NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Trump Marina Associates, LLC d/b/a Trump Marina Hotel Casino *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO. Cases 4–CA–35334, 4–CA–35395, and 4–RC–21278

February 17, 2009

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 18, 2008, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent/Employer (the Respondent) filed exceptions and a supporting brief. The General Counsel and the Charging Party/Petitioner (the Union) each filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions. The Respondent filed an answering brief to the General Counsel and Charging Party's cross-exceptions.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified herein, and to adopt his recommended Order as modified and set forth in full below.[3]

This consolidated unfair labor practice and representation proceeding arises out of the Union's organizing efforts at the Respondent's casino in Atlantic City, New Jersey, in the spring of 2007. The Board conducted an election on May 11, which the Union lost 175 to 183. We adopt the judge's conclusions, for the reasons stated by him, that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by interrogating employees regarding their union sympathies,[4] by threatening that supervisors would no longer grant employees' requests for time off, approve schedule changes, or correct no-call/no-show designations,[5] and by threatening that employees would lose their jobs if they selected the Union to represent them.[6] We also adopt the judge's conclusions, for the reasons stated by him, that the Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by issuing disciplinary warnings and suspensions to employee Mario Spina.[7]

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[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[2] 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.

The judge dismissed five allegations on the basis that the evidence was in equipoise because he was unable to credit one witness over another. Chairman Liebman acknowledges that, on rare occasions, a finding of equipoise may be unavoidable, and she agrees to adopt the judge's dismissals here, but she would find a routine reliance on an equipoise rationale to be troubling.

[3] We have modified the recommended Order and substituted a new notice conforming to language traditionally used for the violations found herein and for directing a second election.

The judge recommended, without setting forth any supporting rationale, that the Board impose a broad order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad cease-and-desist order is not warranted in this case. See *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, we shall substitute a narrow cease-and-desist order and conform the notice accordingly.

[4] Because the Board adopts the judge's conclusion that the Respondent violated Sec. 8(a)(1) by Supervisor Sych's interrogation, Member Schaumber finds no need to pass on the Respondent's exceptions to the judge's conclusion that Supervisor Salvey also unlawfully interrogated employees by soliciting their views on a newspaper ad.

[5] In discussing 8(a)(1) violations of this kind, the judge cited *Baptist Medical Center*, 338 NLRB 346 (2002); *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989); and *Progress Industries*, 285 NLRB 694 (1987). However, in each of those cases there were no exceptions to the findings for which the judge cites them. Accordingly, they have no precedential value and we do not rely on them. Other cases cited by the judge do have precedential value and support his finding. In addition, see *North Star Steel Co.,* 347 NLRB 1364, 1365–1366 (2006) (employer unlawfully threatened that, if the union got in, the employer would no longer have the flexibility to reduce hours during an economic downturn and would have to lay off employees); *P.H. Nursing Home*, 332 NLRB 389 (2000) (employer unlawfully threatened changes in employee call-in policy if employees supported the union); *Springfield Hospital*, 281 NLRB 643, 652 (1986), enfd. 899 F.2d 1305 (2d Cir. 1990) (employer unlawfully threatened to withdraw liberal policy of granting emergency time off if employees voted for union representation).

We shall modify the Order to correct the judge's failure to include remedial language referring to this violation.

[6] Because we adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by Supervisor Mangione's threat, we find no need to pass on cross-exceptions to the judge's failure to conclude that Supervisor Ferrare also unlawfully threatened employees with job loss.

[7] In his description of general legal principles for 8(a)(3) violations, the judge stated that under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel must meet a four-prong evidentiary standard. To establish a violation under *Wright Line*, the General Counsel bears the burden of showing that union animus was a motivating or substantial factor for the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and

We reverse the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) when Supervisor Mike Ferrare twice stated to Spina that management would not negotiate with the Union. It is well established that such statements violate the Act. See *Garvey Marine, Inc.*, 328 NLRB 991, 1004, 1018 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001) (categorical statement that respondent would not negotiate with the union if it became the designated bargaining agent was an unlawful threat of futility); *Equipment Trucking Co.,* 336 NLRB 277, 283 (2001) (respondent unlawfully threatened futility when it told employees that it would never negotiate a contract). Contrary to the judge, neither Spina's status as an open union adherent nor the absence of any adverse reaction by Spina negated the reasonable objective tendency of Ferrare's statements to threaten employees engaged in protected organizational activities. We therefore conclude that the Respondent violated Section 8(a)(1) by threatening the futility of bargaining if employees chose union representation.

Finally, for the reasons stated by the judge, we adopt his dismissal of all of the other alleged 8(a)(1) violations.[8] Based on the violations and objectionable conduct that we have found, we agree with the judge's recommendation to set aside the election results.

union animus on the part of the employer. See, e.g., *Consolidated Bus Transit, Inc.*, 350 NLRB 1064 (2007); *Desert Springs Hospital Center*, 352 NLRB 112 (2008). Member Schaumber notes that the Board and the circuit courts of appeal have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), because *Wright Line* is a causation standard, Member Schaumber agrees with this addition to the formulation, which the judge applied here.

[8] In adopting the judge's dismissal of the allegation that the Respondent implicitly threatened Spina by telling him not to worry about an incident report and suspension notice because the Union had lost the election, we rely on the judge's crediting of Ferrare's account of the conversation. In adopting the judge's dismissal of the allegation that the Respondent unlawfully closed parking lot A on election day, we find that, to the extent that the General Counsel's theory of violation is that the Respondent closed the lot in response to possible union activity, the General Counsel has not proven such by a preponderance of the evidence.

No exceptions were filed to the judge's dismissal of allegations that the Respondent did not violate Sec. 8(a)(1) by telling an employee that it "was looking to fire" those employees who had started the union campaign, and did not engage in objectionable conduct by (a) unilaterally changing the election room in violation of the Stipulated Election Agreement, or (b) monitoring Spina after April 27 so as to intimidate other employees. Inasmuch as we adopt the judge's recommendation to set aside the election results based on unfair labor practices occurring within the critical election period, we find it unnecessary to pass on the Union's cross-exceptions to the judge's overruling of several objections alleging additional acts of election interference.

ORDER

The Respondent, Trump Marina Associates LLC d/b/a Trump Marina Hotel Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, sympathies, and support.

(b) Threatening employees that supervisors would no longer grant employees' requests for time off, approve schedule changes, or correct no-call/no-show designations if the employees selected the Union to represent them.

(c) Threatening employees with loss of their jobs if they select the Union as their bargaining representative.

(d) Threatening employees that selecting a union representative would be futile.

(e) Issuing disciplinary warnings and suspensions to employees because of their support and activities on behalf of the Union.

(f) 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) Make Mario Spina 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 judge's decision.

(b) Within 14 days of the Board's Order, expunge from its records all references to the unlawful warnings and suspensions issued to the discriminatee, Mario Spina, and within 3 days thereafter, advise him in writing that this has been done and that the warnings and suspensions will not be used in any way against him.

(c) 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.

(d) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Re-

[9] 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."

gion 4, 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 April 15, 2007.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 4 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 4–RC–21278 is severed and remanded to the Regional Director for Region 4 for the purpose of conducting a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. February 17, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, 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 interrogate our employees about their union membership, activities, sympathies, and support.

WE WILL NOT threaten our employees that supervisors would no longer grant employees' requests for time off,

approve schedule changes, or correct no-call/no-show designations if the employees selected the Union to represent them.

WE WILL NOT threaten our employees that selecting a union representative would be futile.

WE WILL NOT threaten our employees with loss of their jobs if they select the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union), as their bargaining representative.

WE WILL NOT issue disciplinary warnings to our employees because of their support for, and activities on behalf of, the Union.

WE WILL NOT suspend our employees because of their support for, and activities on behalf of, the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL make discriminatee Mario Spina whole for any loss of earnings and other benefits he suffered as a result of our unlawful action against him, with interest.

WE WILL remove from our records all references to the unlawful actions taken against the discriminatee, Mario Spina, and advise him in writing that this has been done and that these actions shall not be used against him in any manner in the future.

TRUMP MARINA ASSOCIATES, LLC D/B/A TRUMP MARINA HOTEL CASINO

Barbara C. Joseph, Esq., for the General Counsel.
Brian A. Caufield, Esq. (Fox Rothschild, LLP), of Roseland, New Jersey, for the Respondent.
Cassie Ehrenberg, Esq. (Cleary & Josiein, LLP), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me on October 15–18, 2007, pursuant to an original petition for certification of representative filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) in Case 4–RC–21278 on March 30, 2007, which petition sought recognition as bargaining representative of a described unit of employees employed by Trump Marina Hotel and Casino (the Respondent). On April 24, 2007, the Union filed an original charge against the Respondent in Case 4–CA–35334; on May 17, 2007, the Union filed an original charge against the Respondent in Case 4–CA–35395. The Union filed amended charges in Cases 4–CA–35334 and 4–CA–35395 on June 27, 2007, against the Respondent; on July 2, 2007, the Union filed its second amended charge against the Respondent in Case 4–CA–35395.

On May 17, 2007, the Union filed objections to election and a supplemental objection to election on May 18, 2007.

On July 19, 2007, the Acting Regional Director for Region 4 (the Region) of the National Labor Relations Board (the Board) issued a complaint consolidating Cases 4–CA–35334 and 4–CA–35395 and scheduled a hearing on the matter for October 2, 2007.[1] On August 1, 2007, the Respondent filed its answer to the consolidated complaint essentially denying the commission of any unfair labor practices.

On August 29, 2007, the Regional Director for Region 4 issued a notice of hearing on the Union's objections to election and consolidated the objections for hearing with Cases 4–CA–35334 and 4–CA–35395. On September 5, 2007, the Region ordered that the consolidated cases be scheduled for hearing on October 15, 2007.

On October 2, 2007, the Regional Director issued an amended consolidated complaint against the Respondent. The Respondent filed its answer in which it again essentially denied the commission of any unfair labor practices.

The consolidated complaint as amended alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) on numerous occasions during the course of an organizing campaign conducted by the Union, the subsequent election and afterwards, covering mid-April through May 16, 2007. The Union's 15 objections to the election, 11 of which are coincident with the unfair labor practice allegations, alleged misconduct by the Respondent during the campaign and election. Four objections fall within the category of unalleged misconduct as determined by the Region's investigation of the Union's objections.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record,[2] including my observation of the demeanor of the witnesses and after considering the posthearing briefs of the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation, has been engaged in the operation of a hotel and casino in Atlantic City, New Jersey. During the past year (2007), the Respondent received gross revenues in excess of $500,000 and purchased and received at the casino and hotel goods valued in excess of $5000 directly from points outside the State of New Jersey. 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.

[1] On July 20, 2007, the Region issued an erratum stating that the order consolidating these cases contained an error and indicated that par. 5(c) of the complaint should be disregarded and that no answer was required of the Respondent.

[2] The General Counsel's motion to correct transcript is granted. There were many errors in transcription which were addressed by the General Counsel in her motion. My notes of the hearing indicate that her corrections are accurate. The Respondent does not oppose the content of the proposed corrections.

II. THE LABOR ORGANIZATION

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS; THE ELECTION OBJECTIONS

Preliminary Discussion of the Allegations

The consolidated complaint, as amended (the complaint), alleges that the Respondent violated Section 8(a)(1) of the Act on numerous occasions covering the period beginning around mid-April through May 16, 2007. The Respondent is alleged to have violated Section 8(a)(3) of the Act on or about April 21–27, 2007. The charges in question emanate from incidents allegedly occurring during the Union's organizing campaign and shortly after the election.

Pursuant to a Stipulated Election Agreement approved by the Regional Director on April 12, 2007, an election by secret ballot was conducted on May 11, 2007, in the unit set forth in the aforementioned agreement.[3] The tally of ballots disclosed the following results:

- approximate number of eligible votes	398
- void ballots	2
- votes cast for the [Union]	175
- votes cast against [the Union]	183
- valid votes counted	358
- challenged ballots	2
- valid votes counted plus challenged ballots[4]	360

The Union timely filed on May 17 and 18, 2007, objections and a supplemental objection to alleged misconduct of the Respondent affecting the results of the election.

The Board conducted an investigation of the alleged preelection misconduct and during the course thereof, and based on evidence obtained, determined that there was additional unalleged conduct on the Respondent's part which merited inclusion in the objections because they raised substantial and material issues of fact.

The petitioner's objections, the supplemental objection, and the unalleged conduct are the subject of and coincident with many of the unfair labor practice allegations set out in the complaint, and in the discussions to follow will be dealt with, where appropriate, jointly.

IV. APPLICABLE LEGAL PRINCIPLES AND STANDARDS

The Unfair Labor Practice Principles

1. Section 8(a)(1)

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act.[5] The test under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co*., 395 U.S. 575 (1969); *United Rentals, Inc.*, 350 NLRB 951 (2007); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *Johnson Technology, Inc.* 345 NLRB 762 (2005); *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc*., 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Flying Food Group, Inc.*, 345 NLRB 101 (2005); *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1983). *Medcare Associates*, 330 NLRB 935 (2000). *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998).

It is well settled that an employer's interrogation of employees concerning their union activities may be violative of the Act. *Marjam Supply*, 337 NLRB 337 (2001). *Hudson Neckwear, Inc.*, 302 NLRB 93 (1991). Among the circumstantial factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *MSK Corp.*, 341 NLRB 43 (2004); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985).[6] The Board has also considered other factors such as whether the questioning was by an immediate supervisor who worked closely with the employee, whether it was made in a joking tone, and whether the employee was an open, active union supporter, *Raytheon Co.,* 279 NLRB 245 (1986); *Action Auto Stores, Inc.*, 298 NLRB 875 (1990); *Dealers Mfg. Corp.*, 320 NLRB 947 (1996).

The Board has found that threats of job loss may violate Section 8(a)(1) because of the reasonable tendency of such statements to coerce employees in the exercise of their Section 7 rights. *Clinton Electronics Corp.*, 332 NLRB 479 (2000). *S & M Grocers, Inc.*, 236 NLRB 1594 (1978); *Hinky Dinky Supermarkets*, 247 NLRB 1176 (1980), affd. 636 F.2d 231 (8th Cir. 1980).

