Section 8(a)(1) because it announced an overly broad and discriminatory rule that prohibited union talk of any kind (while permitting employees to discuss other topics). *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1438–1439 (explaining that an employer violates Sec. 8(a)(1) when it permits employees to discuss nonwork-related subjects during worktime, but prohibits employees from discussing union-related matters); *NLS Group*, 352 NLRB at 745 (noting that work rules that explicitly restrict protected activity, or can be reasonably construed as restricting protected activity, are unlawful). Taking his remarks a step further, Painter singled out Martinez (the only employee at the meeting who was wearing a union button) and told him that the Union was not going to succeed and that he (Painter) was going to be watching over Martinez. Painter's warning to Martinez stood as an unlawful threat that Martinez risked unspecified reprisals and forthcoming surveillance because he supported the Union. *Metro One Loss Prevention Services*, 356 NLRB No. 20, slip op. at 1, 14.

In paragraph 11(b) of the complaint, the Acting General Counsel alleged that Furtaw also threatened employees with unspecified reprisals if they supported the Union. Martinez' testimony did not support that allegation. The evidence shows that Furtaw spoke about the union organizing campaign, her personal experience with the Union, and the cost of Union dues. The evidence does not show that Furtaw made any remarks that could be construed as threatening unspecified reprisals (for any reason, much less for union activity), and thus I will recommend that the allegation in paragraph 11(b) of the complaint be dismissed.

The Acting General Counsel did meet its burden of proving that Thompson (at the May 12 meeting) unlawfully threatened employees with unspecified reprisals if they engaged in union activities. I have credited Martinez' testimony that Thompson told employees (among other things) that she would not tolerate the efforts by some employees to convince others to support the Union. Thompson's remark (like Painter's remark on February 19) implicitly warned employees that they could face adverse employment action if they encouraged other employees to support the Union.

I find that the Respondent, through Painter on February 19, violated Section 8(a)(1) of the Act by: orally issuing and enforcing an overly broad and discriminatory rule prohibiting employees from discussing the Union; threatening its employees with unspecified reprisals if they supported the Union as their bargaining representative; and threatening employees that the Respondent would engage in surveillance of their union activities. (GC Exh. 2(c), pars. 11(a)(2)–(4).)

I find that the Respondent, through Thompson on May 12, 2010, violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they engaged in union activities GC Exh. 2(c), par. 11(d)).

I recommend that the allegations in paragraphs 11(a)(1), (b), (c), and (e) of the complaint be dismissed.

2. Rosa Herrera—complaint paragraphs 11(f) and (g), and 15(h) and (i)

a. Findings of fact

Rosa Herrera began wearing a union button to work on February 19, 2010. (Tr. 2884.) On or about March 1, Sanitation Supervisor Edwin Samayoa advised Herrera that he would be changing her work hours from noon to 8 to 3 p.m. to 11 p.m. because he needed her for the later time slot. Id.; (R. Exh. 177).[189] On or about the same day, the Respondent changed the

[188] The Acting General Counsel voluntarily withdrew the allegations in pars. 11(c) and (e) of the complaint. See GC Posttrial Br. at 24 fn. 9, 44 fn. 15.

I hereby deny the Acting General Counsel's posttrial request to amend the complaint to replace the allegation in par. 11(b) with an allegation that Furtaw made an unlawful statement of futility. See GC Posttrial Br. at 47 fn. 17. I also deny the Acting General Counsel's request to amend the complaint to allege that Thompson unlawfully created the impression of surveillance of union activities on May 12. See GC Posttrial Br. at 57 fn. 21. It would not be just to permit the proposed amendments at this posttrial stage because among other things, the proposed allegations were not fully litigated. See *Stagehands Referral Service*, 347 NLRB at 1171 (describing three factors to consider in determining whether it would be just to accept a proposed amendment to the complaint: whether there was lack of surprise or notice; whether the General Counsel offered a valid excuse for its delay in moving to amend; and whether the matter was fully litigated). See also Tr. 3287–3329, 3334–3335 (Respondent did not question Martinez about Furtaw's remarks, presumably because the Respondent did not believe that Martinez' testimony established that Furtaw threatened unspecified reprisals, as originally alleged); id. (Respondent did not question Martinez about Thompson's remarks until re-cross-examination, and even then did not address the theory of creating an impression of surveillance). I also note that the Acting General Counsel did not offer a valid excuse for its delay in moving to amend the complaint, particularly in light of the fact that made a different amendment (regarding Thompson) while Martinez was on the stand and available for questioning. See Tr. 3332–3333.

[189] Regarding the date of the schedule change, I have given more weight to Herrera's time sheet entries than I have to her testimony (in which Herrera asserted that her schedule changed on March 7). The time sheets show that Herrera worked the 3 to 11 p.m. shift on March 1,

work hours of one of Herrera's coworkers (employee B.N.) in a similar fashion (changing from noon to 8 to 3 p.m. to 11 p.m.). (Tr. 2969; R. Exh. 177.) Employee B.N. did not wear a Union button or otherwise indicate any support for the Union. (Tr. 2969.)

