

Pioneer Hotel, Inc. d/b/a Pioneer Hotel & Gambling Hall and Local Joint Executive Board of Las Vegas Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL-CIO. Cases 28-CA-13300 and 28-CA-13390

October 31, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On September 17, 1996, Administrative Law Judge Michael D. Stevenson issued the attached decision, finding that the Respondent committed several violations of Section 8(a)(1) and (3) of the Act. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting brief. The Respondent filed an answering brief and reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

¹At the hearing, the judge granted the General Counsel's motion to amend the complaints to add the allegation that the Respondent unlawfully discharged Supervisor Tom Grace. Thereafter, the judge issued a written decision rejecting the Respondent's contention that the complaint amendments were barred by Sec. 10(b) of the Act. In its exceptions, the Respondent, inter alia, renews its 10(b) claim, arguing that the complaint amendments are not "closely related" to the underlying charges within the meaning of *Redd-I, Inc.*, 290 NLRB 1115 (1988). We find no merit in the Respondent's exception.

The charges allege in substance that the Respondent violated Sec. 8(a)(1) and (3) of the Act by engaging in numerous acts and conduct in retaliation for employee union activities. The complaint amendments allege that the Respondent violated Sec. 8(a)(1) by discharging Supervisor Grace because he refused to commit unfair labor practices.

Concededly, the charge allegations and the complaint allegations are not predicated on identical legal theories: the charges allege retaliation against employees for engaging in union activities, while the complaint amendments allege discrimination against a supervisor for refusing to commit unfair labor practices. However, there is an important legal similarity between the two sets of allegations: they involve the same section of the Act (Sec. 8(a)(1)). Furthermore, the two sets of allegations arise from the same factual circumstances or sequence of events. Grace supervised employee Tony Zabala, who is specifically named in the charges as a discriminatee, and it was Grace's refusal to commit the unfair labor practice of discharging Zabala that the General Counsel contended was the cause of Grace's own termination. In addition, Grace's discharge occurred during the general time period alleged in the charges. In these circumstances, we find applicable the principle that "a sufficient relation between the charge and complaint [exists] in circumstances involving 'acts that are part of the same course of conduct, such as a single campaign against a union,' *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), and acts that are all 'part of an

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pioneer Hotel, Inc. d/b/a Pioneer Hotel & Gambling Hall, Laughlin, Nevada, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its Laughlin, Nevada facility copies of the attached notice marked "Appendix."'²⁴ 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. 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 facility 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 August 3, 1995."

overall plan to resist organization.' *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973)." *Nickles Bakery of Indiana*, 296 NLRB 927, 928 fn. 7 (1989). This is true "whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer." *Recycle America*, 308 NLRB 50 fn. 2 (1992). Accordingly, we affirm the judge's ruling that the complaint amendments are not barred by Sec. 10(b).

²The 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.

We further find no merit in the Respondent's allegations of judicial bias and prejudice. On our full consideration of the record in this proceeding, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his credibility resolutions, analysis, or discussion of the evidence.

³Chairman Gould agrees that the Respondent violated Sec. 8(a)(1) by discharging statutory Supervisor Grace for refusing to engage in unfair labor practices. The Chairman, however, would also find that discrimination against a statutory supervisor violates the Act whenever it reasonably may be inferred that the discrimination will chill the concerted or union activities of statutory employees. He, therefore, disagrees with *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 888 (D.C. Cir. 1988), to the extent that it limits the reach of the Act to such conduct.

⁴We shall modify the notice posting requirement in the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

Nathan W. Albright and Scott B. Feldman, Esqs., for the General Counsel.
Gary G. Branton and Norman Kirshman, Esqs. (Kirshman, Harris & Cooper), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Las Vegas, Nevada, on February 13–16 and May 28, 1996,¹ pursuant to complaints issued by the Regional Director for the National Labor Relations Board for Region 28 on October 19, 1995 (Case 28–CA–13300), and on January 18, 1996 (Case 28–CA–13390), and which are based on charges filed by Local Joint Executive Board of Las Vegas Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Charging Party or the Union) on August 30 (Case 28–CA–13300) and on October 30 (original) and on January 12, 1996 (amended) (Case 28–CA–13390). The complaint alleges that Pioneer Hotel, Inc. d/b/a Pioneer Hotel & Gambling Hall (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

1. Whether Respondent’s employees who wore union pins or buttons during worktime were engaged in protected concerted activities, and if so, whether Respondent’s suspension of these employees for refusing to remove these pins or buttons violated the Act.

2. If Respondent’s suspensions of the employees referred to above were unlawful, whether Respondent adequately repudiated its unlawful conduct of its supervisors and agents.

3. Whether an employee was unlawfully denied access to the employee dining room.

4. Whether an employee was unlawfully interrogated by a supervisor regarding the employee’s support for the Union.

5. Whether Respondent, acting through one or more of its supervisors, committed one or more of the following acts involving its employees Tony Zabala and James Guirey, because those employees supported or assisted the Union or engaged in other protected concerted activities:

(a) Reduced Zabala’s work hours; issued him a 3-day suspension, laid him off and constructively discharged him by offering him a lower classification position at a lower rate of pay than Zabala previously had.

(b) Reduced Guirey’s work hours and subsequently laid him off.

6. Whether Respondent terminated its employee and statutory Supervisor Tom Grace, because Grace refused to commit unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

¹ All dates herein refer to 1995 unless otherwise indicated.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT’S BUSINESS

Respondent admits that it is a Nevada corporation which operates a hotel and gaming business and maintains an office and place of business located in Laughlin, Nevada. Respondent further admits that during the 12-month period ending August 30, in the course and conduct of its business operations, its gross volume exceeded \$500,000 and that during the same 12-month period ending August 30, Respondent purchased and received goods and materials valued in excess of \$50,000 from sources outside the State of Nevada. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Local Joint Executive Board of Las Vegas Culinary Workers Union, Local 226 and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Procedural history

a. *Thomas Grace amendment*

During the course of the hearing, the General Counsel called a witness named Thomas Grace, a former Respondent statutory supervisor who had been fired on August 3 allegedly as part of Respondent’s restructuring. At the conclusion of his direct testimony, I raised an issue outside of Grace’s presence as to whether Grace’s termination ought to be part of the complaint. At the same time, I acknowledged a potential 10(b) problem should the General Counsel move to amend the complaint to add the Grace termination. Eventually, the General Counsel did move to amend the complaint and I granted the motion. Then on March 20, 1996, I issued a written decision denying Respondent’s motion asking me to reconsider my earlier decision allowing the Grace amendment over Respondent’s 10(b) objection (G.C. Exh. 82(d)). Respondent then sought the Board’s permission to appeal my decision on the Grace amendment (G.C. Exh. 82(e)). While Respondent’s request for special permission to appeal was pending before the Board, Respondent filed a motion on March 27, requesting that I disqualify myself from the instant case (G.C. Exh. 82(f)). I denied that motion on April 3, 1996 (G.C. Exh. 82(h)). Then on April 4, 1996, Respondent sought to take a second special appeal regarding my continued participation in this case (G.C. Exh. 82(I)). On April 30, 1996, the Board denied Respondent’s request to appeal both matters, “without prejudice to Respondent’s right to raise these issues on exceptions to the [ALJ’s] decision”

(G.C. Exh. 82(k)). On May 28, 1996, the case resumed for a final day's hearing.

I will recite below my findings of fact, conclusions of law, and analysis. For now, I incorporate by reference into this decision, both my March 20, 1996 decision allowing the Grace amendment to stand and my April 3, 1996 decision denying Respondent's motion for me to disqualify myself (G.C. Exh. 82(d)(h)).

b. Respondent's failure to produce documents

During the hearing Respondent refused to produce documents called for by the General Counsel's subpoenas duces tecum. No motion to quash nor motion to modify were made. In fact, Respondent did nothing to alert the General Counsel that Respondent's counsel had not produced all documents called for by the subpoena duces tecum. On the third day of hearing, the General Counsel was alerted by certain testimony that perhaps other documents existed which had not been turned over. Indeed, the General Counsel was correct as Respondent had withheld security officer reports and possibly other documents on the grounds of attorney/client privilege and attorney work product. After protracted argument between the attorneys, I directed Respondent to produce the documents "forewith" but it refused to do so, unless and until the General Counsel had prevailed in U.S. district court in a subpoena enforcement proceeding (Tr. 596-602, 635-645, 646-651).