The Board has found that Section 8(a)(1) may be violated by an employer's threats to employees of unspecified reprisals. *St. Margaret Mercy Health Care Centers*, 350 NLRB 203 (2007); *California Gas Transport, Inc.*, 347 NLRB 1314 (2006). On the other hand, the Board has found that an employer may vio-

[3] The unit included essentially all full-time and regular part-time dealers, dual rate dealers/supervisors and race book writers employed by the Respondent.

[4] The challenged ballots were not determinative of the results of the election.

[5] 29 U.S.C. §158(a)(1).

[6] The Board, however, does not mechanically apply these factors in each case. Rather, it views these criteria as useful indicia that may serve as a starting point for assessing the totality of circumstances. *Professional Medical Transport*, 346 NLRB 1290 (2006); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998). The rank of the interrogator may also be weighed as a circumstance or factor relating to the identity of the questioner in determining the coerciveness of the statement, along with the truthfulness of the reply. *Toma Metals, Inc.*, 342 NLRB 787 (2004); see *Soltech, Inc.*, 306 NLRB 269 fn. 3 (1992), and *Facchina Construction Co.*, 343 NLRB 886 (2004).

late the Act by promising employees benefits of a specific or unspecific nature. *Mickey's Linen & Towel Supply*, 349 NLRB 790 (2007); *Christopher Street Corp.*, 286 NLRB 253 (1987).

Regarding the issue of employee discussions about and solicitations on behalf of unions, the Board recently held and reaffirmed that:

> It is well established that employees are entitled to discuss unions and solicit for unions on nonworking time, unless the employer can show that it needs to limit the exercise of that right in order to maintain production or discipline. *Republic Aviation Corporation v. NLRB*, 324 U.S. 793, 803 (1945); *MBI Acquisition Corp.*, 326 NLRB 1246 (1997); and *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943), enfd. 142 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). It is also well settled that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees' work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work . . . . *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

In *Sam's Club*, 349 NLRB 1007 (2007), the Board also (in fn. 11) noted as follows:

> Conversely, it is clear that en employer may lawfully prohibit solicitation during working time. See *Our Way*, 268 NLRB 394 (1983). Further, retail employers, such as the Respondent, may lawfully prohibit employees from soliciting on the selling floor—even during the non-work time of employees—because active solicitation in a sales area may disrupt a retail store's business. See, e.g., *J. C. Penny Co.*, 266 NLRB 1223 (1983). *Marshall Field & Co.*, 98 NLRB 88 (1952), modified on other grounds and enfd. 200 F.2d 375 (7th Cir. 1952). The Board, however, has not allowed these restrictions on solicitation to be extended beyond that portion of the store that is used for selling purposes. See *Gallup, Inc.*, 349 NLRB No. 113 [1213] (2007), and, e.g., *McBride's of Naylor Road*, 229 NLRB 795 (1977).[7]

It is well settled in Board law that an employer is free to predict the economic consequences it foresees from unionization, so long as the prediction is:

> carefully phrased on the basis of objective fact to convey [its] control. . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation . . . without the protection of the First Amendment. [*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).]

Absent the necessary objective facts, employer predictions of adverse consequences arising from unionization are not protected by Section 8(c), rather they constitutes threats that violate Section 8(a)(1). *Homer Bronson Co.*, 349 NLRB 512 (2007).

An employer who indicates that it would be futile for employees to select a union to represent them because the employer will not negotiate with that union if it is voted in may violate the Act. *Ready Mix, Inc.*, 337 NLRB 1189, 1190 (2002); *Well Stream Corp.*, 313 NLRB 698, 706 (1994).

An employer may violate the Act if its supervisors tell employees of the adverse effects on management—employee relations if the union is brought in. *In Re Baptist Medical Center*, 338 NLRB 346 (2002); *Massachusetts Coastal Seafoods*, 293 NLRB 496 (1989); *Progress Industries*, 285 NLRB 694 (1987); *Michael's Markets*, 274 NLRB 826, 485 (1985).

For example, in *St. Vincent's Hospital*, 244 NLRB 84, 92 (1979), the employer's supervisors told employees that if the union were voted in, they would lose access to them, to include loss of immediate consideration of employee requests for time off for emergency reasons or personal assistance, and vacation switches; a violation of the Act was found by the Board. Also, in *Baptist Medical Center*, supra, the Board found that an employer violated Section 8(a)(1) by threatening employees with loss of jobs and by telling them that supervisors would have less flexibility in handling their concerns if the union were to come in.

Similarly, in *Orange County Publications*, 334 NLRB 350 (2001), a violation of the Act occurred because the employer told its drivers that based on unionization, it would discontinue a past practice of finding work for them to enable them to maintain full-time status.[8]

Finally, the Board has also found violative of the Act an employer's closing of a facility to discourage employees from supporting the union, and limiting the employees' contact with the Union. *Gallup, Inc.*, 334 NLRB 366 (2001).

While Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompa-

[7] Notably, an employer's confiscation of union flyers may violate the Act, *Romar Refuse Removal*, 314 NLRB 658 (1994), as may an employer's interrogation of employees about their possession of flyers. *In Re United Services Auto Association*, 340 NLRB 784 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004).

[8] See also *MK Railway Corp.*, 319 NLRB 337 (1995), employer violated the Act by threatening to look at an option of diverting work to Mexico if the union came in. However, in *Koon's Food of Annapolis,* 282 NLRB 506 (1986), no violation was found where the employer in a letter to employees stated that management had been able to work on an informal basis—person to person, but that if the union came in, this would change and things would be run by the book—with a stranger (the union), and management would not be able to handle personal requests as it had been doing.

Similarly, the Board has found no violation where an employer informed employees that its "open door policy" would no longer exist if employees voted to unionize the plant. *SMI Steel, Inc.,* 286 NLRB 274 (1987); accord: *Montgomery Ward & Co.*, 288 NLRB 126 (1988). In these cases, the Board reasoned that these were not threats to take away benefits but expressions of opinion of possible consequences of union representation and a fact of industrial life that the company would deal with the employees through a union steward.

nied by threats of reprisals, force, or promise of benefits. *NLRB V. Gissel Packing Co.*, 395 U.S. 575 (1969); *International Baking Co. & Earthgrains*, 348 NLRB 1133 (2006).[9]

In fact, the Board as determined that even "intemperate" remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *International Baking Co.*, 348 NLRB 1133 (2006); *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). In accord, an employer is entitled to explain the advantages and disadvantages of collective-bargaining to its employees in an effort to convince them that they would be better off without a union, as long as there are no threats or promises of benefits. *Amersino Marketing Group LLC*, 351 NLRB 1055(2007); and *Langdale Forest Products Co.*, 335 NLRB 602 (2001).

Consistent with an employer's right to express its opinion, the Board permits the employer to distribute antiunion materials, as long as there is no coercion. *In Re Allegheny Ludlem Corp.*, 333 NLRB 734 (2001).

However, an employer may violate the Act by asking employees to read union literature and soliciting their views about the material in an attempt to ascertain the employees' views of the union. *Baptist Medical Center Health Midwest*, 338 NLRB 346, 386 (2002).

2. Section 8(a)(3)

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3)[10] or violations of Section 8(a)(1)[11] turning on employer motivation. 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 decision. This showing must be by a preponderance of the evidence. Then, upon such showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Under the *Wright Line* framework, the General Counsel must establish four elements by the preponderance evidentiary standard. Accordingly, the General Counsel must first show the existence of activity protected by the Act, generally an exercise of an employee's Section 7 rights.[12] Second, the General Counsel must show that the employer was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link or nexus between the employee's protected activity and the adverse employment action. If the General Counsel establishes these elements, she is said to have made out a prima facie case of unlawful discrimination, or a presumption that the adverse employment action violated the Act.[13]

The Respondent, in order to rebut this presumption, is required to show that the same action—the adverse action—would have taken place even in the absence of protected activity on the employee's part. *Mano Electric, Inc.*, 321 NLRB 278 (1996); *Farmer Bros.*, 303 NLRB 638 (1991).

While the *Wright Line* test entails the burden shifting to the employer, its defense need only be established by a preponderance of evidence. The employer's defense does not fail simply because not all of the evidence supports, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992).

It is worth noting that proving discriminatory motive and animus is often elusive. Accordingly, the Board has held that an animus or hostility toward an employee's protected and concerted activity or union activity may be inferred from all the circumstances even without direct evidence. Therefore, inferences of animus and discriminatory motive may derive from evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was fired, and disparate treatment of the discharged employees. *Adco Electric*, 307 NLRB 1113, 1123 (1992); enfg. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); and *In-Terminal Service Corp.*, 309 NLRB 23 (1992).

The judge may also consider prior unfair labor practices in resolving this issue, as well as violations that have occurred before and after an election.[14]

3. The Board's standard for sustaining the results of an Election

In the context of a representation election, the Board employs an objective test of the conduct of a party charged with

[9] In *International Baking Co. and Earthgrains*, supra, a supervisor told an employee, among other things, that the union was not a good thing and that the union would harm him as he was making decent money and advised the employee not to sign a union card. The Board found no violation, holding that the supervisor was merely expressing his lawful opinion concerning the effects of unionization on the employees.

[10] Sec. 8(a)(3) of the Act (Sec. 158(a)(3)) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[11] Sec. 8(a)(1) of the Act (Sec. 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Sec. 7 of the Act."

[12] The protected activity includes not only union activities but also invocation and assertion of rights guaranteed employees under Sec. 7 of the Act. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966).

[13] *Yellow Transportation, Inc.*, 343 NLRB 43 (2004); *Tracker Marine*, 337 NLRB 644 (2002).

[14] On this point, see *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004), holding that union animus was evident through the Respondent's many violations of Sec. 8(a)(1), (3), and (4) found to have occurred before and after the second election campaign. See also *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418 (2004), where the Board noted that the knowledge element of the General Counsel's initial burden also may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations.

interfering with the employees' freedom to choose their representative. The objecting party must show that, inter alia, the conduct in question affected the employees in the voting unit and had a reasonable tendency to affect the outcome of the election. *Delta Brands, Inc.*, 344 NLRB 252 (2005); *Avante at Boca Raton*, 323 NLRB 555, 560 (1997); *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989).

In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers the following factors:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.[15]

Notably, representation elections are not lightly set aside. *NLRB v. Hood Furniture Mfg.*, 941 F.2d 325, 328 (5th Cir. 1991); the burden of proof is on the party seeking to set aside a Board-supervised election to show that the conduct in question had a reasonable tendency to affect the outcome of the election.

V. CREDIBILITY ISSUES

In the discussion to follow, it will be obvious that the Union's organizing effort at the Trump Marino Casino and the Company's opposition produced a spirited and contentious campaign. With the exception of one witness, a paid union employee, all witnesses at the hearing were employed by the Respondent, and each witness was in some degree partisan, either a union supporter or a company supporter.

Ordinarily, in resolving credibility issues, the Board gives employees who testify against the interest of their employee something in the way of enhanced credibility because of the possible risks to their pecuniary interests in so testifying. However, in the instant case, the employees who testified were strongly partisan in their support for the Union or the Company, as the case may be. Accordingly, in resolving the credibility issues associated with the complaint allegations and the objections, I have relied on the traditional indicia to include witness demeanor, evidentiary corroboration, and plausibility of the various events as proffered by the individual witness. In short, as I heard the witnesses, all of whom testified under oath, I gave each equal standing in my estimate of their testimony irrespective of their employment status with the Respondent.

[15] *Taylor-Wharton Division*, 336 NLRB 157, 158 (2001), citing *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).

VI. THE UNFAIR LABOR PRACTICE CHARGES; THE UNION'S OBJECTIONS; AND THE UNALLEGED CONDUCT AS DETERMINED BY THE REGION

As noted previously, the Respondent allegedly has engaged in certain conduct that could affect the results of the election. These misconduct charges were made by the Union and later, others were determined by and through the Region's investigation of the objections; the various charges—the unfair labor practice allegations and the objections—in some cases overlap. Accordingly, where feasible and appropriate, I have attempted to discuss them together for brevity and clarity. Each matter as captioned below will indicate whether the charge is an objection, unalleged objectionable conduct, and/or an unfair labor practice, which will be indicated by reference to the appropriate paragraph in the complaint.

A. Complaint Paragraph 5(a); Objection 5

Floor person Michael Ferrare's alleged threat on or about mid-April 2007 that employees would lose their jobs if they selected the Union to represent them.

The General Counsel called Mario Spina to establish these charges.

Spina testified that he has been employed by the Respondent for about 20 years as a full-time, day-shift dealer; he described himself as an active union supporter before and during the Union's organizing campaign leading up to the election on May 11, 2007.

Spina related that in the employee cafeteria, as he attempted to approach another fellow dealer about supporting the Union, he engaged in a conversation with Michael Ferrare, whom he described as a full-time floor supervisor during the Union's organizing drive around mid-April 2007.

Spina stated that on this occasion, Ferrare joined him and said that a lot of dealers are going to lose their jobs if all the dealers go full time "as per the union." Spina stated that Ferrare went on to say that with union representation all dealers would be full time, so a lot of the (part-time) dealers would lose their jobs because there were not enough full-time positions available at the casino for everyone to be full time.

Spina said that at the time he understood that among the group of dealers who would be voting in the election, there were about 170 full-time dealers and about 230 part-time dealers on all three shifts operated by the casino.

According to Spina, he understood Ferrare to be saying in essence that under these circumstances, the casino could not make all 400 dealers full time, so jobs would be lost if the Union were selected.