On March 8, Herrera began work at 3 p.m.. Near the end of Herrera's shift (at approximately 10 p.m.), Samayoa told her to clean the soda station, which entailed washing the walls, machines, drains, floors, coffee makers and ice makers. The assorted tasks normally required two people and took 7 hours to complete. (Tr. 2885.) Herrera began cleaning the soda station, but notified Samayoa at the end of her shift (11 p.m.) that she could not finish the assignment because it was too much work. Samayoa said that was fine, and advised Herrera (in response to her inquiry) that the 3 to 11 p.m. schedule would be her permanent assignment. Id.

Herrera returned to work on March 11 after 2 scheduled days off. (Tr. 2886.) In the early evening, Samayoa approached Herrera and yelled at her, stating that she did not finish her cleaning assignment from her last shift. Four coworkers were present at the time. Afterwards, Samayoa began: monitoring the time that Herrera spent in the bathroom; telling Herrera that she was "not on break" when she went to get a drink; and telling her that she could not speak to anyone, including her coworkers. Id.

On March 13, Herrera went to the employee dining room during her shift. General Manager Carol Thompson was present and asked Herrera how she was doing. Herrera said she was doing well, but asked Thompson if she could speak to her for 5 minutes about what was happening to her at work. (Tr. 2887.) Thompson agreed, and Herrera met with Thompson, Executive Chef Gerald (JR) Degan, and Director of Human Resources Joseph Hernandez in an office. Herrera told the group about: the changes that Samayoa made to her schedule; the pressure that Samayoa was putting on her; and Samayoa's practices of observing Herrera when she used the bathroom, tried to get a drink of water or spoke to her coworkers. (Tr. 2888–2889.) Thompson promised to conduct an investigation,[190] and Herrera left the office. (Tr. 2889–2890.) Shortly thereafter, Degan approached Herrera at her work station and gave her a yellow certificate in recognition of her good work. (Tr. 2890; GC Exh. 51.)[191] Degan gave Herrera a second yellow certificate on March 14, 2010.[192] (Tr. 2892.) The certificates were part of an employee recognition program that the Respondent began in January 2010, and Herrera agreed that of the various coworkers who had previously received certificates, some indicated that they supported the Union, and others had not indicated any Union support. (Tr. 2968.)

The Respondent changed Herrera's schedule back to noon to 8:00 p.m., commencing on or about May 12. (Tr. 2903, 2971; R. Exh. 178.) The Respondent also changed B.N.'s schedule back to the noon to 8:00 p.m. time slot, commencing on or about May 10. (Tr. 2971–2972; R. Exh. 178.)[193]

b. Discussion and analysis

The complaint alleges that on or about March 8, the Respondent changed Rosa Herrera's work hours, and imposed onerous working conditions on Herrera. (GC Exh. 2(c), pars. 15(h), (i).)

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by (on or about March 13 and 14) granting its employees benefits in the form of a recognition certificate to dissuade them from supporting the Union. (GC Exh. 2(c), pars. 11(f), (g).)

I found Herrera to be a credible witness. Herrera testified in a forthright manner, and gave patient and clear answers in response to extensive and vigorous cross-examination. However, as described below, Herrera's testimony (and the accompanying relevant evidence in the record) fell short of proving the allegations covered by her testimony by a preponderance of the evidence.

The discrimination allegations are covered by the Board's decision in *Wright Line*. Herrera's testimony shows that the Respondent, through Samayoa, did change her work hours and subject her to more onerous working conditions (including giving her difficult work assignments that could not be finished in the time allotted, monitoring her bathroom and water breaks, and prohibiting her from speaking with coworkers). The record also shows that Herrera engaged in union activity by wearing her union button to work, and I infer that Samayoa was aware of that activity since Herrera wore her button openly and in plain view. The Acting General Counsel's initial showing falls short, however, on the issue of union animus. See *Consolidated Bus Transit, Inc.*, 350 NLRB at 1065 (noting that union animus is one of the elements of the Acting General Counsel's initial showing of discrimination). The record on that issue does not identify any direct evidence of animus, and the primary circumstantial evidence of animus is the timing between Herrera's decision to wear her union button and when the adverse employment actions occurred (a period of 11 days, from February 19 to March 1).[194] In this instance, the timing of the

4, 5, 6, 7, and 8, while employee B.N. worked a similar shift on March 2, 3, 4, 5, and 6. R. Exh. 177.

[190] Later that day, Herrera observed Thompson calling other employees into her office for meetings. Tr. 2889.