Pursuant to my order, Respondent did prepare a three-page list of documents, withheld on the grounds of privilege, which documents would otherwise have been within the scope of the General Counsel's subpoena duces tecum (G.C. Exh. 66; Tr. 664). The subpoena duces tecum was also entered into the record (G.C. Exh. 65).

On day 4 of the hearing, the General Counsel asked me to undertake an in-camera inspection of the withheld documents, but Respondent flatly refused to turn over the documents to me for my examination and evaluation of the claim of privilege (Tr. 751-754).

On May 6, 1996, the General Counsel caused a second subpoena duces tecum to issue and this time Respondent filed in proper form a petition to revoke (G.C. Exh. 84). The General Counsel filed its opposition to the petition (G.C. Exh. 85) and on May 15, 1996, I issued a decision denying Respondent's petition to revoke (G.C. Exh. 86).

On May 28, 1996 the parties returned for the fifth and final day of hearing. The General Counsel announced that he had decided not to seek subpoena enforcement of the first subpoena duces tecum. Instead, the General Counsel stated he would urge me to draw an adverse inference for the missing documents (Tr. 843-944). I will revisit this issue regarding the missing documents. For now, I note that the documents within the scope of the second subpoena duces tecum apparently were produced in accord with Respondent's representation to that effect (Tr. 845-850).

2. The property and its managers (past and present)

Respondent is a wholly owned subsidiary of Santa Fe Gaming Corp. located in Las Vegas, Nevada. Consisting of a hotel, a casino, and three restaurants, Respondent is located about 100 miles away from corporate headquarters. The majority owner of Santa Fe is Paul Lowden who did not testify.

His son, Christopher Lowden, Respondent's general manager, did testify. C. Lowden explained that he started with Santa Fe a few years prior to July when it was known as Sahara Gaming Corp. Among other jobs held by C. Lowden was president of Sahara Development Corp., a business entity related to Sahara Gaming Corp. In this capacity, C. Lowden spent about 70 percent of his time outside the State of Nevada exploring business opportunities. For a period of time, C. Lowden was also in charge of operations for the corporation once it changed its name to Santa Fe Gaming.

Sometime in July, C. Lowden learned that Respondent's then general manager, Rich Rabin, who did not testify, intended to resign effective in early August. Between 1988 and 1992, C. Lowden had served as general manager of the property and it was decided by C. Lowden, his father, and other corporate officials that C. Lowden should again serve in that role. At first, C. Lowden's title was "acting G.M."² indicating some uncertainty as to how long C. Lowden's tenure would continue the second time around. As matters turned out, the "acting" part of C. Lowden's title soon disappeared and his appointment became permanent.

The facts and circumstances of the instant case focus primarily on the food and beverage department, managed for about a year ending August 3 by Thomas Grace, who was fired on that date. According to C. Lowden, he had no choice but to authorize the termination of Grace after his preliminary 10-day on-site review of conditions at Respondent convinced C. Lowden that changes were required to get Respondent back on track as it had been before, under C. Lowden's leadership as G.M. between 1988 and 1992. More specifically, C. Lowden capsilized the problems in the food and beverage department into three categories. First, he allegedly found the service and product levels to be low; second, Grace had put in his application to be G.M. to succeed the departing Rabin; and third, feedback to C. Lowden from employees and other managers indicated to C. Lowden that Grace lacked respect for C. Lowden as G.M. (Tr. 860).

Once C. Lowden determined that Grace could not continue in his role as manager of food and beverage, or any other role with Respondent, the question came up who would replace Grace. The answer was Jorge Garcia Perera, referred to as Garcia. To find Garcia, C. Lowden and other corporate officials did not have to look far. For the past 2 years, Garcia had been employed at the Santa Fe Hotel & Casino in Las Vegas as assistant director of food and beverage. Unlike Grace who had applied for Rabin's job and desired to move up, Garcia apparently was satisfied in his position in Las Vegas as he never applied for the job in Laughlin, Nevada. Witness this exchange:

J. STEVENSON—Q: . . . how long before you came to the Pioneer did you know that you would be making the move?

GARCIA—A: I had no idea I was going to the Pioneer. I found out August 4th when I went to work that afternoon that I had been promoted.

Q. Did you find out what happened to the person that normally had held that position?

²Technically, C. Lowden was acting G.M. of both Santa Fe and Pioneer properties. However, C. Lowden's duties in connection with the former are not relevant to any issue in this case.

A. No sir, I just know that he was let go. . . .
[Tr. 821–822.]

Garcia gave the above testimony on February 16, 1996. By May 28, 1996, when the case resumed for the final day, Garcia was gone, having resigned from Respondent, in lieu of termination for alleged poor performance. Garcia was never recalled as a witness and the facts and circumstances of his departure do not concern me.

In conclusion, I consider Rabin under whom Grace served. C. Lowden testified that he was not familiar with Rabin's policy with respect to complaints being made against managers, such as Grace for example. However, C. Lowden did testify that Rabin's policy regarding discipline in general was marked by a "tremendous amount of inconsistency" (Tr. 915). Respondent's witness Joe Catala also gave testimony with respect to Rabin. Between July 1994 and February, when he left to work for another casino, Catala served as Respondent's director of human resources. In this position, Catala was responsible for disciplining and counseling deficient employees, including high-ranking employees like Grace who had certain deficiencies to be explored in greater detail below. According to Catala, Rabin's manner in dealing with Grace was consistent with the manner in which he handled other disciplinary cases. That is, Rabin never showed any favoritism or special way that he treated Grace as compared to other employees. Catala characterized Rabin as not a strong disciplinarian (Tr. 927–928).

Whether C. Lowden is right or Catala is right with respect to Rabin cannot be ascertained, since as noted above, Rabin never testified. What Rabin's absence from this case means with respect to the Grace allegation, if anything, will be determined below. For now, I note that when Rabin left Respondent's employment, after allegedly having allowed Respondent's fortunes to decline precipitously under his tenure, particularly with respect to the food and beverage department, and after allegedly managing Respondent with inconsistent disciplinary policies, Rabin resigned voluntarily (without being pushed) to accept another position in the gaming industry in the State of Colorado (Tr. 915–916).³

3. The restructuring

So far as this case is concerned the restructuring of Respondent's operations in the food and beverage department was accomplished in two parts. First, was the sudden termination of Grace as he awaited a decision on whether he would be promoted to G.M. as Rabin's successor. Within a few weeks after Grace was fired, Executive Chef Paul Krommenacher, one or two sous-chefs, the bar manager, some room managers, and the slot club manager resigned or were fired. In addition some midlevel management changes in the pit and in slots were made (Tr. 863–864, 911–912). As to employees in the food and beverage department, only

³To be sure, C. Lowden also testified that Respondent was downsizing and restructuring and the board of directors generally was not happy with the operation overall [prior to Rabin's departure] (Tr. 916). To the extent this testimony is accurate, Rabin was apparently not held responsible for the sorry state of affairs allegedly found by C. Lowden. Another possibility, perhaps C. Lowden was inaccurate in describing the affairs of the food and beverage department.

five employees were laid off, two of whom Zabala and Guirey were union activists.

When Garcia took over the food and beverage department, about 308 employees worked there including about 8 to 10 supervisors. Employees worked as bartenders, cocktail waitresses, bar backs, pantry and buffet workers, food servers, cooks, and kitchen workers (KWs). The instant case focuses on those employees employed as food preparers and servers.

Respondent maintained three restaurants, a snack bar not involved in the case, and two others, one called the "Boarding House" and the other "Granny's." The Boarding House is open 24 hours per day, 7 days per week and features lunch and dinner buffets. Granny's is renowned for its Sunday brunch served to customers between 9 a.m. and 4:30 p.m. On other days, Granny's is open for dinner only, Tuesday–Saturday between 5 to 10 p.m.