Spina testified that he could not recall his specific response to Ferrare's comments as the conversation went back and forth (with no conclusion as such).[16]

[16] Spina also testified that he had two conversations with Medico DeMarco, whom he described as a dual-rate floor supervisor prior to May 11. Spina said that about 3 weeks prior to the election, he and DeMarco were discussing whether the casino could support the present complement of dealers—full time and part time. According to Spina, DeMarco said that the casino would need only about 250 full-time dealers, so that if the Union were voted in, a lot of dealers will lose their jobs; basically, there would not be enough positions to support the

The Respondent called admitted Supervisor Michael (Mike) Ferrare to rebut these allegations. Ferrare testified that he has been employed by the Respondent for 22 years; his current position is floor person, a supervisory position at the casino. Ferrare stated he held this position during the union organizing campaign of which he was fully aware.

Ferrare stated that he knew Spina personally, has had conversations with him and knew that Spina was a well-known supporter of the Union. Ferrare acknowledged recalling that "someone" asked about the part-time employees and specifically what would happen to them. However, Ferrare denied making any statements (to anyone) around April 19 that employees would lose their jobs if they selected the Union to represent them. Ferrare stated that any conversations that he and Spina had about or regarding the Union took place after the May 11 election and related to Spina's concerns about his being suspended in April. Ferrare testified that on the occasion, he essentially tried to console Spina and advised him to put the suspension behind him.

B. Complaint Paragraph 5(c); Unalleged Objectionable Conduct 1

Floor person Michael Ferrare's alleged threat on or about April 19, 2007, that selection of the Union would be futile because management would not negotiate and was not going to give employees anything; and a collective-bargaining agreement would not matter because management was not going to negotiate with employees.

The General Counsel also called Spina to establish these allegations.

Spina said that he had a second conversation with Ferrare but could not recall the date; however, he noted that the conversation occurred before the election, a few days before his suspension on April 21, 2007.

Spina explained that on the day in question, he was dealing a poker game and the sole casino patron on the game asked him, "Are you guys going union?" Spina said he tried to shrug off the query to keep the game moving, but the customer continued and a back and forth discussion about the Union ensued with the patron. After a time, Ferrare joined the conversation and in the back and forth said that management is not going to negotiate with the UAW.

Spina testified that in such conversations, his usual or "stock" response is, "It's all in the contract," but could not recall whether he responded as such to Ferrare's comments on this occasion. Nonetheless, according to Spina, Ferrare repeated the assertion that management would not negotiate with the Union anyway. In the end, Spina stated that he asked Ferrare if he could go back to his game as it was being ignored. Ferrare allowed him to get back to the game.

Ferrare testified at the hearing and denied ever telling any employee that management would not negotiate with them or give them anything.

Ferrare acknowledged that he did have a conversation in mid-April 2007 with a dual-rate supervisor[17] in which the dual rater asked what Ferrare thought would happen to dual-rate supervisors should the Union come in. Ferrare said that he told the employee that he did not know, but volunteered his opinion that management could either maintain the dual-rate position, promote the dual rater to a full-time supervisory position or demote the employee to a full-time dealer position; that such moves would depend on the contract negotiations with the Union; and that no one knew otherwise where the dual-rate supervisor (position) would end up.[18] Ferrare, however, insisted he had no conversations regarding the topic of negotiations with Spina either alone or in the company of anyone else.

Regarding the Ferrare allegations and related objections, I would find and conclude first that I believe Ferrare made the statements attributable to him. Spina presented as a highly credible witness who testified calmly and in a straightforward way. On the other hand, Ferrare was less credible and his denials seemed to be rather hollow. In fact, he admitted having a "conversation" with Spina (presumably about the Union) and that some unidentified person asked him what would happen to the part-time dealers should the union be voted in, the subject of the alleged unlawful statements attributed to him. Ferrare's vagueness did not enhance his credibility.

However, in context, I cannot find that Ferrare violated the Act, nor was his conduct sustainably objectionable. It should be noted that Spina was a well-known and active union supporter, and the issue of what would happen to the part-time dealers if the Union were voted in was a topic of conversation among the both management and the dealers; and there were opinions being bandied about by the employees, including management. Ferrare merely expressed his opinion to Spina in my view. Ferrare's futility of selection of the union statement was, of course, the more serious allegation and if the circumstances surrounding its making were different, I would be persuaded to find a violation. However, again, the statement was made to Spina who clearly was unimpressed with Ferrare's statement and who gave him his stock reply. Granted, the Board does not require an offending statement to have an effect on the employee to whom it was directed. However, it would

number of dealers currently employed and specifically there would be no part-time positions.

Spina said this was a back and forth conversation that included a debate over whether the unionized Detroit casinos employed part-time dealers. In this discussion, Spina said that he told DeMarco that he was for the Union "all the way." According to Spina, DeMarco said that he knew this.

Spina stated the second conversation took place at a poker game, that DeMarco approached him and asked what the Union would do for employees in the event of a strike. Spina said he told him the employees would get full benefits and a stipend.

Spina's conversations with DeMarco are not charged in the complaint or raised in the objections. Moreover, DeMarco did not testify at the hearing. I make mention of these conversations because while not charged in the complaint, they buttress my findings later determined herein that the Respondent had knowledge of Spina's union activities and support.

[17] Dual-rate supervisors are dealers who are used by the Respondent as both dealers and supervisors. Dual raters were eligible to vote in the election.

[18] Spina testified that he only recalled Ferrare saying that management will not negotiate with the UAW, not that certain matters were open for negotiations. (Tr. 412.)

be my view that any reasonable employee standing in Spina's shoes would not believe his rights were interfered with because as Spina stated, "It's all in the contract," and would, as Spina did, disregard Ferrare's mistaken notion of the collective-bargaining process.

I would recommend dismissal of these allegations. I would also not recommend that the associated objection be sustained.

C. Complaint Paragraph 5(n)

Floor Person Michael Ferrare's alleged advising on May 13, 2007, an employee (Spina) not to worry about an incident report and suspension notice because the Union had lost the election.

Spina testified that the Respondent suspended him on April 21, 2007, pending investigation of his allegedly having engaged in improper conduct. Spina said he lost 3 days of work and was called back to his job on April 26.

Spina stated that he served as a union observer for the election that took place on May 11, 2007. Spina said that the Union's loss of the election concerned him. Accordingly, when he came back to work on May 13, he was nervous and told his immediate supervisor, Ferrare, as such. According to Spina, Ferrare asked him why he was nervous and he told him it was because of his suspension. Spina testified that Ferrare said that he (Spina) did not have to worry about the suspension anymore, to trust him, because the election was over. Spina stated that he knew at the time that Ferrare did not have the authority to remove the incident report, so he did not view his comments to convey that promise.

Ferrare acknowledged that after the election, he discussed Spina's suspension with him as well as the associated incident report. However, Ferrare denied telling Spina not to worry about his incident report or the suspension notice because the Union lost the election. Ferrare parenthetically noted that management was pleased about the Union's loss.

Ferrare explained that after the election, he was supervising the casino floor operations to which Spina was assigned and noticed that Spina seemed a little upset, which prompted him to inquire whether he was okay. According to Ferrare, Spina said that he feared for his job because of his earlier suspension. Ferrare said that he told Spina not to worry, that Spina had basically served the suspension, not to worry about it and put the matter behind him; the incident was done and over with. Ferrare stated that he told Spina that he had also once served a 3-day suspension, and had put the matter behind him. Ferrare said that he suggested to Spina that he do the same.

Ferrare volunteered that he had no authority to remove an incident report from an employee file or to convert a suspension to a lesser discipline, such as a warning.[19]

The General Counsel contends that Ferrare's statements were tantamount to the Respondent's prediction of adverse consequences for Spina because of his union activity and reflected the Company's attempt to discourage and intimidate Spina regarding his support of the Union. I would disagree.

In my view, Ferrare credibly testified that he was merely trying to console Spina and assuage his concerns for his job. Notably, Spina admitted that he was indeed troubled over the election results and the fact that his suspension was issued in the context of the unsuccessful campaign. Ferrare testified that in his attempt to console Spina he told him that he, too, had been suspended and had put the matter behind him. In this case, as I see the matter, Ferrare, out of sympathy, was merely expressing his opinion that Spina had nothing to worry about regarding his suspension, that the discipline based on his (Ferrare's) experience would have no effect on his continued employment. I would recommend dismissal of this charge.

D. Complaint Paragraph 5(f); Unalleged Objectionable Conduct 3

Pit Boss Dan Cummings' alleged interrogation on or about April 25, 2007, of an employee concerning the employee's sympathies for the Union.

The General Counsel called Kathy Perakovich, a full-time dealer, regarding this allegation of objectionable conduct by the Respondent.

Perakovich testified that she is currently employed by the Respondent as a blackjack dealer and has been employed with the casino since 1985.

Perakovich stated that she was aware of the Union's organizing drive leading to the May 11, 2007 election, attended union meetings, and participated in the campaign "by word of mouth."

Perakovich related an incident involving herself and Pit Boss Dan Cummings on or about April 25, 2008. According to Perakovich, Cummings approached her and asked her if she had attended any of the union meetings to which she responded that she had not.

Perakovich said that Cummings also asked her if she could attend union meetings with an open mind, to which she responded that she could. Cummings then remarked that he was glad to hear that she had an open mind about the meetings.

Perakovich stated that Cummings also in this conversation rhetorically asked her what made her think that Trump would bargain with a union. Perakovich said she and Cummings also talked about matters somewhat related to the Union's campaign off and on for about 1 hour.[20] Perakovich noted that while other persons (presumably other employees) were around the pit, she and Cummings were conversing only with each other.

Perakovich noted that management conducted several mandatory meetings with employees after April 25, but that she was not invited to attend any such after her conversation with Cummings on April 25.

Admitted Supervisor Dan Cummings testified that he has been employed by the casino since 1985, and during the time frame of the campaign he served as a pit manager, a position which includes supervising and managing an area, a pit, con-

[19] Ferrare believed that according to company policy, a suspension remained of record with the casino for about a year. Ferrare stated that he did not actually see a copy of Spina's suspension.

[20] Perakovich testified that she and Cummings had talked along these lines about strikes conducted by another UAW local and that casino owner, Donald Trump, had bargained with other locals to avoid a strike.

taining 12–24 games of chance played by the dealers,[21] including Kathy Perakovich.

Cummings stated that he was aware of the union organizing drive that was afoot on April 25, 2007, and admitted that he conversed with Perakovich whom he has known for about 22 years on that day. However, Cummings denied asking her whether she attended any union meetings concerning the organizing effort. Cummings admitted that he did ask her if she had any questions about the informational meetings convened by the Company because he thought that she had attended one of these meetings. Cummings also denied saying to Perakovich, "What makes you think the Company will bargain with the Union?"

Cummings stated that his conversation with Perakovich initially was about the National Basketball Association, which was normal as he and she have enjoyed a friendly working relationship over the years; they have had many conversations, mainly about sports.

According to Cummings, although Perakovich told him that she had not been to any of the informational meetings, he believed that there was misinformation about the bargaining process being bandied about the casino. Acting on this concern, Cummings said he tried to clarify the issues by informing employees that while the Company was required to bargain, there was no requirement that an agreement be reached. Cummings stated that in his view, there was also a perception among the employees that they could only get more benefits with a union in place and not get less. Cummings stated that he wanted to correct this misconception and advise employees that in the negotiations process the employee could go "backwards" in terms of benefits and other terms and conditions of employment.

Cummings noted that in his conversations with Perakovich, he concluded that she was a union supporter and she seemed to believe that the dealers could only go forward in terms of job benefits through union representation; and, therefore, there was no reason not to support the Union. In his one conversation with her, for about 5 minutes, Cummings stated that he sought to correct what he considered was an erroneous view of the collective-bargaining process.[22] Toward this goal, Cummings stated that he told Perakovich that if she had questions about the process, he would try to answer them. Cummings insisted he did not ask her any questions about the Union, only about the Company's informational meetings he thought she had attended.

With regard to this allegation, the matter presents with an essentially one-on-one encounter. Perakovich, an ardent union supporter, claimed that Cummings, a supervisor clearly in opposition to the union cause, made certain statements which certainly could pose a violation of the Act and are arguably reflective of objectionable conduct affecting the results of the election. However, Cummings denied making the statements attributable to him.

Notably, Cummings also elaborated about the nature of his relationship with Perakovich, a friendly 22-year work relationship that included many conversations, including one in which he expressed his view that the employees may have had a wrongful understanding of the nature of union representation, and he sought to disabuse the employees, possibly even including Perakovich, of this notion. Of course, this reflected Cumming's personal opinion which he evidently provided to employees like Perakovich. I believe that he was entitled to express those views under the Act, especially since there was no threat implied or expressed in his statement to her.

Regarding the allegations that Cummings interrogated Perakovich about her union sympathies and also indicated to her that it would be futile for them to pursue union representation, I cannot find and conclude that he made these comments to Perakovich. On this score, Cummings testified matter-of-factly and seemed no more or less credible than Perakovich. Accordingly, the evidence being in equipoise, I would find and conclude that the General Counsel did not meet her burden of preponderance. I would recommend dismissal of this charge, and would not sustain the associated objection.

E. Complaint Paragraph 5(e); Objection 4

Pit Boss Dan Cumming's allegedly telling an employee on April 22, 2007, on the floor of the casino, "We got your union boy, Mario. We got your boy. He is suspended."

The General Counsel called Lori Ann Ludovich in support of this allegation.

Ludovich testified that she has been employed by the casino as a full-time dealer for about 19 years. Ludovich stated that she became aware of the organizing drive through union flyers at the premises. Ludovich said that she became interested in the effort and was told by an associate that Mario Spina, a dealer on the day shift, was a good source of information about the Union—he knew what was going on with the Union and was soliciting authorization cards.

Ludovich related an incident that she said occurred near the employee cafeteria on April 21, 2007, a Saturday. According to Ludovich, she overheard a conversation between Spina and a supervisor, Frank Mangione, as she entered the area leading to the cafeteria. According to Ludovich, Mangione said in a loud voice to Spina, "Have I ever disrespected you.?" Ludovich stated that Spina responded (calmly), "No, you haven't." Ludovich said that she stood there listening for a few seconds—mainly because Spina, Mangione, as well as two other employees, Angel Martinez and Frank Dante, were blocking the entrance to the cafeteria—and then excused herself to get by to go to the cafeteria.[23]

Ludovich said that on the next day, April 22, a Sunday as she recalled, between 4–5 or 5–5 p.m. as the baccarat pit was clos-

[21] Cummings stated he managed pit 4.