[191] Herrera cannot read, and thus was not able to testify about the specific contents of the certificate. Tr. 2892. The Acting General Counsel, however, was able to produce all of the certificates that Herrera received (the two at issue here, and two additional certificates that Herrera received in April and September 2010). I admitted the certificates into evidence because the certificates are unique (small yellow pieces of paper) and Herrera's testimony established that she kept the certificates in her possession (in her purse and then in her home in a folder) until she provided them to the Acting General Counsel's office for copying. Tr. 2899–2900, 2901, 2923–2924.

[192] Herrera did not disagree with the comments on the recognition certificates about the quality of her work (specifically, that she "maintained excellent standards in Feast [a hotel restaurant] and assisted elsewhere," and that she always does "a great job" and is "always an important part of this team"), but did feel that the timing of the awards was like an insult or a slap in the face. Tr. 2890, 2967–2968.

[193] Herrera worked her final 3 to 11 p.m. shift on May 9, while B.N.'s final 3 to 11 p.m. shift was on May 8. Both Herrera and B.N. were off duty until the dates specified above when they returned to the noon to 8 p.m. shift. R. Exh. 178.

[194] The Board has held that "an employer's anti-union comments, while themselves lawful, may nevertheless be considered as background evidence of animus towards employees' union activities." *Tim*

adverse employment actions is not enough to carry the Acting General Counsel's burden of proof, particularly in the absence of any other evidence of animus and the fact that Samayoa also changed the work schedule of employee B.N., who worked with Herrera and did not indicate any support for the Union. Samayoa did single Herrera out for more onerous working conditions, but the evidence of animus is deficient since the record does not show that Samayoa was motivated by antiunion sentiment (as opposed to, for example, displeasure with Herrera because she did not complete the work that he assigned). Since the Acting General Counsel did not make an initial showing that Herrera's union activity was a substantial or motivating factor in the Respondent's actions, or demonstrate that the Respondent discriminated against Herrera because of her union activities, I recommend that the allegations in paragraphs 15(h) and (i) of the complaint be dismissed.

The allegations relating to the recognition certificates that Herrera received on March 13 and 14, suffer from a similar deficiency. While an employer's motive is generally not relevant to the merits of an alleged violation of Section 8(a)(1), employer motive *is* relevant to allegations of unlawful promises or conferral of benefits, as the General Counsel must show that the employer's motive for conferring a benefit during an organizing campaign was to interfere with or influence the union organizing. See *Manor Care of Easton, PA*, 356 NLRB No. 39, slip op. at 21 (2010). Specifically, an employer may prevail against such an allegation by showing a legitimate business reason for granting benefits during an organizing campaign. See *Yale New Haven Hospital*, 309 NLRB at 366 (noting that an employer may establish a legitimate business reason for promising or providing benefits to employees by showing that the benefits were granted in accordance with a preexisting program).

On the issue of motive, the undisputed facts show that the Respondent began awarding employee recognition certificates in January 2010, before the union organizing campaign began. The facts also show that the Respondent awarded Herrera two certificates virtually immediately after she complained about how Samayoa was treating her. However, the record does not include sufficient evidence that the Respondent gave Herrera the recognition certificates because of a motive to influence her views about the union organizing campaign. None of the Respondent's supervisors (Thompson, Degan or Hernandez) referred to the union organizing campaign when they met with Herrera (at Herrera's request). Instead, the facts show that the supervisors focused on getting to the bottom of Samayoa's conduct in light of the concerns that Herrera raised. With that background, it is more likely than not that the Respondent gave Herrera the recognition certificates pursuant to an established employee recognition program because the Respondent was motivated by a desire to reassure and placate Herrera (a valued employee) in light of the mistreatment that she experienced from Samayoa earlier in the month.[195] Accordingly, I find that the Acting General Counsel did not meet its burden of proof for these allegations.

In sum, I recommend that the allegations in paragraphs 11(f) and (g), 15(h) and (i) be dismissed because the Acting General Counsel did not prove those allegations by a preponderance of the evidence.

CONCLUSIONS OF LAW[196]

1. By maintaining and enforcing, since on or about April 15, a rule on its "Record of Counseling" forms that states "[t]his counseling session is confidential and should only be discussed with Management or Human Resources," the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 1(fb), par. 7 (Case 28–CA–23224).)

2. By threatening employees on April 1 with unspecified reprisals if they selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 5(g)(1) (Aliante Station).)

3. By threatening employees on April 1 with additional work if they selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 5(g)(2) (Aliante Station).)

4. By threatening employees on April 1 with losing benefits if they selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 5(g)(3) (Aliante Station).)

5. By issuing and enforcing an overly broad and discriminatory rule on February 19 that prohibited employees from speaking with or listening to union supporters, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 6(a)(1) (Boulder Station).)

6. By asking employees on February 19 to advise the Respondent of the union activities of other employees, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 6(a)(2) (Boulder Station).)

7. By advising employees on February 19 to call the police if union supporters refused to leave their homes after being asked to do so, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 6(a)(3) (Boulder Station).)

8. By threatening employees on February 19 not to sign union membership cards, Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), pars. 6(b)(1), (c), (i)(1) (Boulder Station).)