During the first 2 or 3 weeks of his tenure, Garcia met with employees (one-on-one meetings with 100 to 150 employees), reviewed work schedules and operations at the three restaurants, and reviewed financial accounting practices. He concluded that a restructuring of the entire food and beverage department was in order. Accordingly, Garcia approached C. Lowden with an [oral] plan to consolidate positions, cross-train certain employees, experiment with employees' work schedules by cutting hours and making other changes in employees' terms and conditions of employ[ment]. The five laid-off employees classified as pantry buffet were subsequently offered positions as KWs, a kind of utility unskilled position. KWs performed jobs such as clean-up of floors and walls and fill in as replacements for food service or food preparation employees when they were unavailable. KWs were paid \$5.50/hour compared to the \$6 to 7.50 per hour that the pantry buffet workers made. Moreover, the latter classification had greater opportunities for overtime and tip income particularly those who worked at Granny's Buffet.

In evaluating the bona fides of the so-called restructuring by Garcia, I will consider, among other factors, the use of Manpower temporary employees in the food and beverage department. The General Counsel called a witness named Alan Bluth, a Manpower manager working out of the Laughlin, Nevada office. During the period of 1993 to 1995, Manpower supplied on request, temporary employees to Respondent. Many of the furnished temporaries performed work as KWs at a cost to Respondent of \$7 per hour per employee (but employee paid \$5 per hour by Manpower). During the time of the restructuring and after, Respondent was doing substantial business with Manpower (G.C. Exhs. 56, 57).

B. Analysis and Conclusions

1. Wearing of union buttons and pins

a. The facts

Sometime in early 1995 or perhaps late 1994, the Union began an effort to organize Respondent's employees. In a memo to all employees from Catala, dated January 3, Catala noted receipt of reports that employees were being visited at their homes by union recruiters. The memo goes on to advise employees from the Respondent's point of view how to respond to such home visits and urged employees to consider

carefully any union solicitations. The two-page memo ends by stating:

The Pioneer will resist union representation by all lawful means. We believe that we have an open door policy in all levels of management and that the employees rights are protected. I am confident that with your support, this organizing effort will fail. [G.C. Exh. 3.]

This memo was followed several months later by a letter from the Union to Respondent in which letter were listed the names of the in-house organizing committee at Respondent. While the letter is not dated, it was apparently sent to and received by Respondent in early August (G.C. Exh. 9). The record contains other memos to employees from Chris Lowden dated October 26, November 9, 22, and 30 giving the Respondent's point of view on various issues raised by the Union's organizing activities (G.C. Exhs. 4, 5, 6, and 7).

It was against this prior and subsequent background of union activity and Respondent's responses thereto that on August 2, Sue Winchester, who had replaced Catala as human relations manager, prepared a memo to all employees at the request of C. Lowden. In relevant part, the memo reads as follows:

Following the visit by our Corporate Executives, it has come to my attention that we have become relaxed on adhering to our dress code. Effective immediately the following dress code will be enforced.

As a Pioneer employee dealing with the public on a daily basis, you are expected to maintain a neat and professional appearance.

. . . .
5. Name tags are to be worn at all times while on duty. No other accessories are to be worn on your uniform (i.e. pins, stickers, buttons). [G.C. Exh. 8.]

This memo was distributed to employees by attaching it to employee paychecks.

This new dress code should be compared with the old dress code dated February 14, which reads in relevant part:

5. Name tags are to be worn at all times while at work. Name tags must be worn on the left pocket of the shirt. . . . Stickers or pins on the name tag are not allowed. [G.C. Exh. 60.]⁴

In any event, it is undisputed that on or about August 9, pursuant to prior concerted agreement, a number of employees wore union buttons to work on their uniforms. The buttons, about the size of a one-half dollar read "Local 226, Culinary Workers, COMMITTEE LEADER" (G.C. Exh. 50). Many of the employees wearing the buttons were listed on the in-house organizing committee list referred to above (G.C. Exh. 9).

An employee named Jean Cleland, a food server and union organizing committee member, testified for the General Counsel. She wore her union button on the day in question. A few hours into her shift, Cleland was asked by her supe-

rior, Restaurant Manager Mary McLaughlin, to remove the button as it conflicted with the new dress code. When Cleland refused to remove the button, she was sent home. A similar experience was recounted by Kevin Nash, now a supervisor in the slot department, but on August 9, a floorperson in the slot department. In Nash's case, he was sent home by Winchester. Zabala was also sent home for wearing his union button but for some reason Guirey escaped attention and no one ever asked him to remove his button. All told about 9 to 10 employees wore union buttons and of this group, only one removed the button when Winchester asked him to and the others were sent home. Winchester also asked employees to remove other types of pins such as angel pins, pictures of loved ones, and even Pioneer pins. All of these employees wearing nonunion pins removed them on request.

It is also undisputed that on August 8, within a few hours of employees being sent home, Respondent through C. Lowden changed its policy again. This time employees who had been sent home were notified by supervisors that they could wear union buttons to work, that they should report to work for their next shift, and they would be paid for missed work (including missed tip income when applicable).

b. Applicable law and conclusions

In *Northeast Industrial Service Co.*, 320 NLRB 977, 979, (1996), the judge stated as follows:

The Board has spoken repeatedly concerning the right of employees to wear insignia while at work. Recently, in *United Parcel Service*, 312 NLRB 596, 601 enf. denied 41 F.3d 1068 (6th Cir. 1994), it stated:

It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-802 (1945). In the absence of "special circumstances," the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act. See, e.g., *Ohio Masonic Home*, 205 NLRB 347, enf. mem. 511 F.2d 527 (6th Cir. 1975).

It has also stated that "a rule which curtails that employee right is preemptively invalid unless special circumstances exist which make the rule necessary to maintain production or discipline, or to ensure safety." *Kendall Co.*, 267 NLRB 963, 965 (1983).

Such special circumstances, to the extent relevant here, include situations where the wearing of insignia might "jeopardize employee safety . . . or unreasonably interfere with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." *United Parcel Service*, id., citing *Nordstrom, Inc.*, 264 NLRB 698, 700-702 (1982); and *Kendall Co.*, id. What is called for is a balancing of the conflicting rights, i.e., the employees' organizational rights against the employer's right to maintain discipline or to achieve other legitimate business objectives, under the existing circumstances. *Standard Oil Co. of California*, 168 NLRB 153, 161 (1968), citing *Fabritek, Inc.*, 148 NLRB 1623 (1964), enf. den[ie]d 352 F.2d 577 (8th Cir. 1965).

⁴ An apparent still earlier version of the dress code is found in the employee handbook, where at par. 18, p. 14, employees are admonished to wear designated uniforms and to comply with standard clothing requirements (G.C. Exh. 2).

In its brief, Respondent argues at pages 42 et. seq., that there is no per se rule which makes the prohibition of buttons a violation of the Act. Respondent goes on to contend that because the ban in issue in this case applied to nonunion material, such as angel pins, etc., and because the Board has upheld prohibitions on the wearing of union insignia where a public image which the employer has established as part of its business plan, could be adversely affected by the wearing of union insignia, no violation of the Act can be found here. Little time need be spend on these arguments. First, no evidence was presented to justify the ban in question. In fact when C. Lowden was called as a witness on the final day of hearing, he gave no testimony regarding the ban on wearing union buttons and confined his testimony to other matters. Moreover a rule based on special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances that justify the rule. *Sunland Construction Co.*, 307 NLRB 1036, 1040 (1992). In this case, the new dress code was overboard in that it applied to all employees, not just to those involved in public contact. That is not to say, however, that a more narrowly redrawn dress code would necessarily pass Board muster. For the Board has consistently held that customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees. *Meijer, Inc.*, 318 NLRB 50 (1995). See also *NLRB v. Mead Corp.*, 73 F.3d 74, 78–80 (6th Cir. 1996); *Pay 'n Save Corp. v. NLRB*, 641 F.2d 697, 699–701 (9th Cir. 1981). I find therefore that the General Counsel has established a strong prima facie case of Section 8(a)(1) violation. See *Raley's Inc.*, 311 NLRB 1244, 1246 (1993). I turn now to see if Respondent has met its burden of proving not special circumstances but repudiation.

Under certain circumstances, an employer may relieve itself of liability for unlawful conduct by repudiating the conduct. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1511 (8th Cir. 1993). To be effective, however, the repudiation must be timely and unambiguous, and specifically address the unlawful conduct. Additionally, the employer must adequately publicize the repudiation to all employees involved. Lastly, the repudiation should assure the employees that the employer will not interfere with their protected rights in the future. *Id.* at 1511 (citations omitted). See also *NLRB v. St. Vincent's Hospital*, 729 F.2d 730, 732 (11th Cir. 1984), and *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978).