[22] Cummings stated that he undertook a serious effort to educate himself about the UAW and also received training from the casino management about unions and the collective-bargaining process in general. Cummings noted that a major topic of conversation among the dealers related to what would happen to the dual-rate employees should the Union be elected. He cited his research on this topic, using the UAW website and constitution to inform employees who asked, that they could not work more than one job if the Union were selected.

[23] The Spina-Mangione encounter is the subject of a separate unfair labor practice and objection and will be discussed more at length later herein.

ing, Pit Manager Dan Cummings ran up to her and said, "Oh, we got your guy, we got your guy—he's suspended." Ludovich said she responded by asking who it was. Cummings said, "We got him, we got Mario. We got your union guy" [or your union boy] or words to that effect. Ludovich noted that other employees were in the vicinity when Cummings made his comments, but she could not recall their names. According to Ludovich, the baccarat pit is played by the "high rollers" and there were always people standing around the area. At the time, Ludovich said she was assigned to a game that at the time was closed; but there were also customers around and Cummings' remarks were loud enough for them to hear because (as she put it) his remarks were uttered "loud and proud."

Ludovich noted in passing that at the time Cummings made his remarks, she had heard through the other dealers that Spina had been suspended; Cummings simply verified the rumor.

Cummings testified that he knew Ludovich and was working on April 22, his wedding anniversary, supervising two pits as he customarily does on Sundays. Cummings emphatically denied saying to Ludovich or anyone else that we've got your union boy, Mario and that he is suspended. Cummings testified that on that day, he did not have a lot of conversations with anyone.

Cummings acknowledged that he knew that Spina was one of the "leading people" for the Union, that he was known to pass out authorization cards though he never saw him doing this. Cummings also acknowledged that he had heard that Ludovich was a union supporter. According to Cummings, his conversation with her occurred when she asked him why she had not been invited to any of the information meetings convened by management. Cummings said that he told her he did not know why but would find out for her.[24]

At the threshold of resolving this allegation is the determination of whether Cummings made the statement attributed to him by Ludovich. I found Ludovich to be a very credible witness. She testified in a matter-of-fact way, straightforward with a good command of facts. She did not overstate or hyperbolize in reciting her version of events. Although she was a union supporter, she did not come off as extremely partisan. Be that as it may, Cummings, who admittedly simply denied making the statements in question to Ludovich, was not incredible in my view. Here again, in a one-on-one confrontation, I cannot find that Ludovich was more credible than Cummings. Accordingly, the evidence being in equipoise, the General Counsel did not meet her burden of proof. I would recommend dismissal of the allegation, and that the objection in question not be sustained.

F. Complaint Paragraph 5(g); Unalleged Objectionable Conduct 3

Floor Supervisor Linda Sych's alleged interrogation in the employee cafeteria around the end of April 2007 of an employee's sympathies for the Union.

Regarding these allegations, the General Counsel called blackjack dealer and current 19-year casino employee Diane Rieck.

Rieck testified that she works the day shift and became aware of the union organizing drive, and later the May 11, 2007 election, through Mario Spina who solicited her interest in the Union by giving her an authorization card. Rieck related a conversation she had with Linda Sych, a supervisor, about 2 weeks before the election in the employee cafeteria.

Rieck said that she was eating lunch that day and Sych asked her on which side she was. Rieck testified that she responded, "I'm for the union," and told Sych to hold her breath, not to say anything else, because she was for the Union. Rieck said that she then simply ended the discussion and left the cafeteria.

Linda Sych was called by the Respondent to rebut these charges. Sych testified that she has been employed by Trump Marino for about 15 years; her current position is that of a game supervisor who directly supervised Rieck.

Sych admitted that she had a "10-second" conversation with Rieck before work at about 11 a.m., in the employee cafeteria. Rieck noted that she and Rieck have worked together off and on for 15 years and have conversed during this time about various topics such as family, their kids, and grandchildren.

On the day in question, Sych testified that as she and Rieck were seated together having breakfast, she just asked Rieck "out of the blue" whether she had any questions; did she do her homework (about the Union).

Sych said that she did not use the word union regarding the homework query. However, her intention was to open lines of communication with respect to the union matter and her questions to Rieck were directed along those lines. According to Sych, she was simply asking Rieck whether she had looked into "everything" she needed to make a decision about the Union; Sych insisted she was not trying to determine if Rieck was for the Union. However, Sych conceded that she did ask Rieck whether she had any questions about the Union.

According to Sych, Rieck said this place (the casino) hasn't done anything for her, and that was the end of the conversation. Sych denied asking Rieck what side she was on or whether she favored the Union or the Company. Sych stated that before her conversation with Rieck, she did not know where Rieck stood on the union issue. Basically, according to Sych, she asked Rieck the questions because no one else was around. Sych confessed that there was no particular reason for questioning Rieck at that time, that this was just her attempt to make general communication with Rieck, and no one else.[25]

Again, the threshold inquiry is whether Supervisor Sych made the offending statement—questions—to Rieck. While again, the conversation was one-on-one, in this instance I would credit Rieck's version of the encounter that in their exchange Sych did ask (interrogate) her as to what side she was on. I am persuaded to this finding because Rieck presented in rather no-nonsense and matter-of-fact way. Sych's version of the encounter left me with questions. For instance, why would

[24] Cummings said he expressed Ludovich's concerns to management and he believed she ultimately attended a meeting. Cummings said he later learned that she later became an advocate for the Company after attending one of the informational meetings; he believed that she had changed her mind about the Union.

[25] Sych later testified that she could have spoken with two other dealers initiating a similar conversation with them, asking them if they had questions and, if they needed to talk, she could help. (Tr. 642.)

she "out of the blue" ask Rieck any questions about the informational meetings held by the Company, and had Rieck done her homework about the Union, unless perhaps she was trying to determine Rieck's union sympathies.

Notably, Sych admitted that she had initiated discussions in similar fashion (out of the blue?) with two other dealers, asking them if they needed to talk and that she could help. Sych did not elaborate about what the questions were or the homework that needed to be done in her conversations with Rieck or presumably other dealers she queried.

In my view, Sych's testimony bespeaks of a pattern of interrogation with a view toward her determining the employees' sentiments and sympathies regarding the Union. I would find and conclude that the Respondent, through Sych, violated the Act in interrogating Rieck about her union sympathies. In likewise, I would sustain the Union's objection based on this finding.

G. Complaint Paragraph 5(m); Unalleged Objectionable Conduct 4; Objection 14

Pit Boss Steven Salvey's alleged interrogation of an employee's union sympathies on or about May 11, 2007.

Ten-year current employee Janet Edwards was called by the General Counsel to establish this allegation.[26]

Edwards testified that she was aware of the union organizing drive as well as the election held on May 11, 2007, on which day she worked a normal tour at her assigned gaming table.

Edwards stated that on May 11, Pit Boss Steve Salvey suggested that the newspaper on the pit stand should be read by the dealers and told dealers to read the newspaper before they voted that very day. According to Edwards, while Salvey told her to read the newspaper, she responded no, that she already knew what was in the news.

According to Edwards, Salvey pressed her, saying, "Do you want to read this—what do you think about it?" Edwards said that she told Salvey that the news was propaganda, and that is what she thought of it.[27]

Edwards said that Salvey left the paper at the pit stand for 1–2 hours; he then folded it up and handed it to another floor supervisor who took it away. She noted that there were about 10–11 dealers working their games at the time and, as they left the pit, Salvey asked about 5–7 of them to read the newspaper.[28] Edwards stated that the newspaper was placed at the pit stand once the vote started. Edwards said that Salvey did not really force anyone to read the news piece, but merely suggested that the dealers read it.

Steve Salvey, a self-described 22-year employee currently employed as a dual-rate pit manager at Trump Marina, testified that he knew Edwards, a part-time dealer whom he supervised on May 11, 2007; Salvey stated that he was aware that the employees voted that day.

Salvey was shown a copy of the newspaper article (GC Exh. 2) by the Respondent's counsel and recalled seeing it on the day of the election in the game pit. He noted that newspapers are generally left in the cafeteria but on occasion dealers will bring them back to the pit to read on their breaks throughout the day.

Salvey denied requiring any dealers to look at the newspaper (and ads), and specifically could not recall approaching Edwards about the newspaper, which he admitted was indeed on the pit stand on that day. Salvey insisted that, in fact, he had no conversations with the dealers about the newspapers because he had been instructed by management not to discuss anything about the Union or the election on election day. Salvey said that he could not recall speaking with Edwards at all that day. Salvey conceded that he also observed the newspapers in a couple of pits that day, including his area, but he did not know how they got there.

First, I would credit Edward's version of her encounter with Salvey. Edwards, as I observed her, was clearly an uncomfortable and somewhat reluctant witness—she did not want to testify. In spite of her feelings, however, in my mind she gave a detailed account of her conversation with Salvey. On the other hand, Salvey's testimony did not ring true, especially where he stated that he did not recall having spoken with Edwards at all that day—least of all about the newspaper ad. It seemed highly unlikely that a supervisor would not say anything to one of his staff during the entire workday.

The question remains whether, as Edwards testified, Salvey's asking whether she had read the article, and his suggestion to the dealers to read the antiunion literature are tantamount to an unlawful interrogation about her union sympathies and an unlawful order to read the antiunion literature.

I would find and conclude that Salvey's actions violated the Act as charged. It is very significant to me that Salvey was aware that the antiunion literature was in the pit area on election day which, according to witnesses for the Respondent, was not allowed. In spite of this prohibition, Salvey allowed the literature to remain and suggested to other dealers, including Edwards, to read the materials. It seems likely to me that Salvey used the same approach with the other dealers as he did with Edwards, that is, asking her if she had read it, soliciting her views, and suggesting that "she read" it before she votes. Taken together, Salvey's actions as a whole redound to unlawful behavior, that is, unlawful interrogation of an employee to determine her union sympathies in violation of Section 8(a)(1) of the Act. In likewise, I would sustain the Union's objections based on this conduct.

H. Complaint Paragraphs 5(b)and (h); and Objection 9

Dual-Rate Shift Supervisor Jack Julian's alleged threat that the Respondent would not grant employees' requests for a day off (or approve schedule changes) if they selected the Union to

[26] Edwards was subpoenaed to testify and said that she was not "happy" to testify at the hearing.

[27] Edwards identified GC Exh. 2, the May 11 newspaper article—actually a full page ad that appeared in an Atlantic City newspaper—which spoke against the union organizing at Trump Marina. Edwards said that Salvey told the dealers, "Read it [the article] before you go up and vote."

[28] Edwards was reminded by the Respondent's counsel that she had overheard Salvey speaking to at least 10 other dealers about the newspaper. On the stand, she recalled 7–10 dealers. This discrepancy is of minor significance in my view.

represent them in mid-April 2007; Julian's alleged correction of an employee's no-call/no-show designation and threat that he would not grant leave requests or make corrections if the employees selected the Union at the end of April or on May 15, 2007.

The General Counsel called Perakovich and part-time dealer Delores (Lori) Summers to establish these allegations.

Perakovich testified that about a couple of weeks before the election, she needed a personal day off which had to be approved by her shift manager. On the day in question, Perakovich said she asked Jack Julian, then the assistant shift manager, for his approval of what is known at the casino as a GDO (given day off). According to Perakovich, Julian approved her request but told her that "if we [dealers] had a union," he would not be able to grant her request. Perakovich stated that this encounter took place between just the two of them.[29]

Delores Summers testified that she has been a part-time dealer at Trump Marina since July 2005, and was aware of the union organizing drive and election on May 11.

Summers related an encounter she had with Julian on or about April 26, 2007, about a week before the election. Summers related that there had been a death in her family requiring a couple of days off to attend the funeral. Jack Julian was her shift manager from whom she needed approval to get time off.

Summers intimated that she had been forewarned by coworkers to be careful in her approach and dealings with management because it was rumored that, as she put it, management was "coming to employees and asking difficult questions" and to be watchful because of what had happened to Mario Spina.[30]

Accordingly, out of this concern, she asked Perakovich to accompany her to make the request of her shift manager, Julian, who ultimately granted her 2 days—Friday and Saturday—off. However, while at the funeral that Saturday, a coworker called her and advised that she had been marked as a no-call/no-show on her assigned shift, an infraction that could result in termination or at least a writeup discipline.

Summers said that when she returned to work, she (accompanied by Perakovich as her witness) spoke to Julian about the mistake. According to Summers, Julian admitted that he had approved her request and promised to correct the matter with the schedulers, which he then did on the phone. After completing the call, according to Summers, Julian said, "Did you see how I handled that? If you guys bring the Union in, I won't be able to handle [that] the way I did—no disrespect to you or your family."

Jack Julian, a 22-year casino employee, testified that during the campaign and currently, he is an assistant shift manager working on the day shift; Julian said that his duties included management of the gaming operations.

Julian testified that he recalled speaking with Perakovich possibly several times about schedule changes, along with other dealers in mid-April 2007, and in the case of one dealer—Vincent Ona who needed time off—he was able to correct an erroneous no-call/no-show for him.

With respect to Ona, Julian stated that a couple of weeks before the election, he told Ona if we were to get a union, it was possible he would not have that authority any more. Julian also admitted that he may have said a similar comment to another dealer but could not recall telling this to Perakovich or Summers who (he vaguely recalled) had asked him about a relief day.

Julian said that he could not recall clearly the substance of the conversation with Summers but thought she needed him to excuse something, or she gave him some paperwork documenting her attendance at a funeral.

First, I would credit the testimony of both Perakovich and Summers regarding their respective encounters with Julian concerning their requests for time off. I note that Perakovich and Summers had essentially the same experience with Julian, and Summers' experience in particular was corroborated by Perakovich who was enlisted by Summers to be her witness in dealing with Julian.