9. By promising benefits to employees on February 19 in the form of solving their problems to dissuade them from supporting the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), pars. 6(b)(2), (i)(2) (Boulder Station).)

10. By informing employees on February 19 that it would be futile for them to support the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 6(b)(3) (Boulder Station).)

Foley Plumbing Service, 337 NLRB at 329 and fn. 5. Consistent with that authority, I have considered the evidence that the Acting General Counsel presented about the Respondent's Sound Byte campaign, and I find that the Sound Byte campaign is too remote from the allegations that Herrera addressed in her testimony to serve as evidence of animus.

[195] Put another way, I find that the Respondent gave Herrera the recognition certificates as a form of an apology for Samayoa's behavior (behavior that was improper in the Respondent's view, but has not been shown to violate the Act).

[196] All violations of Sec. 8(a)(3) of the Act set forth below are also both independent and derivative violations of Sec. 8(a)(1) of the Act.

11. By unlawfully interrogating Jacob Jimenez on February 23 about his union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 6(h)(2) (Boulder Station).)

12. By engaging in surveillance of Ana Galo on February 25 to discover her union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(a) (Fiesta Henderson).)

13. By engaging in surveillance of Ana Galo on February 27 to discover her union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(b)(1) (Fiesta Henderson).)

14. By interrogating Ana Galo on February 27 about her union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(b)(2) (Fiesta Henderson).)

15. By threatening Ana Galo on February 27 by inviting her to quit her employment because she supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(b)(3) (Fiesta Henderson).)

16. By punishing Ana Galo and Norma Flores on February 28 by making them work alone because they supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(c)(1) (Fiesta Henderson).)

17. By orally issuing and enforcing an overly broad and discriminatory rule prohibiting employees who were union supporters from assisting each other at work, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(c)(2) (Fiesta Henderson).)

18. By denying work opportunities to Galo on March 10 and 14 because of her union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 15(l) (Fiesta Henderson).)

19. By orally issuing and enforcing a rule on March 19 that prohibited Maria Camacho from moving to another station without permission because she had engaged in union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 12(f) (Fiesta Henderson).)

20. By imposing more onerous working conditions on Maria Camacho because of her union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 15(n) (Fiesta Henderson).)

21. By denying Jose Reyes benefits on April 13 in the form of open discussion at preshift meetings because he supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 12(g) (Fiesta Henderson).)

22. By suspending Adelina Nunez on May 29 and by discharging Nunez on June 2 because she engaged in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (GC Exh. 1(fb), par. 8 (Case 28–CA–23224) (Fiesta Henderson).)

23. By orally issuing and enforcing an overly broad and discriminatory rule on February 27 that prohibited employees from soliciting for the Union during work hours, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 13(a)(1) (Fiesta Rancho).)

24. By threatening employees on February 27 with unspecified reprisals if they engaged in union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 13(a)(2) (Fiesta Rancho).)

25. By threatening employees from on or about March 2010 through May 2010, by telling them not to sign union membership cards, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 13(c)(1) (Fiesta Rancho).)

26. By threatening employees with job loss if they supported the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 13(c)(2) (Fiesta Rancho).)

27. By interrogating Teresa Debellonia about her union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(c)(1).)

28. By interrogating Michael Wagner on February 24 about his union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(d)(1) (Green Valley Ranch).)

29. By threatening employees on February 24 with stricter enforcement of work rules if employees selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(d)(4) (Green Valley Ranch).)

30. By threatening employees on February 24 that the Respondent would end the ability of employees to talk to their supervisors and managers if employees selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(d)(5) (Green Valley Ranch).)

31. By promising employees increased benefits on February 24 if they refrained from union organizing activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(d)(6) (Green Valley Ranch).)

32. By interrogating Michael Wagner on February 26 about his union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(e)(1) (Green Valley Ranch).)

33. By threatening employees on February 26 with closer supervision and stricter enforcement of work rules if employees selected the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(e)(2) (Green Valley Ranch).)

34. By promising employees increased benefits on February 26 if they refrained from union organizing activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 14(e)(3) (Green Valley Ranch).)

35. By orally issuing and enforcing a discriminatory rule on March 25 prohibiting off duty employees from engaging in union activities in the employee parking garage at the Green Valley Ranch facility, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 14(f) (Green Valley Ranch).)

36. By orally issuing and enforcing a discriminatory rule on June 18 prohibiting employees from engaging in union activities in the employee parking garage at the Green Valley Ranch facility, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 14(g)(2) (Green Valley Ranch).)

37. By suspending Teresa Debellonia on March 18, 2011, and by discharging Debellonia on March 24, 2011, because she engaged in union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (GC Exh. 1(c), par. 6 (Case 28–CA–23434) (Green Valley Ranch).)