Applying the criteria listed above, I find the purported repudiation to be ineffective. First, I find that the attempted repudiation was not unambiguous. For example, when Mary McLaughlin called Cleland to report that she could return to work and would be paid for lost time, Cleland asked if she would be permitted to wear her union button. McLaughlin replied that “we prefer you didn’t, but we can’t stop you.”⁵ See *Overnite Transportation Co.*, 254 NLRB 132, 133 (1981). I further find that there was inadequate publication of the attempted repudiation. Winchester explained that no memo was ever circulated to employees explaining that para-

graph 5 of the revised dress code was no longer being enforced. Rather, Winchester relied on word of mouth from supervisors to circulate the new policy to current employees. As to new employees, an employee named Nancy Draper who did not testify, supposedly told employees that they could wear pins or buttons, without specifically referring to union buttons. There is no evidence of companywide assurances to employees that there will be no inference with protected rights in the future. See *Kinney Drugs v. NLRB*, 74 F.3d 1419, 1430 (2d Cir. 1996). Finally, I find no acknowledgment of wrongdoing by Respondent. *Distillery Workers Local 42 v. NLRB*, 951 F.2d 1308, 1312 (D.C. Cir. 1991). Because Respondent’s repudiation was not effective, I find that Respondent violated Section 8(a)(1) of the Act by ordering employees to remove their union buttons at work or be sent home.

2. Alleged unlawful layoff of Zabala

On May 27, 1994, Zabala was hired by Respondent as a cook, although at first he worked temporarily, about 2 to 3 weeks on the buffet. On October 27, Zabala was laid off by Garcia allegedly as a result of restructuring (G.C. Exh. 20). On November 14, Respondent by Human Resource Manager Sue Winchester, sent Zabala a letter offering him a position as KW on the graveyard shift at the rate of \$5.50 per hour (G.C. Exh. 21). On November 17, Zabala sent Winchester a letter refusing her offer on the grounds that the KW job constituted a demotion which Zabala felt he didn’t deserve. Zabala made a counteroffer to return to his regular job as soon as possible (G.C. Exh. 22). Zabala’s regular job at the time of layoff had been pantry worker at Granny’s Buffet, where he performed food preparation and food service duties for \$7.75 per hour.

After Zabala had been hired and completed his 3-week temporary assignment, Zabala worked for about a year on the swing shift (2 to 10 p.m.), as a front cook at the Boarding House Restaurant. Zabala left his job in late May early June when he was transferred by Grace to Granny’s Sunday Buffet as a brunch cook which also required work on days during the week preceding for preparation. This transfer and a new pay rate of \$7.75/hour was initiated by Grace as a favor to Zabala to get him “out of the line of fire,” i.e., to remove him from friction with certain of his supervisors to be detailed below. In fact on or about June 20, Winchester told Grace that corporate wanted Zabala to be fired. Grace refused, stating he was a good employee and wouldn’t fire him. No reason was reported to Grace for the order to fire Zabala. Zabala’s new pay rate together with the availability of more overtime than was available in Zabala’s prior job resulted in an increase in his income.⁶

The General Counsel contends that the friction between Zabala and certain of his supervisors resulted from Zabala’s union activities. I note that Grace testified he became aware of Zabala’s union activities sometime between the end of May and June 20, after being told by two of Zabala’s supervisors Tom Stewart and Chef Paul, neither of whom testified

⁵ Under the Board’s teaching of *DeMuth Electric*, 316 NLRB 935 (1995), McLaughlin’s statement to Cleland may will have violated the Act. I need not decide that question, however, as I hold only that McLaughlin’s statement falls far short of the standard for repudiation.

⁶ Respondent presented evidence that Grace did not like Zabala based on certain disparaging comments Grace had made to others about Zabala. I am unwilling to probe the motives of Grace for transferring Zabala particularly since this case does not require me to conduct such an inquiry.

in this case. Then all three discussed the subject with Winchester (Tr. 308–309). In fact, Zabala had been organizing for the Union, soliciting employees to sign authorization cards, attending union meetings, and generally talking up the Union. In early August, Zabala's name was included on a list of in-house union organizers sent to Respondent (G.C. Exh. 9). On August 9, Zabala wore his union button to work and refused to remove it when asked to do so by a supervisor, and was ordered to leave the premises by Winchester. For Zabala, however, the matter was not closed when he was told to report back to work the following day and that he would be made whole.

Four days later, a Sunday, Zabala was working at his usual station as a food server when he was told by Sous Chef Bob Winchester (husband of Sue Winchester), who did not testify, that per the orders of Chef Paul, Zabala was to be reassigned as a runner only. When Zabala asked Chef Paul for an explanation, Chef Paul said merely, no problem, just do what I tell you. I find that this unexplained job reassignment to more onerous duties and Respondent's departure from its past practice of not reassigning pantry workers from one job to another during the Sunday buffet without a good reason supports the General Counsel's theory of discrimination. *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

On October 13, a Friday, Zabala and another employee named Sheila Falk, who did not testify, were handbilling customers waiting in line for a popular seafood buffet.⁷ Exactly what happened is sharply disputed. According to Zabala, he was not speaking to customers as he handbilled. But according to Respondent witness Larry Sipe, a uniformed security guard on duty at the time and place in question, Zabala told customers in line that if Pioneer had better dining room supervision they would not have to wait in line as long [up to 2 hours]. Zabala also told customers that Pioneer pays low wages and benefits and if they didn't want to wait, they could go to another casino where the slot machines were looser and where they could get better payoffs. Zabala also talked about getting two chefs their jobs back.

On cross-examination of this witness, Respondent's counsel first claimed that the witness' security report was made at the direction of counsel and was therefore privileged as attorney work product. Then counsel said that said privilege would be waived in this instance (Tr. 581–583).⁸ About 2 days' later, Sipe recognized a customer named Beery who had been in the line when Zabala was distributing handbills. Sipe asked Beery to prepare a written statement of what he heard and saw. Apparently Beery prepared such a statement at his home after talking to Sipe and dropped it off later. Beery never testified, but his statement reads as follows:

⁷At p. 36, fn. 56, Respondent urges that I draw an adverse inference from Falk's failure to testify for the General Counsel. I find no basis for an adverse inference in deciding whether Zabala was unlawfully laid off.

⁸There is some confusion evident in the record. A prior security report about this incident (G.C. Exh. 13) was not authored by Sipe. The security report which was turned over to the General Counsel was not offered into evidence so I cannot be certain what it says. In addition, there is a handbill in the record (G.C. Exh. 54), but it was not clearly established that Zabala was handing it out at the time and place in question.

Going up stairs from the back dock at the Pioneer, when a man was handing out flyers for the union, he started bad mouthing the Pioneer. The gambling machines had the poorest payout on the river. He also said the employees & security had poor attitude towards the guest. Told me to gamble somewhere else if I wanted good service. [G.C. Exh. 45, p. 3.]

I credit Respondent's witnesses on this episode and find Zabala was making the statements as described by Sipe. Zabala's claim that he was distributing flyers without talking to customers is not believable. While I assign little weight to Beery's statement since he did not testify, it is entitled to some weight. Moreover, the failure of Falk to testify cannot be ignored, though an adverse inference is not appropriate. On October 21, Zabala was suspended by Garcia for 3 days for disloyalty and for disparaging remarks about Respondent to its customers waiting in line (G.C. Exh. 45).⁹

Before he was disciplined by Garcia, Zabala returned to work on Saturday, October 14, to find that 8 to 10 of his hours were to be cut as part of Garcia's restructuring. When Zabala protested that he couldn't afford to have his hours out, Garcia told him that as a result of restructuring only people who are loyal to the company and good workers are going to stay. Zabala next spoke to C. Lowden about the possibility of having his hours restored. Like Garcia, Lowden refused, telling Zabala he couldn't, "because of the boycott" (Tr. 201), apparently a reference to Zabala's distribution of flyers the day before.