For his part, Julian was vague and could not recall with any clarity even dealing with Perakovich or Summers about their request for time off. Yet, he could remember a similar situation with another dealer (who did not testify). To me, this was simply reflective of his effort to avoid responsibility for the statements he made to Perakovich and Summers.

I would find and conclude that the Respondent, through Julian, violated the Act by in effect threatening the employees that he would or could not grant days off, schedule changes, or make corrections of the employees' no-call/no-show determination if the employees selected the Union to represent them. I would also sustain the Union's objection associated with this finding.

I. Complaint Paragraph 5(i); Objection 10

The Respondent's closing of casino parking lot A allegedly to discourage employees from encouraging other employees to support the Union and intimidate them the day before the election and on election day.

The General Counsel called Sharon Rivera, a union organizer,[31] to establish these charges. Rivera testified that as the Union's lead organizer of the organizing drive at Trump Marina, she was actively involved in the planning for the campaign from its inception in January 2007. Rivera stated that the Union identified early on that gaining access to the casino workers would be an issue. Accordingly, the Union undertook investigation of the casino's property lines for purposes of its visibil-

[29] Shown her affidavit of May 2, 2007, that she provided to the Board agent, Perakovich conceded that she did not mention this incident, which she did mention in her May 24, 2007 affidavit to the Board. Perakovich explained her omission, saying that other matters were more important to her on the earlier date.

[30] Summers said that she was aware that Spina was "one of the main persons organizing to get the Union started" (Tr. 257) and that he had been suspended allegedly for cursing at or to someone. Summers testified that she, too, was an active union supporter and one who worked hard for the Union, including handing out union literature in the breakroom.

[31] Rivera testified that she has been employed by the UAW as organizer for 2-1/2 years and was assigned as the lead organizer for the Union's organizing drive at Trump Marina.

ity activities, e.g., stationing union supporters as close to the casino as possible. Rivera noted that the casino security personnel told them at some point that the union supporters could not set up positions in the roadway directly in front of the casino and asked them to move.

Rivera said that the Union then decided on a strategy to locate supporters in front of parking lot A where a majority of the dealers, those with less than 15 years tenure, were allowed to park their cars; Rivera stated that dealers who had 15 or more years' seniority were allowed to park in the customer parking garage appurtenant to the casino on floors 6, 7, and 8.[32]

Rivera said that parking lot A is about 3–4 blocks from the casino and was not only used by the casino employees but also members of the public, such as those who docked their boats at the Marina.

Rivera said that on May 10, the Thursday before the election, she discovered that the Company was going to require all employees to park in the parking garage; on May 11, election day, she drove by the lot around 6:45–6:50 a.m. and observed a wooden barrier at the entrance of lot A.

Rivera said that around 7 a.m. on May 10, she attended a preelection conference that included Board agents and the observers for the Union and the Company. Rivera stated that one of the Union's concerns, and as well as the company observers, was getting notice to the voters who did not work on Thursday that lot A was to be closed on Friday, election day. According to Rivera, the Board agents asked the Trump representatives how these employees would be notified and were told that a notice had been posted informing the employees to park in the parking garage and a sign had been posted directing employees where to park in the facility. Rivera said that she mentioned to the security officer providing the information that she had not seen any such signs.

Rivera said that on May 11, she inspected lot A and asked the guard posted there why the lot was now closed. According to Rivera, the guard did not really respond to her question and, exhibiting some reluctance, merely pointed to some management personnel on the scene. Rivera said she decided not to pursue questioning the guard to avoid putting him on the spot. Rivera noted that before visiting the lot this second time, she overheard a casino security representative tell Board agents that the lot was closed because of ongoing work. However, when the Board agents and union and management representatives came to the lot accompanied by casino security, there was no construction going on, and no workers were there except the security guard.

According to Rivera, on May 11, she returned to the lot after the 2 p.m. voting session and at that time there were orange cones all over the lot but no one was performing any work that she could see. Rivera said that she actually went back and forth to the lot at the end of each voting session throughout the day, but never saw any work being performed.

Rivera stated that also on May 11, the casino security personnel informed the union representatives that they could not politick on the street in front of the Marina; rather, they could collect on a field toward the end of the street. Rivera said that casino security informed the Union that the street in front of the casino was Trump property. Rivera stated that along with the closure of lot A, the Union's plan to interact with the dealers was basically thwarted. Since the lot was closed and the street was not available, Rivera said the Union's only option was to politick across the street from the Marina, on public property.

Rivera said that the Union's main concern was to be able to interact and speak with the voters prior to the vote. Rivera stated that being restricted to a location across the street from where the employees would be entering the casino was not acceptable. Rivera said that under the circumstances, the union supporters, about 15–20, could not adequately politick without causing traffic problems.[33]

According to Rivera, the union supporters were left with "just standing there in the street holding signs," with little or no opportunity to interact with the voters who were all parking in the garage and from there going directly into the casino to sign in and out as the case may be. Rivera believed that by closing parking lot A, the Respondent created an encumbrance on the Union's organizing efforts. Rivera conceded that the Respondent did not interfere with the union supporters on the street on election day as they were standing across the street from the casino.

The Respondent called no witnesses[34] to rebut this allegation and admits that it closed parking lot A.

The General Counsel (and the Union) asserts that the Respondent improperly tried to limit contact between its employees and the Union, especially on the day of the election. Moreover, since the Company knew that prior organizing by the Union had taken place on lot A, it decided to close the lot on election day so that it could more closely monitor the electioneering activities of the Union. Accordingly, all employees were directed to use the parking garage.

The General Counsel notes that no one saw any work—environmental or otherwise—on lot A being done on lot A. She argues that the lot was closed simply to restrain and coerce the employees in their right to communicate with each other about the Union.

Contrary to the General Counsel and the Union, the Respondent asserts the Company did not close the parking lot for any

[32] While there was no documented evidence of the casino's parking rules for its employees, there is no dispute about Rivera's testimony in this regard.

[33] Rivera emphasized that the Union could not have engaged the voters on the public street and roadway without causing traffic hazards. She believed that the union supporters simply could not stop employees in their cars on the street to engage them in conversation either before or after work. However, Rivera admitted that the union supporters were not only gathered outside of the casino all day holding signs but also gathered just before the garage entrance holding a fairly large union banner.

[34] The Respondent's counsel offered to present a witness on this allegation; however, the witness was not available or at least nor present at the close of the Respondent's case. I gave the Respondent a substantial amount of time to secure the witness, whom I was told repeatedly was on his/her way. After waiting far longer than I wanted to, and considering the trial had been ongoing for several days, I decided to close the record. The Respondent proffers that the witness would have testified that the lot was closed due to an inspection of the property. I noted the Respondent's objection and proffered testimony at the time.

unlawful purpose; its witness would have established that the lot was closed for purposes of an inspection of the lot. The Respondent also asserts that the Union had available to it ample other unrestricted channels of communication with the employees. The Respondent notes that on election day the union supporters were located on the street outside the casino carrying union signs and displaying a large union banner. The Respondent also notes that the union supporters were in the casino during the campaign playing games in their union T-shirts. Moreover, during the campaign, the Union conducted meetings and had access to the employees in the cafeteria and breakroom.

The Respondent argues that it was not required to provide the Union with the best or optimal location to convey its message. The Respondent essentially asserts that simply because the union considered the parking lot a good place to conduct its visibility activities, did not make the lot a place to which the Union was legally entitled to have access. The Respondent argues that it did not violate the Act in closing the parking lot in question.

For the reasons and the authorities cited by the Respondent, I would find and conclude that the Respondent's closing of Parking lot A on election day did not violate the Act. I am mindful that while the Respondent did not produce a witness[35] to explain the decision to close the lot, the casino's stated reason was to perform some work on the lot on election day. However, it seems clear that no actual work was being performed on May 11. This fact does that fact does not mean that none was planned by the casino.

Be that as it may, my agreement with the Respondent does not rest on whether work was being or to be done on parking lot A. The record is clear that the campaign lasted for several months, and there was much "electioneering" by the parties, both inside and outside the casino; both the Union and the Respondent evidently took advantage of whatever means at their disposal to communicate with the dealers, to include employer and union meetings, union and company literature onsite; T-shirts and stickers being worn on and offsite; and employees actively campaigning either for or against the Union, to name but a few opportunities taken by the parties.

As noted by the Respondent, the Union was not entitled to the best location on or near the Company's property to convey its message as long as the Company did not place undue or discriminatory restrictions on access to its employees.

On May 11, the lot was closed but notice had been given to the employees and the Union of the closure. The Union undismayed, nonetheless, conducted its campaign on the street in front of the casino. In fact, according to witnesses, both sides were represented and interacted with each other on the street in question. It can hardly be gainsaid on this record that the Respondent's closure of parking lot A was designed to discourage employees from encouraging other employees to support the Union or intimidate them before or on election day.

I would recommend dismissal of the charge, and not sustain the associated objection.

J. Complaint Paragraph 5(j); Objection 11

The Respondent's alleged surveillance by its guards and supervisors on May 11, 2007, in the casino parking garage of an employee attempting to engage in union activities; its alleged direction of the employee to leave the garage; its alleged following of the employee off the property; its continued watching of the employee for an extended period; and its alleged threat to charge the employee with loitering if she distributed prounion literature in nonwork areas.

Perakovich also testified at the behest of the General Counsel regarding these allegations.

Perakovich said that on May 11, she arrived at the casino at around 8 a.m. and parked on the eighth floor of the parking garage. She noted that she had 15 or more years of seniority and was allowed to park there at no cost. Perakovich stated that after casting her vote, she went back to her car as this was her scheduled day off; however, she did not intend to leave the garage because she was a union observer for the election.

Perakovich testified that since the Respondent had closed parking lot A, she thought that perhaps her coworkers might not be aware of this. Accordingly, she decided to place telephone calls to them while standing outside of the elevator on the eighth floor of the garage. While there, Perakovich stated that a security guard on a bicycle approached her and told her that she should not be doing "what you are doing." Perakovich said that she told him she was doing nothing, to which the guard said (accusingly), "You know what you are doing—get in your car and leave," pointing to an older Mercedes parked nearby which happened to have a UAW sign in the rear window. Perakovich said she told the guard that the Mercedes was not her vehicle, but the guard (sarcastically) expressed his disbelief, saying, "Yeah, right."

Perakovich said as it happened a security supervisor, Sharon Long,[36] came on the scene and proceeded to ask Perakovich what was going on and what she was doing.

Perakovich said she responded to Long, telling her that she had made a few telephone calls. According to Perakovich, Long told her that she could not loiter there. Perakovich said that she told Long she was not loitering, which prompted Long to ask again what she was doing. Perakovich said that she told Long that she was waiting for a ride from a friend. Perakovich stated that Long, obviously not believing her (because nonemployees had to pay in advance to use the parking garage), asked whether her friend was going to pick her up in the garage.[37]

[35] The Respondent seemingly asserts that it was prejudiced by my not allowing it to present a witness on this issue. However, it is a party's obligation to secure the timely attendance of witness; this was not done. It is the ALJ's responsibility to manage the trial, and as efficiently and expeditiously as possible. I allowed ample time for the Respondent's witness to appear and even called a recess to accommodate the Respondent, but the witness was not forthcoming.

[36] Perakovich did not at the time know Long's last name. Perakovich noted that Trump security guards wear uniforms but Long was in plainclothes and wore a badge; Perakovich related, however, that she has observed Long nearly every day but did not know her last name at the time.

[37] It should be noted that on cross-examination by the Respondent's counsel, Perakovich admitted that she lied to Long because Long and *two* other security personnel on the scene scared her and intimidated her by asking her to leave when she believed she was permissibly in the

Ultimately, according to Perakovich, Long told her that she had to wait for her ride downstairs at the employee entrance to the garage. Thereupon, Perakovich said that she and Long took the elevator and Long got off on the casino level and she on the ground level, where she walked to the employee entrance and waited. Perakovich noted that when she arrived at the entrance, the first bicycle guard was there. Perakovich said that she waited for about 10 minutes for him to leave and then returned to her car. While leaving the garage, Perakovich said that she again saw the bicycle guard who said, "I thought you did not have a car." Perakovich said that she simply left without further comment.

Sharon Long was called by the Respondent and testified that she is currently employed by Trump Marina as a security shift manager charged with overseeing the safety and security of casino guests and employees as well as the casino assets.[38]

Long said that she was familiar with the union campaign as well as the election held in on May 11, on which day she was working. Long recalled an incident with an employee whose name she could not recall in the parking garage.

Long said that on this day, a bike security officer on patrol in the garage advised her that an employee had been in the garage for quite a while and requested that Long respond to the area to determine what was going on. Upon arriving at the garage eighth-floor level, Long said that the bike officer pointed to the (female) employee in question, whereupon Long said she asked the employee whether she was coming on shift, currently working, or leaving work.[39] According to Long, the employee said that she was leaving work, had completed her shift, and was waiting for a ride. Long testified that she informed the employee that casino policy required that employees be picked up and dropped off at the employee entrance. Long stated that she asked the employee why she would be waiting to be picked up on the eighth floor which required her ride to pay a parking fee. According to Long, the employee "hemmed and hawed," so she politely asked her to go to the employee entrance to be picked up; both she and the employee together got on the elevator. Long said that she got off on the casino level as did the employee, but she did not see where the employee went and had no further contract with her.

Long denied threatening the employee or intimidating her; and she denied following her off the property and watching her for any extended period of time. Long insisted that she responded to the area solely because of the report of the bike officer who provided a description of a person thought to be loitering in the garage.

In agreement with the Respondent, I would find and conclude that Long did not engage in unlawful surveillance or otherwise violate the Act in her encounter with Perakovich.