38. By suspending Teresa Debellonia on March 18, 2011, and by discharging Debellonia on March 24, 2011, because she filed charges or gave testimony under the Act, the Respondent violated Section 8(a)(4) and (1) of the Act. (GC Exh. 1(c), par. 7 (case 28–CA–23434) (Green Valley Ranch).)

39. By threatening Antonia Gutierrez on February 19 with unspecified reprisals if she continued to support the Union as her bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(b)(1) (Palace Station).)

40. By discriminating against Gutierrez by summoning her to the human resources office on February 19 because she supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(b)(2) (Palace Station).)

41. By unlawfully engaging in surveillance of Celina Ballinas' union activities on February 19, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(c)(1) (Palace Station).)

42. By grabbing Celina Ballinas' arm/shoulder because she supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(c)(2) (Palace Station).)

43. By denying employees benefits on March 31 in the form of open discussion at preshift meetings because they supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 7(j)(1) (Palace Station).)

44. By orally issuing and enforcing an overly broad and discriminatory rule on March 31 that prohibited its employees from discussing issues of common concern (such as the union organizing campaign) at preshift meetings, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 7(j)(2) (Palace Station).)

45. By denying employees benefits on April 10 in the form of open discussion at preshift meetings because they supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(l)(1) (Palace Station).)

46. By orally issuing and enforcing an overly broad and discriminatory rule on April 10 that prohibited its employees from discussing issues of common concern (such as the union organizing campaign) at preshift meetings, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 7(l)(2) (Palace Station).)

47. By threatening employees with discharge on February 19 if they engaged in union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(a) (Red Rock).)

48. By interrogating employees on February 19 about their union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), pars. 8(b), (c) (Red Rock).)

49. By interrogating Hilda Sanchez on February 20 about her union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(e) (Red Rock).)

50. By engaging in surveillance of Queen Ruiz on February 20 to discover her union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(g)(1) (Red Rock).)

51. By orally issuing and enforcing a discriminatory rule on February 20 prohibiting off duty employees from engaging in union activities at the Red Rock facility, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 8(g)(2) (Red Rock).)

52. By prohibiting Queen Ruiz (an off duty employee) from accessing the Red Rock facility on February 20 because of her union activities, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 8(g)(3) (Red Rock).)

53. By orally issuing and enforcing an overly broad and discriminatory rule on February 21 prohibiting Fermina Medina from wearing her union button, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(k) (Red Rock).)

54. By interrogating Robert Brescia on February 21 about his union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(h) (Red Rock).)

55. By threatening Robert Brescia on February 21 with unspecified reprisals if he supported the Union as his bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(s) (Red Rock).)

56. By soliciting complaints and grievances from employees on February 21 and thereby promising increased benefits and improved terms and conditions of employment if employees refrained from union organizing activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(i) (Red Rock).)

57. By granting benefits to Jesus Hernandez on February 21 in the form of a certificate and gift card to dissuade him from supporting the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(j) (Red Rock).)

58. By soliciting complaints and grievances from Leonardo Calderon on February 23 and thereby promising increased benefits and improved terms and conditions of employment if Calderon refrained from union organizing activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(r) (Red Rock).)

59. By threatening employees on March 11 with unspecified reprisals if they signed union membership cards, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 8(o) (Red Rock).)

60. By threatening employees on February 19 with reduced work hours because they engaged in union activities, the Respondent violated Section 8(a)(1) of the Act. (GC Exh. 2(c), par. 9(d)(1) (Santa Fe).)

61. By threatening employees on February 19 with the loss of the graveyard shift because they engaged in union activities, the Respondent violated Section 8(a)(1) of the Act. (GC Exh. 2(c), par. 9(d)(2) (Santa Fe).)

62. By telling employees on February 24 that it would be futile for them to support the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (GC Exh. 2(c), par. 9(f) (Santa Fe).)

63. By orally issuing and enforcing a discriminatory rule on March 18 prohibiting employees from engaging in union activities in the parking garage at the Santa Fe facility, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 9(g) (Santa Fe).)

64. By engaging in surveillance of Lisa Knutson on June 9 to discover her union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 9(p)(1) (Santa Fe).)

65. By orally issuing and enforcing a discriminatory rule on June 9 prohibiting employees from engaging in union activities in the parking garage at the Santa Fe facility, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 9(p)(2) (Santa Fe).)

66. By denying Lisa Knutson benefits on June 17 in the form of open discussion at preshift meetings because she supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 9(q)(1) (Santa Fe).)

67. By orally issuing and enforcing an overly broad and discriminatory rule on June 17 that prohibited its employees from discussing issues of common concern (such as the union organizing campaign) at preshift meetings, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 9(q)(2) (Santa Fe).)

68. By threatening Lisa Knutson with unspecified reprisals for speaking out in support of the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 9(q)(3) (Santa Fe).)

69. By interrogating Lisa Knutson on June 26 about her union membership, activities and sympathies, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 9(r) (Santa Fe).)