The Board has held . . . that an employee may properly engage in communication with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communications did not constitute a disparagement or vilification of the employer's product or its reputation. *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), *enfd.* 636 F.2d 1210 (3d Cir. 1980). In this case, I find that the remarks in issue are related to a legitimate ongoing labor dispute. I turn next to focus on whether Zabala disparaged or vilified Respondent's product.

The Board instructs, *Allied Aviation Service Co. of New Jersey*, *supra* at 231, that great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. In the *Allied Aviation Service Company* case, an employee wrote two letters to airline customers of the employer raising safety matters. The employer there was sensitive to that issue no less so than Respondent here with Zabala raising questions about its slot machines. Yet the Board stated, *id.* at 231, "absent a malicious motive [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum." See also *Greyhound Lines*, 251 NLRB 1638 (1980); *Pareco, Inc.*, 269 NLRB 1027 (1984); Compare *Grant Open Air Market*, 231 NLRB 945, 946 (1977).

Based on the above discussion, I find that Respondent violated Section 8(a)(1) of the Act by suspending Zabala for 3 days. I also find that the cutting of Zabala's hours was relat-

⁹Zabala denied the conduct attributed to him and offered to produce Falk as a witness on his behalf. However, Garcia refused to talk to Falk.

ed to his protected concerted activities on October 13. See *Action Mining*, 318 NLRB 652, 667–668 (1995).¹⁰

After Zabala's return from his 3-day suspension, Garcia issued a memo, dated October 26, stating employees would go back to 40 hours per week (G.C. Exh. 47). On the same day as this memo, Zabala was sent to Garcia's office where he was told by Garcia that he was being laid off as a result of restructuring (G.C. Exh. 20). Garcia used disciplinary history and work performance as criteria for Zabala's and the four other layoffs which occurred (Tr. 695–696).¹¹ This was contrary to statements Garcia had made in memos to employees that seniority would be observed in the food and beverage department during the restructuring process (G.C. Exhs. 48, 49).¹² Moreover, a layoff based in part on Zabala's unlawful suspension is violative of Section 8(a)(1) and (3) of the Act. *Care Manor of Farmington*, 318 NLRB 725, 726 (1995).

I find that Respondent violated the Act for additional reasons besides the fact that the layoff was tainted by an unlawful suspension.

a. Cook's test

After Zabala was laid off, he attempted to be rehired as a cook and contacted Garcia for that purpose. In November, Garcia told Zabala he would have to take a cook's test to be considered for reinstatement as a cook. This test, first administered to Zabala, is in the record (G.C. Exh. 23). Its origins are murky, but apparently it came in whole or in part from another casino/hotel. Zabala asked for time to study, but Garcia refused saying there was no pass or fail. Zabala had never had to take a cook's test before in performing any of the cook's jobs he held at Respondent. As matters turned out, Garcia told Zabala he didn't do very well on the test and no cook's job was ever offered to Zabala. The test Garcia gave to Zabala should be compared to the skills test given to cooks and others at Respondent currently. The employee who takes the skills test grades himself, and generally no one fails.

I find that Respondent has failed to show any rational basis for giving a cook's test to Zabala. Instead, it appears Garcia was merely putting Zabala through the hoops for no apparent reason than harassment.

b. Manpower temporary employees

As already noted, the General Counsel offered evidence of use of temporary employees in the food and beverage department. A summary of the use of these employees shows many were working during the fall and winter, just when the restructuring was yielding more efficient operations (G.C. Exh. 57). The testimony of Manpower Manager Bluth indicates that some Manpower employees were doing the work of KWs. The invoices show that many temporaries also worked as cooks and bakers (G.C. Exhs. 55–56). There is no evi-

dence that any temporary cooks were required to take tests before performing their duties.

In *E & L Transport Co. v. NLRB*, 85 F.3d 1258, 1272–1273 (7th Cir. 1996), the issue was whether the use of Kelly Temporary Service employees rather than hiring of the predecessor's unionized office workers could be justified. The Court held that the Respondent had simply failed to show that using Kelly was better than hiring or at least interviewing the former union employees. I find here that Respondent has also failed to show why using the Manpower temporaries was better than reinstating Zabala, an experienced cook, food server, and food preparer.

The General Counsel has the burden of proving that protected activity was at least a partial motivating factor in the employer's discharge decision. Having done so, the burden then shifts to the Respondent to show that lawful reasons necessarily would have caused the discharge. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

As cited by the General Counsel, the Board recently explained the allotted *Wright Line* burdens of proof in *W. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. 70 F.3d 863 (6th Cir. 1995). In that case, the Board stated:

First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activities. To establish its defense, the Respondent has the burden of presenting "an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." [Citation omitted.]

The *Wright Line* burden of proof imposed upon the General Counsel may be sustained with evidence short of direct evidence of motivation, i.e., inferential evidence arising from a variety of factors, i.e., union animus, timing, pretext, etc. Furthermore, it may be found that where the Respondent's proffered nondiscriminatory motivational explanation is so consummately false, even in the absence of direct evidence of motivation, the trier of fact may infer unlawful motivation. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Abbey's Transp. Services v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988); *Rain Ware, Inc.*, 735 F.2d 1349, 1354 (7th Cir. 1984); *Williams Contracting*, 309 NLRB 433 (1992).

For all the reasons noted above, I find that Respondent has violated Section 8(a)(1) and (3) of the Act by laying off Zabala.¹³

¹⁰Falk's name was also entered on the list of in-house organizers (G.C. Exh. 9). But there is no evidence as to whether she was disciplined for the events of October 13 and if so, to what degree.

¹¹Other than Guirey, the other persons laid off as a result of restructuring did not testify.

¹²Employee Jessie Buckman had less seniority than Zabala, but she was not laid off (G.C. Exh. 53; Tr. 765). Garcia's explanation that Buckman was on a different shift is not persuasive for deviating from seniority.

¹³To the extent there may be an issue regarding Zabala's refusal to accept the postlayoff KW position offered by Winchester, that issue can be resolved at compliance. *G. P. Electric Corp.*, 321 NLRB 518 fn. 2 (1996). The General Counsel has not argued in his brief that Zabala was constructively discharged by the offer of a lower classification. In light of this fact and that any remedy would be cumulative, I decline to analyze the Zabala case under *Crystal*

3. Alleged unlawful layoff of Guirey

Guirey was hired on January 31 to perform kitchen work. Beginning in August, he received a 50-cent-per-hour raise and was assigned to work as a food server on the buffet line and as a pantry worker preparing salads, jellios, and other foods. On October 22, in a 6-month appraisal, Guirey was rated by his supervisor Randy Ammerman, who did not testify, as "Successful" on his job, a middle category below "Outstanding" and "Highly Successful" (G.C. Exh. 36), but above "Needs Improvement" and "Unsatisfactory." There were no general comments about Guirey and his supervisor found him to be quite satisfactory, "most of the time." On October 26, Guirey was laid off by Garcia, who had previously conducted a one-on-one interview with Guirey in order to probe his opinion on the restructuring, whether Guirey thought it was better to either eliminate 5 jobs or to cut back on the hours of 10 to 11 employees (Tr. 699).¹⁴ (It isn't clear whether Guirey was told as he was probed by Garcia, that his job would be one of those eliminated.) Garcia allegedly made the decision to layoff Guirey based on Garcia's evaluation of his work performance and of his file.

On November 6, Winchester wrote a letter to Guirey offering him a position as a KW for \$5.50 per hour on the graveyard shift (G.C. Exh. 32). For some reason, this letter was never received by Guirey, but when he learned that Zabala had received an identical letter, he inquired of Winchester why he had not been offered a job as KW. When he learned that a letter had been sent to him with that offer, he told Winchester he would accept and on or about October 21, Guirey returned to work as a KW.

On August 11, Guirey wore a union button to work (G.C. Exh. 50), but for some reason he was not ordered to remove it or to leave. In addition on subsequent days, Guirey passed out flyers to customers, circulated petitions, and informed employees about what was going on with the Union.