I note that Long and her security members were charged with securing the casino property and it seems clear the security officers believed that Perakovich was loitering, which in turn triggered a response from Long. Notably, Perakovich admitted that for her own reasons, she did not mention her union activities but instead told Long she was waiting for a ride. Long credibly testified that she informed Perakovich of the casino policy in such circumstances and merely accompanied her to the appropriate place for employees to be picked up or dropped off.

I would agree with the Respondent that Long and other security officers merely responded to a suspected loitering by Perakovich who did not tell them at the time that she was engaging in union activities.[40] I would recommend dismissal of this charge and that the associated objection not be sustained.

K. Complaint Paragraph 5(p)

Shift Manager Karen Lew's allegedly suggesting to an employee on or about May 16, 2007, that the employee and other employees who supported the Union should quit (Trump Marina) and go to other unionized (casino) houses.

Perakovich was again called by the General Counsel to establish this charge.

Perakovich testified that about 5 days after the election, she was called into the office of Karen Lew, her shift manager, whereat Lew[41] said that the election was over and the Union had lost; that she (Lew) knew that Mary Lou Calderon, Mario Spina, Lori Summers, and Perakovich had put a lot of effort into the union drive, but things were going back to business as usual. According to Perakovich, Lew said that she wanted to make sure all would get along and there would be no problem. According to Perakovich, Lew went on to say that "this was a non-union house, and there were other union (houses) in town; if we didn't like it, there was the door." Perakovich said that she did not respond to these comments which she acknowledged were made between the two of them alone in Lew's office.

Admitted Supervisor Karen Lew testified that she did not make the remarks attributed to her by Perakovich on May 16, 2007 (or on any other date).

In agreement with the Respondent, I would find and conclude that the General Counsel has not met her burden of proof, and I would recommend dismissal of this charge.

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garage; was scheduled to serve as an election observer; and was merely trying to inform her coworkers that parking lot A was closed. Perakovich testified that she did not think she was doing anything wrong but the *three* security personnel intimidated her, and that she made up the story.

[38] The Respondent stipulated and agreed that Long was a statutory supervisor.

[39] Long stated that she did not know what the employee was doing at their initial encounter. Long noted on cross-examination that the employee told her that she had not parked her car in the garage, but was aware of the policy regarding employees to be dropped off and picked up in the area designated for them.

[40] The Respondent asserts that Perakovich's testimony should be discredited because of inconsistencies in her testimony and that she admitted at the hearing that she lied to Long about her purpose for being in the garage, supposedly because the security guards scared her. I have not elected to discredit Perakovich in my findings. Rather, in my view, because she did not tell the security personnel of her true purpose for being in the garage, Long could not have known that she was possibly engaged in protected activity. Therefore, Long's actions in the garage were in my mind taken in good faith and pursuant to a legitimate objective.

[41] The transcript records that Perakovich said Karen Little. However, the Respondent acknowledges that Perakovich probably meant Lew as the casino does not employ anyone named Karen Little.

I note in so finding that this incident involves a one-on-one conversation allegedly occurring between the very partisan Perakovich and her supervisor, the very partisan Lew. In my view, the testimonial evidence is in equipoise; and, accordingly, the charge fails.

L. Complaint Paragraphs 5(k) and (l); Objection 12

The Respondent's alleged attempt on May 11, 2007, to confiscate union flyers from employees near the casino's cafeteria; its interrogation of an employee regarding his possession of union flyers; its threat to an employee that his conduct would be reported to higher casino authorities; its prohibiting the employee from distributing flyers "anywhere" during the remainder of May 11; its telling the employee to surrender his flyers to a supervisor; and its permitting antiunion employees to distribute literature without confiscation of their literature.

The General Counsel called 22-year Trump employee, Charles Gregor, who testified that he was a full-time dealer who very actively supported the Union in the organizing drive and also served as a union election observer.

Gregor stated that he was working at the casino on election day. Gregor noted that he had passed out union literature—"quite a lot" by his estimate—in the cafeteria, parking lot, and the parking garage where as a 15-year (plus) employee he was allowed to park his vehicle before the election and on May 11 as well.

Gregor testified that on May 11, he had handed out union literature near the cafeteria doorway just before he started his 4 a.m. shift and was walking with a coworker, Mary Lou Calderon, when a casino security supervisor, Phil Conklin, came up from behind, but happened to trip over something and dropped his wallet. At the time Gregor said that he had some union literature in his hands and while assisting Conklin recover from his stumble (holding the door for him), Conklin asked what he had in his hands and requested a copy. Gregor stated that he gave Conklin a union flyer, but then Conklin attempted to grab the entire package of flyers from him. Gregor said that he believed Conklin was kidding and recoiled playfully while not giving Conklin the flyers. However, according to Gregor, he determined that Conklin was serious—he did want all of the flyers—and upon Gregor's refusal to hand them over, Conklin went over to the pit and placed a call on his walkie-talkie. Gregor said that he went on his way.

Gregor said that he was smiling during the whole encounter and then simply went to his table, thinking nothing of the matter. However, as he was walking, James DiRenzo, a shift supervisor stopped him and asked if he had been passing out flyers on the casino floor. Gregor responded that he had not, but DiRenzo stated that Conklin had said that he had been passing out the flyers. Gregor testified that he explained to DiRenzo that Conklin had asked for the flyers and that he had given him one copy.

According to Gregor, DiRenzo then told him that he had been rude to Conklin by saying, "[G]et out of here," and he (DiRenzo) was going to have to report the incident to the casino manager.[42] Gregor noted that in his view DiRenzo exhibited a mean demeanor and attitude while telling him of his intentions.

According to Gregor, DiRenzo then ordered him to go to his gaming table and warned him not to distribute flyers during the day of the election. Gregor said he told DiRenzo that he (Gregor) did not know about this, because DiRenzo did not specify where he could distribute—he seemed to be saying he just could not pass out flyers anywhere.

According to Gregor, DiRenzo then asked if he had the flyers with him and, if so, to give them to him. Gregor said initially he told DiRenzo he did not have them with him but that he would give them to someone to hold for him. Gregor said he then told DiRenzo that he would get the flyers on his break and hand them over; however, according to Gregor, he did not happen to see DiRenzo at all during the day to give him the flyers.

Later that day, Gregor stated that his pit boss, Robert Bell (who goes by Bruce), approached him at his game and told him that he was not supposed to pass out flyers that day, that he was telling everyone about this on the instruction of management.[43]

Gregor mentioned in passing that he had been and was at the time very friendly with security personnel, including Conklin, which is why he thought Conklin was teasing him over the flyers. Gregor stated that he did say "get out of here" to Conklin but said this in the context of what he thought was Conklin's playful request. Gregor testified that he later came to think that DiRenzo might have thought that what he said to Conklin was rude, but at the time he had no idea that he had caused offense or a problem because Conklin allowed him to walk out to the casino floor with the flyers.

Gregor noted that at the point he dealt with DiRenzo, he could not recall whether Calderon was still walking with him, but he was sure he no longer possessed the flyers.

Counsel for the Union examined Gregor regarding his observations of the conduct of employees who were not supporters of the Union. Gregor testified that he saw Trump dealers wearing yellow T-shirts with "Vote No" on them on the casino floor and while working the blackjack table a week before the election. He identified Linda (Angier) and Guiseppe (Guiffrida), whom he knew to be company supporters, sporting the yellow T-shirts, as well as a couple of other dealers whose names he could not readily recall; Angier and Guiffrida were full-time dealers.

Gregor specifically recalled Angier taunting him with arms raised at a gaming table about a week before the election. Coincidentally, Bell came on the scene at that time and Gregor looked at him, expecting some action on his part. However, according to Gregor, looking somewhat aggravated, Bell, nonetheless, said and did nothing about Angier's behavior or her T-shirt.

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[42] According to Gregor, Don Brown was the casino manager, and he was a "big honcho" in the casino's management.

[43] According to Gregor, Bell later told him to go see DiRenzo in his office when he got a break. Gregor testified that he was aware of Spina's suspension and feared that he might be suspended or written up for the flyer incident. [Note: Gregor did not testify in more detail about this meeting, or if it even took place; nor did he testify that he received any discipline over this matter.]

Gregor also recalled that on election day, Kent Taylor, another dealer (and an election observer for the casino), told him that Ernie Isgro, a dual-rate casino shift manager, had instructed him to wear a similar yellow T-shirt.[44]

Conklin testified at the hearing and stated that for the past 3-1/2 years he has served as a Trump Marina security officer and during the union campaign and election served as a dual-rate security shift manager. Conklin stated that while he does not know Gregor personally, he did have an encounter with him on May 11, election day.

According to Conklin, as he was walking onto the casino floor from the area of the cafeteria, he observed "Chuck" on the casino floor in the slot machine area passing out flyers to other dealers at about 5 a.m.[45] Conklin intimated that management had instructed security to be on the alert for this type of activity and, observing Gregor, he asked him what he was holding; Gregor showed him a flyer. At the time, Conklin said that they were on the casino floor in the slots section.

Conklin testified that he advised Gregor of the casino's no-solicitation on the casino floor and work area policy and went on to his other duties. However, Conklin admitted that as per management's directions, he advised Gregor's supervisors that he had spoken to Gregor about the matter. Conklin denied making any attempt to confiscate the flyers, to snatch, or grab them from Gregor. Conklin admitted that Gregor voluntarily gave him a flyer, which he turned over to Gregor's supervisors, DiRenzo and Isgro.

James (Jimmy) DiRenzo testified that he has been employed by Trump Marina for about 10 years, and at the time of the election supervised the graveyard shift—4 a.m. to 12 noon.

DiRenzo recalled conversing with Gregor, one of the dealers on his shift, after being apprised by Conklin, a security supervisor, that he saw Gregor handing out union flyers on the casino floor. DiRenzo said that he saw Gregor, standing with Ernie Isgro at pit 8 and informed him that he was seen distributing flyers on the casino floor. DiRenzo stated that Gregor denied doing this. DiRenzo, accepting Gregor's denial, said that he reminded Gregor that he could not distribute on the casino floor and Gregor said okay.

DiRenzo stated that during a shift change, he observed a morning shift dealer walking by reading something, which turned to be a union flyer. DiRenzo asked the dealer where he had obtained the flyer and was told that Mary Lou Calderon, a graveyard shift dealer, had given it to him on the casino floor. A few moments later, Calderon, accompanied by Gregor, happened by and DiRenzo (with Isgro standing by) said he spoke directly to her, but reminded the two about the distribution policy on the casino floor. According to DiRenzo, both Calderon and Gregor said okay and that ended the matter.

DiRenzo admitted that neither Gregor nor Calderon were argumentative or otherwise disagreeable about the matter. Accordingly, DiRenzo denied telling Gregor that he would report him to higher casino authority, there was no need under the circumstances. DiRenzo testified that he did not take any flyers from Gregor; in fact, Gregor had none in his possession at the time. DiRenzo said the only flyer he saw was the one given him by the swing shift dealer, and that he gave that one back to the dealer who had completed his shift.

DiRenzo volunteered that the no-solicitation policy on the casino floor applied at all times, not just on election day. In that vein, DiRenzo stated that on election day he had seen no union or antiunion materials on the pit stand, and specifically did not see the newspaper ad (GC Exh. 2). However, DiRenzo admitted that on election day, he wore an antiunion sticker which he had picked up from the shift manager's office.

DiRenzo stated that he had observed dealers Angier, Guiffrida, and Nina Braithwaite wearing yellow T-shirts on the premises but was not sure if they were then working as they work on the swing shift, not his graveyard shift.

Ernie Isgro testified that he has been employed by Trump Marina for about 22 years, and during the election and union campaign he was serving as a dual-rate casino shift manager; Isgro says his immediate supervisor is DiRenzo with whom he was working on May 11. Isgro also stated that he knew Chuck Gregor as a graveyard shift dealer who also was working that night.

Isgro testified that on May 11, he was working with Gregor in pit 8 and DiRenzo came over and asked Gregor if he had been distributing flyers on the casino floor. According to Isgro, Gregor said he had not, to which DiRenzo said, "[O]kay," but to make sure that Gregor did not do this on the casino floor.

Isgro said as it happened, a dealer was coming their way with a paper in his hand and DiRenzo called him over and asked what he was reading. The dealer admitted that he should not have what turned out to be a union flyer on the casino floor. According to Isgro, DiRenzo told him to put it away, not to read it on the casino floor. The dealer went on his way without further ado, but advised that Calderon had given it to him. Then, as Calderon accompanied by Gregor happened by, DiRenzo advised her (and Gregor) not to distribute on the casino floor.

Isgro stated that DiRenzo did not tell Gregor (or the dealer or Calderon) that he could not distribute flyers anywhere else on the property and made no attempt to confiscate any flyers. According to Isgro, there were simply no flyers to confiscate except the one the swing shift dealer was reading.

Isgro also said that DiRenzo did not tell Gregor he would be reported to higher management. According to Isgro, there was no problem; the dealers said they would comply with the solicitation policy. Isgro intimated that he personally did not see

[44] According to Gregor, Kent Taylor did not want to wear the shirt and did not put it on in the men's room where this discussion took place.

[45] Conklin testified that when he observed Gregor, he (Conklin) was not coming from the cafeteria but his office, which is located in an area between the cafeteria and the casino floor. He did not recall tripping over the steps and Gregor's holding the door for him. I found it noteworthy that while Conklin said that he did not know Gregor personally, he referred to him as "Chuck," a common nickname for persons named Charles.

Conklin said he received no instructions regarding the parking garage. Conklin explained on cross-examination the nature of the policy as told to him by management, saying that basically there was to be no solicitation on the casino floor or in work areas on election day. Conklin interpreted this to mean no flyers, no election materials, and no discussions about the election in the work areas. He was to report instances of the kind.

Gregor in possession of any flyers, and DiRenzo never asked Gregor to hand over flyers, at least in his presence.

Isgro acknowledged that the casino management had instructed him that there was to be no distribution on the casino floor of any kind to include flyers or paperwork, especially on election day. Isgro conceded that while he had observed antiunion material on the pit stands,[46] the material was not evident on election day.