70. By responding on February 18 to a complaint that an employee posted on the Union's website and thereby promising increased benefits and improved terms and conditions of employment to dissuade the employee from supporting the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 10(i) (Sunset Station).)

71. By threatening employees on February 22 with adverse employment action for speaking about the Union in front of customers, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 10(a) (Sunset Station).)

72. By disciplining Jose Omar Mendoza on February 23 for engaging in protected activity in the presence of customers, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 15(d) (Sunset Station).)

73. By denying Jose Omar Mendoza benefits on February 25 in the form of open discussion at preshift meetings because he supported the Union, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 10(c)(1) (Sunset Station).)

74. By orally issuing and enforcing an overly broad and discriminatory rule on February 25 that prohibited its employees from discussing issues of common concern (such as the union organizing campaign) at preshift meetings, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 10(c)(2) (Sunset Station).)

75. By disciplining Jose Omar Mendoza on February 25 for engaging in protected activity at preshift meetings, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 15(e) (Sunset Station).)

76. By threatening Hilda Griffin with further discipline on March 3 because she supported the Union, the Respondent violated Section 8(a)(1) of the Act. (Sunset Station.).[197]

77. By threatening Hilda Griffin with further discipline on March 14 because she supported the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 10(f) (Sunset Station).)

78. By disciplining Hilda Griffin on March 14 for engaging in protected activity, the Respondent violated Section 8(a)(3) and (1) of the Act. (See GC Exh. 2(c), par. 15(k) (Sunset Station).)

79. By orally issuing and enforcing an overly broad and discriminatory rule on February 19 prohibiting employees from discussing the Union, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 11(a)(2) (Texas Station).)

80. By threatening employee Ignacio Martinez with unspecified reprisals if he supported the Union as his bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 11(a)(3) (Texas Station).)

81. By threatening Ignacio Martinez that the Respondent would engage in surveillance of his union activities, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 11(a)(4) (Texas Station).)

82. By threatening employees with unspecified reprisals if they supported the Union as their bargaining representative, the Respondent violated Section 8(a)(1) of the Act. (See GC Exh. 2(c), par. 11(d) (Texas Station).)

83. The unfair labor practices stated in Conclusions of Law 1–82 above are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

84. I recommend dismissing the allegations stated in the following paragraphs of the complaint: [198]

Paragraphs 5(a), (b), (c), (d), (e), (f), (h) and (i).
Paragraphs 6(d), (e), (f), (g), (h)(1), (i)(3) and (j).
Paragraphs 7(a), (d), (e), (f), (g), (h), (i), (j)(3) and (k).
Paragraphs 8 (d), (f), (l), (m), (n), (q) and (t).
Paragraphs 9 (a), (b), (c), (e), (h), (i), (j), (k), (l), (m), (n), (o) and (s).
Paragraphs 10(b), (d), (e), (g), (h) and (j).
Paragraphs 11(a)(1), (b), (c), (e), (f) and (g).
Paragraphs 12(d), (e) and (h).
Paragraph 13(b).
Paragraphs 14(a), (b), (c)(2), (d)(2)–(3) and (g)(1).
Paragraphs 15(a), (b), (c), (f), (g), (h), (i), (j), (m), (o) and (p).
Paragraph 16.

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[197] The Acting General Counsel only alleged that this violation occurred on March 14. See GC Exh. 2(c), par. 10(f) I found that the Respondent committed the same violation on March 3. See discussion, supra, sec. V(K)(3).

[198] The Acting General Counsel voluntarily withdrew the following allegations in the complaint: pars. 6(f)(2), (h)(1), and (i)(3), 7(j)(3), 8(m), 9(o), 10(b) and 10(j), 11(c) and (e), and 14(b) and (d)(3) of the complaint. See GC Exh. 2(c) (pars. 8(m), 10(b), 14(b)); GC Posttrial Br. at 19, 21, 24, 44, 49 and 86.

Paragraph 17.

VII. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully disciplined Teresa Debellonia (on March 18, 2011), Hilda Griffin (on March 14, 2010), Jose Omar Mendoza (on February 23 and 25, 2010), and Adelina Nunez (on May 29, 2010), I shall require the Respondent to rescind the disciplinary actions taken against Debellonia, Griffin, Mendoza, and Nunez and post an appropriate notice.

The Respondent having discriminatorily denied work opportunities to Ana Galo (on March 10 and 14, 2010), the Respondent must make her whole for any loss of earnings and other benefits, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent having discriminatorily discharged Teresa Debellonia and Adelina Nunez, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).[199]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[200]

ORDER

The Respondent, Station Casinos, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in protected concerted activities or supporting the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE, or any other union.

(b) Discharging or otherwise discriminating against any employee for filing charges or giving testimony under the Act.

(c) Maintaining and enforcing a rule on its "Record of Counseling" forms that states, "[t]his counseling session is confidential and should only be discussed with Management or Human Resources."