On August 18, Guirey arrived at the employee dining room (EDR) at 9 p.m., about an hour before his shift was to begin. Guirey began to circulate a petition to other employees there, also waiting for the graveyard shift to begin, asking Respondent to rehire two sous chefs. During this activity, a Respondent security guard, Gary Hall, who testified for Respondent, asked Guirey what he was doing. When Guirey explained his purpose, Hall asked him what time he started and Guirey answered, "10 p.m." Then Hall explained that Guirey was in violation of a Respondent rule or policy limiting employee use of the EDR to 30 minutes or less prior to beginning of the shift. Guirey protested that there were 20 or more other graveyard employees in the EDR at the time who were not accosted by Hall. After Hall reported the matter to Lt. Richins, his supervisor and also a Respondent witness, Richins went to Guirey where he reiterated the statement of Hall.

I find that Respondent violated Section 8(a)(1) of the Act by warning Guirey not to clock in more than 30 minutes before his shift thereby interfering with Guirey's right to en-

Princeton Refining Co., 222 NLRB 1068, 1069 (1976), to determine whether Zabala was constructively discharged.

¹⁴In a document completed by Guirey on his final day of employment before his layoff (G.C. Exh. 33, p. 5), Guirey wrote for par. 12 [Briefly explain why are you leaving the Pioneer?] "Because of my union activities."

gage in protected activities. In support of that conclusion, I find that other employees were in the EDR more than 30 minutes before their shift but they were not warned. Moreover, I do not find that any such rule exists to begin with. Lt. Richins referred to Time Office Procedures, located at General Counsel's Exhibit 2, page 31, but that rule does not appear to be the rule enforced by Hall. Respondent never offered any such rule as was enforced by Hall.

Circulating a petition in the EDR before worktime to have discharged employees rehired is protected by Section 7 of the Act. *General Electric Co.*, 321 NLRB 662, 667 (1996). In *Parsippany Hotel Management Co.*, 319 NLRB 114, 127-128 (1995), an employee was written up for clocking in early. The judge found and the Board approved, that under the facts and circumstances surrounding the warning that it violated Section 8(a)(1) of the Act. Here, Hall's attention was directed to Guirey because of his protected concerted activities. The warnings about a nonexistent or at least a selectively or disparately enforced rule violated Section 8(a)(1) of the Act. *Waco, Inc.*, 273 NLRB 746, 748 (1984).¹⁵

I also find that Respondent's security guards interfered with the Union's right through employees, to communicate with other employees and the right of these other employees to hear the Union's message. See *Mediplex of Wethersfield*, 320 NLRB 510, 516 (1995).¹⁶

After August 18, Guirey continued his union activity continuing to pass out flyers and even meeting with C. Lowden to give him a petition.

In early October, Guirey became aware that his hours had been cut about 5 hours per week. No prior notice was given before Guirey observed the work schedule for the coming week. When Guirey asked Supervisor Ammerman and Miller for an explanation, they both said they had no information about it, but would look into it and get back to Guirey. Neither one ever did. Like Zabala, seniority was not followed in that employee Brian Davis, junior to Guirey, had more hours per week than Guirey did.

On the day Garcia told Guirey he would be laid off, Guirey asked him "why me?" To this, Garcia responded, [because of] poor work habits and lack of consistency. This conclusion is refuted by Guirey's un rebutted testimony that his immediate supervisor Ammerman had told him he was doing a good job. Ammerman's evaluation of Guirey indicates average or better work habits with a promise of improvement to come (G.C. Exh. 36). In fact, Garcia apparently had not reviewed Ammerman's recent evaluation of Guirey before Guirey was selected for layoff. Moreover, Respond-

¹⁵If Respondent's rule limiting access to the EDR to off-duty employees for 30 minutes or less truly existed, it would be subject to challenge under the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976). Among the other deficiencies in Respondent's alleged rule besides questions about its existence and selective enforcement, is the lack of evidence showing clear dissemination to all employees. There is no evidence of any signs in the EDR notifying employees about the alleged rule. Even Officer Hall, the enforcer of the rule, could not clearly explain where the rule could be found (Tr. 532-533). Guirey had never heard of the rule before his encounter with Hall.

¹⁶I find that while Guirey may have been loud and abusive when approached by Hall, his conduct was provoked and was not otherwise so outrageous as to remove him from protection of the Act.

ent's subsequent rehire of Guirey as a KW belies Garcia's characterization of Guirey's work performance as poor.

Once Guirey had returned to work, he observed a Manpower temporary employee named Mark doing pantry work, e.g., peeling carrots, that Guirey used to perform. Another employee told Guirey that Mark was being paid \$6.50 per hour.

For the same reasons as found for Zabala, I find that Guirey was laid off in violation of Section 8(a)(1) and (3) of the Act. I find that the reasons given were pretextual and meant to cover up the real reasons that Guirey engaged in union or other protected activities, that Respondent was aware of Guirey's union activities and that Respondent had animus toward these protected activities and intended the layoff to discourage Guirey from continued participation in those activities. See *Schaeff Inc.*, 321 NLRB 202 (1996).

4. Adverse inference for refusing to produce documents

In sum, I have found that Zabala and Guirey were laid off as the result of pretext.¹⁷ In further support of that conclusion, I draw an adverse inference from Respondent's failure to produce documents, within the scope of the General Counsel's subpoena duces tecum. The facts and circumstances surrounding the withholding of documents have been recited above.

As to whether this Respondent or any party to any cause can decide for itself whether to comply with a presumably valid subpoena duces tecum, which has been properly served, I find that such discretion would hobble if not destroy the process under which we labor. Therefore, I draw an adverse inference from Respondent's failure to comply with the General Counsel's subpoena duces tecum. In *Auto Workers v. NLRB*, 459 F.2d 1329, 1340 (D.C. Cir. 1972), the court discussed at length the adverse inference rule regarding a party's failure to produce documents. At page 1338, the court stated, "But while the adverse inference rule in no way depends on the existence of a subpoena, it is nonetheless true that the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the pre-existing inference." Compare *Riverdale Nursing Home*, 317 NLRB 881 (1995), where the Board found that the judge's use of the adverse inference rule to fill an evidentiary gap proving joint employment status "sweeps too broadly." In the instant case, by contrast, I find that the General Counsel has proven a prima facie case by substantial evidence. The adverse inference which I draw from Respondent's non-compliance with the subpoena merely corroborates and reinforces the General Counsel's prima facie case, but does not establish it, even in part. See also *National Football League Management Council*, 309 NLRB 78, 97-100 (1992).

Moreover as noted by J. Breyer (concurring) *U.S. v. Armstrong*, 116 S.Ct. 1480, 1490 (1996), "the privilege derived from the work product doctrine is not absolute" (citations omitted). The same is true for the attorney/client privilege. Since Respondent refused to permit an in-camera examina-

tion, an adverse inference is justified since I cannot decide whether its privilege claims are justified.¹⁸

5. Grace's termination

It is undisputed that for all times material to this case, Grace was a statutory supervisor, manager of the food and beverage department. In *Liberty Natural Products*, 314 NLRB 630, 639 (1994), the judge explained the law regarding discipline and discharge of supervisors quoting P. Hardin, *I The Developing Labor Law* 132 (3d ed. 1992).

Supervisors are excluded from the Act's definition of "employee" because they are agents of the employer. Accordingly, supervisors do not enjoy the protection of the Act and are subject to other discipline for engaging in union or concerted activity. Thus, when an employer has disciplined or discharged a supervisor out of a legitimate desire to assure the loyalty of its management personnel and its action was "reasonably adapted" to that end, the Board has found such conduct permissible even if an incidental effect was to instill in employees the fear that the same fate would befall them for engaging in protected activity.

For many years, however, the Board has held that the discipline or discharge of a supervisor violates section 8(a)(1) "when it interferes with the . . . exercise [by employees of] their rights under section 7 of the Act." Thus, an employer may not discipline or discharge a supervisor . . . for refusing to commit unfair labor practices. [Citations omitted.]

Parker-Robb Chevrolet, 262 NLRB 402 (1982), affd. 711 F.2d 383 (D.C. Cir. 1983); *Casa San Miguel*, 320 NLRB 534, 546-547 (1995). To determine whether Grace was terminated for refusing to commit unfair labor practices, I turn to the record.