The General Counsel submits that the Respondent's encounter with Gregor was basically a manifestation of its objective to be on the lookout for any union activities employees may be engaging in, particularly on election day, and pursuant to this objective informed its security staff to prevent these activities.

The General Counsel further submits that Gregor's testimony should be credited over that of DiRenzo, Conklin, and Isgro because he was straightforward and detailed, while the management employees were vague and overreaching in their understanding of the casino's workplace rules covering solicitation.

The Respondent asserts that with respect to Gregor's encounter with Conklin, Conklin, having observed Gregor passing out flyers on the casino floor, merely informed him that this was not permitted in the work area of the casino. Conklin, then acting on instructions from management, reported the incident to DiRenzo. The Respondent contends that it was Gregor who engaged in impermissible conduct and that Conklin was simply enforcing a legitimate rule of the casino. The Respondent submits that Conklin's denial that he confiscated or attempt to confiscate Gregor's flyers should be credited.

Regarding Gregor's encounter with DiRenzo, the Respondent contends that contrary to Gregor's vague and prompted testimony, DiRenzo credibly testified that he told Gregor that he could not distribute the flyers on the casino floor, "our work place." Moreover, since Gregor himself testified that at the time of this encounter, he had no flyers in his possession, DiRenzo could not have confiscated any flyers from Gregor.

The Respondent asserts that DiRenzo did not coercively interrogate Gregor by asking him whether he had distributed on its casino floor as reported to him by Conklin, because their questioning was based on a possible violation of a legitimate work rule and policy, and not to determine Gregor's union sentiments or otherwise interfere with his rights under the Act.

Gregor's encounter with management is somewhat puzzling. It would appear that Gregor believed that Conklin was teasing him regarding Conklin's purported attempt to confiscate his flyers. Conklin testified that he saw Gregor distributing flyers on the casino floor, which he should not be doing according to company policy. Acting on Conklin's report, DiRenzo told Gregor that he could not distribute the flyers in the working areas. Gregor came to the belief that DiRenzo was saying that he could not distribute "anywhere."

Notably, DiRenzo's version of his encounter with Gregor was essentially corroborated by another manager, Isgro. Another person with possible knowledge of the events, Mary Lou Calderon, a union supporter by all accounts, did not testify at the hearing.

On balance, I cannot find and conclude that the Respondent violated the Act with respect to the Gregor incident on May 11. Specifically, I cannot find that either Conklin or DiRenzo attempted to confiscate Gregor's flyers; I cannot find that either Conklin or DiRenzo unlawfully interrogated Gregor regarding his possession of the flyers. It would be my finding that Conklin and DiRenzo lawfully asked Gregor whether he was distributing flyers on the casino floor—a clear working area—and reminded him that such distribution was not permissible. I cannot find that either Conklin or DiRenzo told Gregor (or any employee) that he could not distribute "anywhere" on casino property.[47] In likewise, I cannot find that either Conklin or DiRenzo told Gregor to surrender his flyers to management.

Since I cannot conclude that the Respondent confiscated or attempted to confiscate Gregor's union literature, I cannot in likewise conclude that the Respondent permitted antiunion employees to distribute literature without confiscating (or attempting to) their literature.

I would recommend dismissal of these allegations, and would not sustain the associated objection.[48]

M. Complaint Paragraph 5(o)

The Respondent, through an alleged agent/supervisor, Mary Ann Henson, allegedly telling an employee on May 14, 2007, that the casino was looking to fire employees who started the union campaign.

Diane Rieck also testified regarding this allegation.

Rieck stated that on the Monday after the May 11 election—the 14th—an employee, Mary Ann Henson said to her in the cafeteria, "[W]hoever is starting the stuff with the Union, we're looking to fire." Rieck testified that Henson made this comment when no one else was around, but looking directly at her when she uttered those words. Rieck said that she walked away from Henson, but was very surprised by her comments.[49]

Henson did not testify at the hearing; no reason was provided by the Respondent for her nonappearance. The Respondent, however, called Barbara Hulsizer[50] as its witness to rebut these charges. Hulsizer stated that Mary Ann Henson during the relevant period was employed by Trump Marina as a national marketing executive, a full-time salaried position with no su-

[46] Isgro admitted that he had seen the newspaper ad (GC Exh. 2) in the breakroom, but not on the casino floor on election day.

[47] It seems that Gregor drew this conclusion from the circumstances, but not from the actual words of either Conklin or DiRenzo.

[48] It should be noted that in concluding that the Respondent did not violate the Act with respect to the Gregor incidents, I have essentially determined that Gregor's testimony was effectively rebutted by the Respondent's witnesses and as such, my dismissal is based on a failure of proof, the evidence being in equipoise.

[49] Rieck testified that Henson's name was on her identification badge but she only saw "Ann" at the time. Rieck thought her name was Jo Ann and stated this in her affidavit to the Board agent. However, she later found out her name was Mary Ann by asking coworkers about her. Rieck described Henson's physical characteristics, noting that she wore suits every day. Rieck insisted that the person making the comments on May 14 was Mary Ann Henson.

[50] Hulsizer said she was employed by Trump Marina in human resources. She was designated by the Respondent as its representative during the hearing.

pervisory responsibilities. According to Hulsizer, Henson is not considered a managerial employee. Rather, she is a professional employee whose main duties were to ensure that casino customers had a satisfactory experience while visiting the casino. Basically, according to Hulsizer, Henson's job was one step up from a "host" position; her main function was to bring in customers to play the slot machines.

Hulsizer went on to say that Henson did not hold herself out as an agent, because in her role, she had only a limited interaction with employees and had no duties that relate to employee discipline, granting time off, or like matters. According to Hulsizer, Henson did not really deal with the other casino employees, including the dealers, in an occupational sense. Hulsizer stated that Henson's role was mainly public relations.

Henson did not testify at the hearing so the only account of what happened between Henson and Rieck comes from Rieck. Rieck was, as I have stated, a credible witness, and although her identification of Henson was not as surefooted as one would like, I will credit her version of Henson's comments to her, which comments, in my view, constitute a violation of the Act.

As accurately submitted by the Respondent, the burden of proving supervisory authority is on the party asserting it, and such proof must be established by a preponderance of the evidence. *Oakwood Healthcare, Inc.*, 348 NLRB 686 fn. 3 (2006); *Dean & Deluca*, 338 NLRB 1046, 1047 (2003). Purely conclusory evidence is not sufficient to establish supervisory status. The Board requires evidence that the employee actually possesses the 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727 fn. 5 (2006).

On this record, there was no evidence of consequence adduced by the General Counsel sufficient to imbue Henson with supervisory status.

The Respondent also correctly cited the Board's test for agency, mainly whether, under all the circumstances, an employee could reasonably believe that the alleged agent was reflecting company policy and speaking for management. *Waterbed World*, 286 NLRB 425, 426–427 (1987); *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993). The Board has held that the party asserting that an agency relationship exists bears the burden of proof. *Shen Automotive Dealership Group*, 321 NLRB 586 (1996); see, e.g., *National Gypsum*, 293 NLRB 1138 (1989); *Matheson Fast Freight*, 297 NLRB 63 (1989).

Here, it seems clear that Henson had little or no contact with the dealers, as confirmed by Rieck who barely knew who Henson was, except for having seen her around the casino and having a vague recollection of her name. Rieck, in fact, did not seem to know what Henson's job was at the casino. So, in my view, a claim that Rieck could reasonably believe that Henson was reflecting company policy when she made the offending remark is simply not supportable.

In agreement with the Respondent, I would find and conclude that Henson was neither a statutory supervisor nor agent. I am persuaded to this conclusion by the description of Henson's role and duties as credibly explained by Hulsizer. It seems that Henson was basically a hostess and possessed no supervisory authority, or any apparent authority to represent the Company or speak for it regarding employee relations. Accordingly, I would recommend dismissal of the charge.

I note in passing that while Henson's remarks cannot be attributable to the Respondent for purposes of determining a violation of the Act, these remarks certainly are indicative of management's pervasive hostility to the union cause and, by extension, those who supported it.

N. Objection 1

The Respondent's alleged unilateral change of the location of the election room in violation of the Stipulated Election Agreement.

The Union contends that the Respondent unilaterally changed the location of the election from the Biscayne Room in the casino facility to the Hatteras Room 1 in the same facility, in violation of the parties' Stipulated Election Agreement. The Union argues that the Respondent's unilateral action was undertaken without the casino's informing the Union of its intentions. The Union contends that it only learned about the change from the employees and thereupon contacted the Board to protest the move.

The Union also contends that the Respondent's action essentially was a slap in the Union's face, which served its purpose to communicate to the employees that the casino could summarily ignore and modify any agreements reached with the Union and could ignore the Board and the Act at its pleasure. The Union submits that this conduct, taken together with the Respondent's other objectionable conduct, had a reasonable tendency to affect the outcome of the election.

The Respondent counters, arguing that the Marina secured the Region's agreement to move the polling place before the Region posted the official notices of election. The Respondent further contends that the notices were timely posted and also served as an official notice from the Board that a change of location was authorized by the agency conducting the election.

The Respondent submits under the circumstances it cannot be reasonably gainsaid that employees were somehow disenfranchised or otherwise discouraged, and intimidated in the free exercise of their rights under the Act.

The Respondent also submits that the Marina did not act unilaterally in the changing of the polling place. The Respondent notes that the Respondent's counsel, once apprised that the Marina had reserved the Biscayne Room for another group, immediately advised the Region and sought a room change which was actually a better choice because the new location was near the casino escalator and close to the casino floor where the dealers worked.

The Respondent submits its action, sanctioned by the Region, could not and did not affect the results of the election.

I agree with the Respondent and would recommend that Objection 1 not be sustained. The facts are as follows. On April 24, 2007, the Respondent's counsel, Christine A. Cannella, e-mailed Board agents Scott Thompson and Devin Gosh, informing them that the Biscayne Room had been previously booked by another group[51] for May 11, 2007.

[51] See R. Exh. 15, copies of a series of emails and an attachment covering the previous booking by the New Jersey County College

On April 30, 2007, Regional Director Dorothy L. Moore-Duncan notified counsel for the Union and the Respondent by letter[52] that she had determined to proceed with the election, notwithstanding the Respondent's *unilateral modification* (emphasis supplied) of the terms of the Stipulated Election Agreement by relocating the polling place from the Biscayne room to the Hatteras Room 1.

The Regional Director stated that the Notices of Election (would) indicate that the place of the election would be the Hatteras Room 1, and that all other terms of the Stipulated Agreement remained the same.

On May 7, 2007, by letter to the parties, Board agent Devin Gosh confirmed the arrangements for the representation election to be held on May 11. The letter, inter alia, indicated that the election would be held in the Respondent's facility at certain times in the Hatteras Room 1.

Under these facts and circumstances, I cannot find and conclude, first, that the Respondent's conduct affected the employees in the voting unit. It seems highly improbable and unlikely that reasonable employees, once informed of what amounts to be a booking error by the Respondent, would conclude that the Company disrespected the Board, its process and procedures, or the Union. The booking error in the minds of reasonable casino employees in all likelihood was not an unusual event in casino operations. They would surely understand that reservations by casino customers had to be honored as a good business practice, and to ensure positive relations with the casino's patrons.

In likewise, given the facts and circumstances, I cannot find that the change in the location of the polling place had a reasonable tendency to affect the outcome of the election. First, the request for change was made timely enough for the Region to investigate the matter and make a determination. Second, all parties, it seems, were given sufficient notice by the Region so that their respective constituencies could be informed. Third, it should also be noted that the change was merely to another room in the casino as opposed to a change to another facility. The voting unit certainly was not inconvenienced by the change, at least on this record. Significantly, no witnesses testified that the room change affected them one way or the other.

Therefore, I would recommend that Objection #1 not be sustained. *Avante at Boca Raton*, 323 NLRB 555 (1997).

O. Objections # 7, 8, 13, and 15

1. Objection #7

The Respondent's alleged granting of access on or about April 9, 2007, to antiunion supporters during worktime and in work areas while denying such access to union supporters.

2. Objection #8

The Respondent's allegedly allowing on about April 9, 2007, employees to wear antiunion apparel and insignia on the casino (gaming) floor in violation of its policy prohibiting wearing any apparel other than uniforms and employee badges on the casino floor, including prohibiting wearing American flags on their badges.

3. Objection #13

The Respondent's alleged placement of stickers on the escalator railings leading up to the polling place on May 11, 2007.

4. Objection #15

The Respondent's alleged threatening, coercion, and intimidation of employees on about May 10, 2007, by distributing antiunion stickers and buttons for employees to wear.

The Union contends essentially that with respect to these related objections, the Respondent engaged in an active antiunion campaign (on the premises of the casino) but at the same time denied similar access to union supporters.

As a preliminary matter, union counsel notes that the Respondent, as part of its campaign to defeat the Union, included a letter[53] instructing employees how to revoke or rescind their union authorization cards with their paychecks and left a stack of such letters by their paychecks. Essentially, union counsel assigns, this action as objectionable conduct because of the threatening implication that employees' support of the Union was connected to their employment; furthermore, the Company would assist them in revoking the authorization cards and the threat would be thereby removed. She notes that this ploy was successful in at least two cases where employees filled out the cards revoking authorization, using the employer's forms.[54]

Union counsel also points to two documents[55] produced by the casino which were widely distributed to the employees and specifically made available to them by being placed next to employee paychecks. Union counsel contends that the documents and their placement were objectionable in that the casino granted itself unfettered access to the employees for its counter-campaign but denied similar access (to disseminate information) to the Union. Moreover, she asserts that the documents themselves were coercive, and thereby objectionable.

Notably, these preliminary matters are not cited in the pleadings as objections, unalleged or alleged. Accordingly, I will not make a ruling on these matters.

However, turning to the pleaded objections themselves, the following witnesses were called to offer testimony on the specific objections by the parties.

Elaine Catalfano, a part-time blackjack dealer, testified that she has been employed by the casino for about 2–3 years and

Business Officers Association of the Biscayne Room on February 13, 2007.