(d) Creating an impression among employees that their union activities are under surveillance.

(e) Threatening employees not to sign union cards.

(f) Threatening employees with unspecified reprisals if they support or select the Union as their bargaining representative.

(g) Threatening employees with additional work if they select the Union as their bargaining representative.

(h) Threatening employees with losing benefits if they select the Union as their bargaining representative.

(i) Issuing and enforcing overly broad and discriminatory rules that prohibit employees from speaking with or listening to union supporters.

(j) Asking employees to advise the Respondent of the union activities of other employees.

(k) Advising employees to call the police if union supporters refuse to leave their homes after being asked to do so.

(l) Promising increased benefits and/or improved terms and conditions of employment to employees to dissuade them from supporting the Union.

(m) Informing employees that it would be futile for them to support the Union as their bargaining representative.

(n) Unlawfully interrogating employees about their union membership, activities and sympathies.

(o) Unlawfully engaging in surveillance of employees' union activities.

(p) Threatening employees by inviting them to quit their employment because they support the Union.

(q) Punishing employees by making them work alone because they support the Union.

(r) Issuing and enforcing overly broad and discriminatory rules that prohibit employees who support the Union from assisting each other at work.

(s) Denying work opportunities to employees because of their union activities.

(t) Issuing and enforcing rules that prohibit employees from moving to another station without permission because they have engaged in union activities.

(u) Imposing more onerous working conditions on employees because of their union activities.

(v) Denying employees benefits in the form of open discussion at preshift meetings because they support the Union.

(w) Issuing and enforcing overly broad and/or discriminatory rules that prohibit employees from discussing issues of common concern (including but not limited to the union organizing campaign) at preshift meetings.

(x) Issuing and enforcing overly broad and discriminatory rules that prohibit employees from soliciting for the Union during work hours.

(y) Threatening employees with job loss if they support the Union as their bargaining representative.

(z) Threatening employees with stricter enforcement of work rules if they select the Union as their bargaining representative.

(aa) Threatening employees with closer supervision and stricter enforcement of work rules if employees select the Union as their bargaining representative.

(bb) Threatening employees that it (the Respondent) will end the ability of employees to talk to their supervisors and managers if employees select the Union as their bargaining representative.

[199] The Respondent has represented that it has already reinstated Debellonia and Nunez without loss of seniority and with full backpay. See sec. V(G)(3) (citing GC Exh. 1(e), Affirmative Defense 2 (Case 28–CA–23434)), supra; Jt. Exh. 11, pars. 11–12. The remedy that I have set forth above remains in effect to the extent that the Respondent has not already taken the required remedial measures stated above.

[200] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(cc) Issuing and enforcing discriminatory rules that prohibit employees from engaging in union activities in the Respondent's employee parking garages.

(dd) Issuing and enforcing discriminatory rules that prohibit off-duty employees from engaging in union activities at the Respondent's facilities, including but not limited to employee parking garages.

(ee) Summoning employees to the human resources office because they support the Union.

(ff) Grabbing employees because they support the Union.

(gg) Threatening employees with discharge if they engage in union activities.

(hh) Prohibiting off duty employees from accessing the Respondent's facilities because of their union activities.

(ii) Issuing and enforcing overly broad and discriminatory rules that prohibit employees from wearing union buttons.

(jj) Soliciting complaints and grievances from employees and thereby promising increased benefits and improved terms and conditions of employment if employees refrain from supporting the Union.

(kk) Granting benefits to employees to dissuade them from supporting the Union.

(ll) Threatening employees with unspecified reprisals if they sign union membership cards.

(mm) Threatening employees with reduced work hours because they are engaging in union activities.

(nn) Threatening employees with losing the graveyard shift because they are engaging in union activities.

(oo) Threatening employees with unspecified reprisals for speaking out in support of the Union.

(pp) Threatening employees with adverse employment action for speaking about the Union in front of customers.

(qq) Disciplining employees for engaging in protected activity in the presence of customers.

(rr) Disciplining employees for engaging in protected activity at preshift meetings.

(ss) Threatening employees with further discipline because they support the Union.

(tt) Disciplining employees for engaging in protected activity.

(uu) Issuing and enforcing overly broad and discriminatory rules that prohibit employees from discussing the Union.

(vv) Threatening employees that the Respondent will engage in surveillance of their union activities.

(ww) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Teresa Debellonia and Adelina Nunez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Teresa Debellonia, Ana Galo, and Adelina Nunez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision, with interest.

(c) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful disciplines and discharge, and within 3 days thereafter notify Teresa Debellonia, Hilda Griffin, Jose Omar Mendoza, and Adelina Nunez in writing that this has been done and that the unlawful disciplines and/or discharge will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in and around Las Vegas, Nevada, copies of the attached notice marked "Appendix" in both English and Spanish.[201] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means.[202] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 18, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. September 22, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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[201] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[202] The notice posting language provided herein (specifically regarding distributing notices electronically) is consistent with the Board's recent decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010).