Grace started with Respondent in May 1994 as restaurant manager. After 40 days he was promoted to bar manager and restaurant manager. Thirty days later, Grace was promoted again, to food & beverage director. Sometime during the tenure of Catala as human resources manager (7/94-2/95), Grace became aware of union activities at Respondent. Shortly before his termination, Grace filed an application for Rabin's position as G.M. It is undisputed that as recently as August 2, Tim Maland, Respondent's chief operating officer, who never testified, told Grace that he was still in the running for Rabin's position, that things were looking up, and that Grace was doing a good job. Then on August 3, about 11:20 a.m., acting on orders of C. Lowden, Cliff Holder, Respondent's [corporate] director of security called Grace to his office to tell him that management desired to make a change and that he was fired. Like Maland, Holder did not testify in this case.

The General Counsel's theory is that Grace was terminated because he refused to commit unfair labor practices and fire Zabala, who Grace knew to be a union activist. According to Grace, on June 20, he had a conversation with Winchester

¹⁷ A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982).

¹⁸ See also, A "Delicate and Difficult Task," Balancing the Competing Interests of FRE 612, The Work Product Doctrine and the Attorney-Client Privilege. *Buffalo L. Rev.*, Winter 1996, Vol. 4, No. 1 pp. 101-138.

in which she told him that Grace's superiors wanted Zabala fired. Grace replied that he couldn't do that because Tony was a good employee. Grace then asked Winchester who she was referring to, Rich? [Rabin] and she replied, "[N]o, corporate." Again, Grace refused to do as requested telling Winchester, I don't care what Chris Lowden and his prima donna self wanted, "I'm not going to do it." As matters turned out, Grace not only didn't fire Zabala, but a day or two after talking to Winchester, he transferred Zabala to Granny's buffet to get Zabala "out of the line of fire." When Grace told Winchester what he had done, she said "I hope this little stunt doesn't cost you your job."

Winchester denied both conversations attributed to her by Grace, but I credit Grace over her denial. When he gave his testimony, initially, Grace was not a party to the case and he did not seem overly bitter about his termination. He impressed me as a credible witness without a motive to fabricate. Because Winchester was a statutory supervisor at the time of her conversation with Grace, I weigh the effect of her remarks against Respondent and find that the General Counsel has established a prima facie case that Grace was terminated because corporate officials wanted Grace to fire Zabala because of Zabala's union activities and Grace refused. I turn to consider Respondent's evidence, presented on the final day of hearing to see if said evidence shows that Grace would have been fired absent his protected refusal to fire Zabala.

According to C. Lowden, he made the decision to fire Grace in late afternoon of August 2 and he based his decision, as noted above, on Grace's alleged poor performance and his lack of respect for C. Lowden. These reasons should be compared to what Maland told an in-house grievance board convened on August 9, at Grace's request to consider his discharge. There Maland stated that Grace was terminated due to "corporate restructure," i.e., a change in management (Tr. 953). This is essentially what Grace testified that Holder told him on August 3, as the reason for his termination: that management desired to make a change, and Holder added, "[Y]ou haven't done anything wrong" (Tr. 372). Because Maland and Holder were not called as witnesses, it is impossible to resolve the conflict between them and C. Lowden. Instead, I will draw adverse inferences from their absence from the case and weigh these against Respondent since I must assume that these executives would be favorably disposed toward Respondent. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 270 (6th Cir. 1988); *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1552 (10th Cir. 1996). I refuse to draw an adverse inference from the absence of Rabin, since I do not assume that as a former G.M., Rabin would necessarily be favorably disposed toward Respondent. *NLRB v. Norbar, Inc.*, 752 F.2d 235, 240 (6th Cir. 1985). Rabin was equally available to the General Counsel to call as a witness. *Salisbury Hotel*, 283 NLRB 685, 692 fn. 10 (1987). On the other hand, I do not ignore completely Rabin's absence from the case since if Grace was not doing a good job, who better to know than his immediate supervisor, Rabin. *C & S Distributors*, 321 NLRB 404 fn. 2 (1996).

Had he testified, perhaps Rabin could explain to my satisfaction why Grace was rapidly promoted soon after he was hired. Perhaps too, Rabin could enlighten as to the reason for Grace's generally positive performance appraisal, dated Feb-

ruary 13 and wherein Rabin wrote for [Grace] OVERALL RATING, "HIGHLY SUCCESSFUL," and for the General Comments about Grace's overall performance. Rabin wrote, "Tom has done a complete meta porphus [sic] regarding his prior weakness and has improved on his strengths" (G.C. Exh. 76, p. 3).¹⁹

I conclude with two final documents. First, is Grace's letter to Paul Lowden dated July 18, in which he applies for Rabin's job. Self-appraisal is a risky business but I am impressed enough with the paucity of evidence to counter this self-appraisal that I find it has some probative value. It reads as follows:

Dear Mr. Lowden

I would like to take this opportunity to have you consider me for the position of General Manager at the Pioneer Hotel and Gambling Hall, Laughlin, Nevada. I ask this for the following reasons.

Monetary savings to the company

I would not command the wage of Rich Rabin, although someday I hope to have his reputation and ability. I would continue as Food and Beverage Director as well as my new position. This would save the company approximately \$55,000 annually.

If you would like to do this on an interim basis until you felt comfortable with your decision or until you found the perfect person for the job, that would be acceptable to me as well. I would expect to go back to being the Food and Beverage Director at the agreed upon salary if you did replace me.

Continuity of company policies

I believe quite strongly in 99% of Mr. Rabin's policies, procedures, and style of management. I would keep things moving in the same positive direction as Mr. Rabin has them heading. This would allow staff to feel the same comfort level with me that they feel towards Mr. Rabin. We wouldn't need to start all over again and get used to another person.

Pioneer morale

I presently run the largest department at the Pioneer. Over one third of all employees work in my department. I have an honest rapport with my supervisors and staff and I feel this will only continue to flourish at the position of General Manager.

Productivity

I would continue along the lines Mr. Rabin headed regarding directors and managers, except I would make them more accountable for the results and follow up actions they took or failed to take regarding the operation of each department.

¹⁹At p. 930 of the transcript, Attorney Kirshman complained that Rabin was too lenient and too generous with subordinates and Grace's appraisal should be considered in that light. Such a person as this should have been called as a witness to explain his grading practices. This Respondent did not do and the document will speak for itself.

Stability

I am recently married and a home owner in the local community, so I am anxious to continue with employment in the area. I am 48 years old so I believe my approach to management and life is quite solid and realistic. This will only help to keep things moving on an even keel.

I have over 20 years management experience and I have been very successful in all my business endeavors. I am hard working, reasonable, humanistic, and very honest. I believe my conduct would make you proud of your decision.

I realize this is rather forward of me, however, I also understand that to succeed you must be a go getter and a self starter. I am both and glad of it.

Respectfully,
/s/ Tom Grace

cc:
Tim Maland
Rich Rabin
[G.C. Exh. 80.]

A second document, the Profit & Loss (P&L) statement for the food and beverage department for June 94 and June 95 (G.C. Exh. 81), was entered into the record but I do not reproduce it here because it is too long and complex. It suffices to say that I have given this document due consideration and the weight that it deserves, and that I find that it generally supports the General Counsel's theory that Grace was doing a good job before his termination.

If the evidence supporting Respondent's claim that Grace was not doing a good job is sparse, the evidence that Grace publicly disparaged C. Lowden to Grace's peers and subordinates is abundant. Catala credibly testified that Grace had a long-standing problem of making uncalled for and disparaging comments about his peers and supervisors. In October 1994, Grace was written up over this deficiency (R. Exhs. 8, 9).

Respondent also brought in two very credible witnesses, the first, Dawn Burnes, a former employee of Respondent and a confidant of Grace's. She recalled Grace making comments to her shortly after she was hired in May 1994 that C. Lowden was a spoiled little rich kid who had everything handed to him his entire life. In April, while a special promotion was in progress involving a Harley-Davidson motorcycle weekend, C. Lowden called Grace to request that champagne and beer be sent to his room immediately. Apparently, Grace interpreted this request as meaning that Grace should personally deliver the beverages to Lowden's room which he did. In the course of filling the order, Grace referred to C. Lowden as a "prima donna." This remark was heard by Respondent's other witness Mary McLaughlin, the restaurant manager. On another occasion, when Grace refused to promote an employee whom McLaughlin believed was deserving, McLaughlin argued that the employee might complain to C. Lowden. To this, Grace represented that he "didn't give a shit what C. Lowden had to say about any subject at any time."