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with UNITE HERE, or any other union.

WE WILL NOT discharge or otherwise discriminate against any employee for filing charges or giving testimony under the National Labor Relations Act.

WE WILL NOT maintain and enforce a rule on our "Record of Counseling" forms that states "[t]his counseling session is confidential and should only be discussed with Management or Human Resources."

WE WILL NOT create an impression among employees that their union activities are under surveillance.

WE WILL NOT threaten employees not to sign union cards.

WE WILL NOT threaten employees with unspecified reprisals if they support or select the Union as their bargaining representative.

WE WILL NOT threaten employees with additional work if they select the Union as their bargaining representative.

WE WILL NOT threaten employees with losing benefits if they select the Union as their bargaining representative.

WE WILL NOT issue and enforce overly broad and discriminatory rules that prohibit employees from speaking with or listening to union supporters.

WE WILL NOT ask employees to advise us of the union activities of other employees.

WE WILL NOT advise employees to call the police if union supporters refuse to leave their homes after being asked to do so.

WE WILL NOT promise increased benefits and/or improved terms and conditions of employment to employees to dissuade them from supporting the Union.

WE WILL NOT inform employees that it would be futile for them to support the Union as their bargaining representative.

WE WILL NOT unlawfully interrogate employees about their union membership, activities and sympathies.

WE WILL NOT unlawfully engage in surveillance of employees' union activities.

WE WILL NOT threaten employees by inviting them to quit their employment because they support the Union.

WE WILL NOT punish employees by making them work alone because they support the Union.

WE WILL NOT issue and enforce overly broad and discriminatory rules that prohibit employees who support the Union from assisting each other at work.

WE WILL NOT deny work opportunities to employees because of their union activities.

WE WILL NOT issue and enforce rules that prohibit employees from moving to another station without permission because they have engaged in union activities.

WE WILL NOT impose more onerous working conditions on employees because of their union activities.

WE WILL NOT deny employees benefits in the form of open discussion at preshift meetings because they support the Union.

WE WILL NOT issue and enforce overly broad and/or discriminatory rules that prohibit employees from discussing issues of common concern (including but not limited to the union organizing campaign) at preshift meetings.

WE WILL NOT issue and enforce overly broad and discriminatory rules that prohibit employees from soliciting for the Union during work hours.

WE WILL NOT threaten employees with job loss if they support the Union as their bargaining representative.

WE WILL NOT threaten employees with stricter enforcement of work rules if they select the Union as their bargaining representative.

WE WILL NOT threaten employees with closer supervision and stricter enforcement of work rules if employees select the Union as their bargaining representative.

WE WILL NOT threaten employees that we will end the ability of employees to talk to their supervisors and managers if employees select the Union as their bargaining representative.

WE WILL NOT issue and enforce discriminatory rules that prohibit employees from engaging in union activities in Station Casinos' employee parking garages.

WE WILL NOT issue and enforce discriminatory rules that prohibit off-duty employees from engaging in union activities at Station Casinos' facilities, including but not limited to employee parking garages.

WE WILL NOT summon employees to the human resources office because they support the Union.

WE WILL NOT grab employees because they support the Union.

WE WILL NOT threaten employees with discharge if they engage in union activities.

WE WILL NOT prohibit off duty employees from accessing Station Casinos' facilities because of their union activities.

WE WILL NOT issue and enforce overly broad and discriminatory rules that prohibit employees from wearing union buttons.

WE WILL NOT solicit complaints and grievances from employees and thereby promise increased benefits and improved terms and conditions of employment if employees refrain from supporting the Union.

WE WILL NOT grant benefits to employees to dissuade them from supporting the Union.

WE WILL NOT threaten employees with unspecified reprisals if they sign union membership cards.

WE WILL NOT threaten employees with reduced work hours because they are engaging in union activities.

WE WILL NOT threaten employees with losing the graveyard shift because they are engaging in union activities.

WE WILL NOT threaten employees with unspecified reprisals for speaking out in support of the Union.

WE WILL NOT threaten employees with adverse employment action for speaking about the Union in front of customers.

WE WILL NOT discipline employees for engaging in protected activity in the presence of customers.

WE WILL NOT discipline employees for engaging in protected activity at preshift meetings.

WE WILL NOT threaten employees with further discipline because they support the Union.

WE WILL NOT discipline employees for engaging in protected activity.

WE WILL NOT issue and enforce overly broad and discriminatory rules that prohibit employees from discussing the Union.

WE WILL NOT threaten employees that we will engage in surveillance of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Teresa Debellonia and Adelina Nunez full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Teresa Debellonia and Adelina Nunez whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspensions and discharges of Teresa Debellonia and Adelina Nunez, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL make Ana Galo whole for any loss of earnings and other benefits resulting from loss of work opportunities, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Hilda Griffin and Jose Omar Mendoza, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

STATION CASINOS, INC.