Neither Burnes nor McLaughlin reported Grace's intemperate remarks to C. Lowden or to anyone else. However, it is clear to me that Grace was not only intemperate, but indis-

creet, and frequently made disparaging remarks about C. Lowden in front of other employees. On cross-examination Grace conceded that he didn't like C. Lowden and felt he was a privileged and "snotty" young man (Tr. 1033).

C. Lowden testified that he heard about Grace's remarks about him from about six employees who heard remarks "or they heard from somebody else, or they heard so-and-so saying this, overheard, that kind of stuff" (Tr. 910). While poor food quality and poor service were factors, according to C. Lowden, Grace's lack of respect was the primary factor in his termination because this trait of Grace's indicated that the parties could not work together (Tr. 910-911).

An employee cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985). For the reasons stated below, I find that Respondent has failed to show that it [C. Lowden] relied upon or was even aware of Grace's propensity to make disparaging remarks about his peers and supervisors including C. Lowden as a justification for discharge.

(1) Catala testified that after he counseled Grace about his deficiencies (October 19, 1994), there was some improvement in Grace's performance in that Catala heard nothing more about Grace making disparaging comments (Tr. 938-939).

(2) C. Lowden provided no names of any employee who allegedly told him prior to Grace's discharge that Grace had made disparaging comments about C. Lowden.

(3) Neither C. Lowden nor anyone else ever went to Grace or otherwise conducted any kind of investigation of Grace's alleged misconduct. The Board has considered an employer's failure to conduct a fair investigation and to give employees an opportunity to explain their actions before imposing disciplinary actions to be significant factors in finding of discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995); See also *U.S. Rubber Co. v. NLRB*, 384 F.2d 660, 662-663 (5th Cir. 1969). Instead there was such a rush to judgment to get Grace out that Respondent cannot agree on the reasons for his termination, either simple discharge as a result of restructuring or as a disciplinary reaction for poor performance and for disparaging C. Lowden. These vacillating and shifting reasons gives rise to an inference that the real reason for Grace's termination was not among either of the two suggested. *Zurn Industries*, 255 NLRB 632, 635 (1981); *Atlantic Limousine*, 316 NLRB 822, 823 (1995). *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Zengel Bros.*, 298 NLRB 203, 206 (1990).

For all of these reasons together with the adverse inferences referred to above, I find that Respondent has violated Section 8(a)(1) of the Act by its discharge of Grace.²⁰

²⁰ At p. 60, fn. 55 of its brief, the General Counsel cites *RMS Foundation*, 317 NLRB 1303, 1310 (1995), for the proposition that a "personality conflict" would not be a sufficient reason for not retaining Grace. Assuming without finding that this authority is applicable in the case of a statutory supervisor, I do not rely on it here because Grace's remarks about C. Lowden indicate more than a personality conflict. On the other hand, Respondent's distortion and magnification of Grace's deficiencies casts a deep shadow over any

6. Grace's alleged unlawful interrogation

The General Counsel also alleges that Grace unlawfully interrogated an employee named Sheila Falk who did not testify. The facts are undisputed. In the spring, Grace learned of union activities in the food and beverage department, after some of his employees informed him that they had signed union cards. Unlike two prior conversations where employees had initiated the conversation with Grace, in this case Grace initiated the conversation with Falk whom he believed had signed a union card and said to her:

A. "I know that you're in the union and it's okay with me, but I wanted to talk to you about this problem." . . . So she said she would and she—we stepped off to the side. I said, "Have—has my management people, Mary and me and Chef Paul and those people, have we done something to make you unhappy with us." And she said, "No, it isn't you guys, it's them."

And I said, "Who is them"? And she said, "The Pioneer, the Lowden's." And I said, "Well, just so it's not something we're doing wrong." And she said, "It isn't." And I said, "Thank you," and that ended it.

[Tr. 307.]

I find that Respondent violated Section 8(a)(1) of the Act when Grace questioned Falk. *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub. nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). There is no evidence that Falk was an open and active union supporter. Further as the Board stated in *Varco, Inc.*, 216 NLRB 112 (1974):

However, it is not the solicitation of grievance itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation . . . that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the Employer.

See also *Foamex*, 315 NLRB 858 (1994), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Compare *Best Plumbing Supply*, 310 NLRB 143, 148 (1993).²¹

CONCLUSIONS OF LAW

1. The Respondent is and has been at all relevant times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct.

claim that mere business judgment was involved in Grace's termination. *Postal Service*, 256 NLRB 736, 738 (1981).

²¹Over the General Counsel's objection, I admitted a charge filed by Grace on February 22, 1996 with the Arizona Civil Rights Division alleging age discrimination as the reason for his termination from Respondent (R. Exh. 12). I find nothing in that charge to assist Respondent in the instant case, for Grace is doing nothing more than alleging alternative causes of action. See Fed.R.Civ.P. 8(e)(2).

(a) Directing employees to remove their union buttons while at work.

(b) Terminating Supervisor Tom Grace.

(c) Interrogating employees concerning their union activities.

(d) Denying an employee access to the employee dining room.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following acts and conduct.

(a) Reducing the hours of Tony Zabala and James Guirey and subsequently laying them off, and suspending Zabala for 3 days.

5. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having concluded that Pioneer Hotel, Inc. d/b/a Pioneer Hotel & Gambling Hall engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer immediate and full reinstatement to Tony Zabala, James Guirey, and Tom Grace by reinstating each of them to their former job classifications from which they had been unlawfully laid off, or in the case of Grace, terminated. In addition, it shall be ordered to remove from its files any references to the unlawful layoffs or terminations of Zabala, Guirey, or Grace, notifying each one in writing that it has done so, and, further, shall be ordered to make them whole for any loss of pay and benefits suffered because of their unlawful layoffs or terminations, with back-pay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based on the above findings of fact and conclusions of law and on the basis of the entire record herein, I issue the following recommended²²

ORDER

The Respondent, Pioneer Hotel, Inc. d/b/a Pioneer Hotel & Gambling Hall, Laughlin, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to remove their union buttons while at work.

(b) Reducing employees hours, suspending and laying off employees because of their support for the Union or for engaging in other protected concerted activities.

(c) Terminating its supervisor, Tom Grace, because he refused to commit unfair labor practices.

(d) Denying an employee access to the employee dining room.

²²If 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.

(e) Interrogating employees concerning their union activities.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.²³

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Tony Zabala and James Guirey full reinstatement as pantry workers, 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 Tony Zabala and James Guirey 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.

(c) Within 14 days from the date of this Order, offer Tom Grace full reinstatement as director of the food and beverage department, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Tom Grace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of this Order, remove from Tony Zabala, James Guirey, and Tom Grace's files any reference to the unlawful suspension, layoffs, or discharge, and within 3 days thereafter notify the employees in writing that this has been done and that the suspension, layoffs, or discharge will not be used against them in any way.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its Laughlin, Nevada facility copies of the attached notice marked "Appendix."²⁴ 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. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

²³The General Counsel's request, Br. 70, for a broad cease-and-desist order is denied.

²⁴If 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize.

To form, join, or assist any union.

To bargain collectively through representatives of their own choice.

To act together for other mutual or protection.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT order our employees to remove union buttons from their clothing while at work and WE WILL NOT suspend our employees from work for refusing to remove the union buttons.

WE WILL NOT suspend, lay off or otherwise discriminate against Tony Zabala and James Guirey or any other employee because they engaged in union activities or because we suspect that they are engaging in union activities, nor because they engaged in any other activity protected by Section 7 of the Act.

WE WILL NOT deny employees access to the employee dining room on account of their union activities.

WE WILL NOT terminate Supervisor Tom Grace, because he refused to commit unfair labor practices.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT in any like or related manner 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 Tony Zabala and James Guirey full reinstatement as pantry workers or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tony Zabala and James Guirey 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.

WE WILL, within 14 days from the date of this Order, offer Tom Grace full reinstatement as director of the food and beverage department or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Tom Grace whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL within 14 days from the date of this Order, remove from Tony Zabala, James Guirey, and Tom Grace's

files any references to the unlawful layoffs or termination, and within 3 days thereafter notify the employees in writing

that this has been done and that the layoffs or termination will not be used against them in any way.

PIONEER HOTEL, INC. D/B/A PIONEER HOTEL
& GAMBLING HALL