[52] See CP Exh. 3, a copy of the Regional Director's letter.

[53] See CP Exh. 6.

[54] See CP Exh. 5.

[55] The documents entitled "UAW organizers Are Allowed To Mislead Workers Into Supporting Their Union" (CP Exh. 7) and "An Election Reminder" (CP Exh. 8) which contained a sample ballot marked "No." The union counsel asserts that CP Exh. 7 was not widely distributed to the employees; however, CP Exh. 8 was placed next to the employee paychecks.

Union supporter Mario Spina testified that he observed CP Exh. 7 on the top of pit 8 on May 10 and 11; that a lot of these "were all over the place"; and that he received his copy from a fellow dealer. (Tr. 390.) Spina said that copies of CP Exh. 8 were in a pile in the area where dealers pick up their checks. He saw a copy on the Saturday before the election and also 2 days before the election in pit 8. Spina said dealers are not allowed to place anything on the pit stands. (Tr. 395.)

considered herself a strong supporter of the Company and was opposed to the union campaign.[56]

Catalfano testified that she supported the Company's opposition to the Union and spoke to the dealers about her position. Catalfano said that she wore over her uniform a yellow T-shirt that was provided to her by two fellow dealers, Linda (Angier) and Guiseppe (Guiffrida), and displayed a poster in support of the Company on election day. Catalfano noted that she was given the T-shirt at work, but only wore it on election day over her dealer shirt and not while working. Catalfano admitted that before signing in on election day, she wore the shirt on the casino floor briefly (walking around the floor) and she also wore the shirt in the cafeteria. Catalfano noted that when she wore the shirt on the casino floor, she did not speak to any of the dealers.

Catalfano explained that on election day she and her husband, who also works for the casino, began work at 8 p.m. and, having seen fellow dealers outside the building wearing union shirts and carrying union posters, decided to support the casino by displaying a poster. Catalfano noted that prior to May 11 about a month or so prior, she observed both management and union literature in the cafeteria.

Guiseppe Guiffrida and Linda Angier testified at the hearing.[57]

Guiffrida stated that he was aware of the Union's organizing campaign as well as the election held on May 11; Guiffrida stated unequivocally that he supported the Marina which he felt "treated him right," and he got along well with the Company.

Guiffrida said to show his support, at his own expense he purchased, designed, and printed up yellow T-shirts on which he included antiunion information and an antiunion website. Guiffrida said that he made up the T-shirts about a couple of days before the election, perhaps as much as 4–5 days prior to the election, but with no instruction or support from the casino management. Guiffrida said his plan was to distribute the shirts to antiunion supporters at work in reaction to the UAW representatives who had worn union shirts and walked around the casino, in his view trying to intimidate the dealers. Guiffrida related that one of the UAW supporters stood right in front of him while he was running his game and even tried to stop and talk with working dealers on break. Guiffrida stated that in his view, the campaign was contentious.

Guiffrida said that he gave a shirt to anyone who wanted one—he did not force a shirt on anyone—a couple of days before the election (and on election day as well) in the cafeteria, where he distributed most of these shirts.

Guiffrida said that he and Linda Angier were on vacation during the week of the election, but came to work at around 6–6:30 p.m. to show support for the Company. Guiffrida said that he wore the T-shirt on Marina property including the casino floor briefly, but mostly outside the building. Guiffrida stated that management did not say anything to him when he was on the casino floor and he was sure he was observed because he stood out. Guiffrida conceded that he saw the UAW supporters on the casino floor one day and also saw UAW propaganda on a cafeteria table, in the employee quiet room, and in the men's room.

Guiffrida acknowledged that he knew Jack (Julian), a supervisor on the day shift, and recalled that he and Linda Angier showed him the shirts, but could not recall his Julian's laughing about them; whether Julian actually took one; or whether he held one up to show to Julian.

Linda Angier stated that she was aware of the union organizing campaign and the election and she, like her fiancé, Guiffrida, strongly supported the Marina not only by talking to other dealers about the Company and against the Union (which she believed did not offer anything to her or the dealers) but also by making up and distributing the yellow T-shirts.

Angier stated that she and Guiffrida came up with the T-shirt idea because the UAW supporters "were parading" around the casino floor, which she took to be a form of intimidation that angered her. Accordingly, she and Guiffrida decided to combat the UAW with bright canary yellow T-shirts—to connote caution and suggest that the dealers proceed cautiously before deciding for the Union.

Angier echoed Guiffrida's testimony in that she confirmed that they paid for the shirts and there was no involvement of management in the decision to make them up or distribute them to anyone who asked.

Angier said she wore a T-shirt at different times of the day inside and outside casino property, including the casino floor for a short period almost every day the week before the election and on election day. Angier said that she and Guiffrida were on vacation during the week before the election.

Angier noted that during the campaign she saw UAW material; for example, leaflets and authorizations in the cafeteria; however, she did not see any company materials.

Angier related that Guiffrida brought the T-shirts to the casino in a crochet bag and while she could not recall saying anything specific to Jack Julian, it was possible that she showed him the T-shirts. Angier stated that she distributed the shirts to any dealer who asked but not to managers or supervisors. Angier noted that on election day[58] when she wore the T-shirt on the casino floor, she did not offer shirts or even speak to any dealers who were working; she merely made a brief "loop" around the casino floor with the shirt on. Angier believed that

[56] Catalfano was called by the Respondent but not subpoenaed; she appeared voluntarily. Catalfano volunteered that as a teacher and vice principal, she was a member of a different union and served on its negotiating team. However, she did not think that a union was a feasible option for the dealers at Trump Marina. Moreover, she was loyal to the Company because she believed that it had been very accommodating of her scheduling weeks over the years.

[57] Guiffrida and Angier have been employed by the casino for 11 and 12 years, respectively. Guiffrida was promoted from a dealer position to dual-rate supervisor sometime in August 2007. Angier, also formerly a dealer (during the campaign), was promoted to dual-rate supervisor some time prior to her testimony on October 17, 2007. Angier and Guiffrida live together and are known as a couple among the employees at Trump Marina. Both persons testified that they were not subpoenaed by any party but were appearing voluntarily to testify in support of the Company even though they had to travel to Philadelphia the night before from Ohio.

[58] Angier stated that she was on vacation during the 4 days prior to and including May 11, and that she wore the T-shirt on those days and walked the casino on those days with Guiffrida.

the floor supervisor should have seen her, but no one from management told her she could or should not be on the floor. Angier stated that the UAW supporters she observed had been on the floor for several days before, so she felt she could do the same thing.[59]

Angier noted that during the campaign, she recalled seeing UAW leaflets in the cafeteria, and authorization cards being passed out; she did not see any company materials there.

Angier testified that no one from management told her that she could not be on the casino floor wearing the T-shirt and noted that any rule prohibiting off-duty workers from being on the casino floor was an unenforced rule in her view, since employees have to traverse the casino floor to get to the (work) scheduling area.

Kathy Perakovich testified that prior to the election (about a day before), she observed several employees wearing yellow T-shirts on which appeared an antiunion message—a circle with a slash running through UAW—on the casino floor and in the break room and cafeteria. Perakovich stated that of these employees, the only person she knew was Elaine Catalfano, a swing shift dealer; the others she could not recall by name.

Perakovich said that on the day of the election, she observed Donna Townsend, a dual-rate dealer in the voting area with an antiunion sticker on her badge in violation of the employees' handbook rules.[60] Perakovich said that she also observed at least four stickers on the escalator railings going to the voting room.

Lori Ludovich testified that on election day, she observed Elaine and Tony (Catalfano) and Nina Braithwaite wearing bright yellow T-shirts in the cafeteria; she observed one of these persons (she did not say who) on the casino floor as well.

Ludovich noted that the casino's policy, as she understood it, prohibited the wearing of any buttons, pins, or like items on an employee's uniform or badge.

Ludovich stated that she did not know whether the employees wearing the yellow shirts were working that day, but as she understood casino policy, employees could not be on the casino floor without permission if they were not actually working. Ludovich said that when she was not working, she only came to the casino to retrieve her paycheck; otherwise, she had to have permission from management to go in other areas of the casino.[61]

Ludovich testified that she also observed dual-rate floor personnel or full-time floor personnel—supervisors—wearing small white antiunion UAW stickers, which were distributed to them by Shift Manager Jack Julian, from a roll of the stickers. Ludovich stated that she observed him handing these to one or two (management) floor persons—a dual-rate supervisor in particular—but not to the dealers. Ludovich stated that on election day, she observed these stickers affixed to the railings on the escalator leading to the polling place.

Ludovich said that she also observed employees wearing blue bracelets (on their wrists) which were supportive of the UAW while working and throughout the election day, and she saw persons she believed to be guests or customers wearing UAW T-shirts on the casino floor.

Sharon Rivera testified that she provided union supporters with T-shirts, yellow and navy blue, one with a slogan "Union Yes" and another with "AC Dealers" on the front and "United We Bargain, Divided We Beg" on the back; these shirts were employed to give the union cause visibility and were worn both inside and outside the casino by supporters.

Rivera stated that she herself wore union T-shirts on about five occasions during the 2 weeks preceding the election on the casino floor, but that no Trump Marina dealers wore them on Trump property; however, other dealers from Caesar's, Bally's, and Trump Plaza did wear the shirts on the casino floor.

Rivera noted that when the union supporters wore the shirts inside the casino, company security personnel approached them and actually followed them. She also volunteered that after dealer Mario Spina was suspended by the Respondent, the Trump Marina supporters were terrified and did not want to risk being disciplined. According to Rivera, a number of dealers wanted to wear the union T-shirts and she actually distributed T-shirts to dealers; however, after Spina's suspension on April 21, none to her knowledge ever wore a union shirt on Trump property.

Dan Cummings testified that he observed the yellow T-shirts being worn on two occasions—once on the casino floor and in the cafeteria.[62] Cummings stated that he also observed persons wearing union shirts, walking up and down the casino floor aisles, and greeting the working dealers and soliciting their support.

Cummings stated that he was not aware of any company policy that prohibits off-duty employees from being on the casino floor. He noted that part-time dealers have to come to the casino while off-duty to get their scheduling information and, therefore, have to cross the casino floor.

Mike Ferrare testified that he observed "some dealers" while off-duty wearing yellow T-shirts on the day of the election in the cafeteria.

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[59] Angier said that the union supporters wore black T-shirts with "AC Dealers" on them, and a slogan, "United We Stand, Divided We Beg." However, Angier conceded that none of these persons were known to her as Trump Marina dealers.

[60] Perakovich said that she wore an American flag pin on her badge for 5 years after the 9/11 attack, but decided to remove it in April 2007 because of the pending election and the atmosphere in the casinos' being, in her words, "sticky." Perakovich admitted that no one asked her to remove it. She noted that at the time other employees had cute things on their badges (flowers or pictures of children) but were asked by management to remove them; so she decided to remove the flag pin. She noted that at the time employees were told to stop putting things on their badges because management felt things were getting out of hand, but not just because of the ongoing election.

[61] Ludovich conceded on cross-examination that employees do linger in the cafeteria when they pick up their checks, or check their schedules, and chat with one and the other. However, she insisted that casino policy prohibited going on the casino floor without management's permission.

[62] Cummings stated that he saw "Guido" and Linda, whose last name he could not recall, wearing the yellow T-shirts on the casino floor and in the cafeteria. (Cummings was clearly referring to Giuseppe Guiffrida and Linda Angier.) Cummings also believed that he saw Nina (Braithwaite) wearing a yellow shirt in the cafeteria. Cummings also believed that the yellow shirts were worn on a Wednesday or Thursday but not on election day.

Delores Summers testified that she observed two Trump Marina employees, Donna Townsend and Barbara Greer,[63] with antiunion stickers (a red circle with the diagonal slash running through "No Union") affixed to their name badges while both were working games on the casino floor on election day. Summers stated that she had observed Townsend wearing the sticker one day before the election and advised her that this was not allowed. According to Summers, Townsend asked her whether Karen Lew, the day shift manager, knew of the prohibition.

Summers said she also observed about 1 week before the election the yellow antiunion T-shirts being worn on the casino floor (morning shift) by dealers (unidentified) and actually saw a supervisor, Jack Julian, holding up a shirt for display to the working dealers in the pit. Summers said that the dealers also wore the T-shirts as they were casting their ballots on election day, but she could not say whether they were on duty at the time.

Summers also testified that while working pit 1 on the day before the election, she observed antiunion literature that spoke to "union failures" and that supervisors, such as full-time supervisor, Nancy Cantrell, were speaking to the dealers about this literature.[64] Summers said this literature was also laying on the blackjack table on the day in question. Summers said that she observed full-time swing shift dealer, Nina (Braithwaite), handing out (antiunion) literature near the timeclock, and in the cafeteria and breakroom on the day before the election and on election day.

Summers stated that she left prounion materials in the employee breakroom but on each occasion it was removed by persons unknown; her "girl friend" (unidentified) experienced the same thing.

Jack Julian testified that on election day, he observed three night-shift dealers—Linda Angier, Guiseppe Guiffrida, and Nina Braithwaite—wearing yellow T-shirts with a red circle and a line through it; Julian was not sure whether they were on duty at the time.

Julian recalled that Guiffrida had a bag of the shirts with him that he had brought in to work. Julian stated that he could not recall whether he (Julian) actually handed out any of the shirts. Julian admitted that he placed antiunion stickers on the several pit bosses' desks and distributed the stickers on strips to the pit managers, but not to the dual-rate dealers or other dealers eligible to vote.

As noted previously herein, Charles Gregor testified that he passed out union literature "quite a lot" in the cafeteria, parking lot (A), and the garage before and on election day as well.

Gregor stated that he observed full-time dealers Angier and Guiffrida and a dual-rate dealer named Joe (last name unknown) wearing the yellow antiunion T-shirts over their uniform shirts on the casino floor about a week before the election. According to Gregor, Angier stood in front of his blackjack table on one occasion, taunting him with her arms raised. Supervisor Bell actually came on the scene as she was engaging in this behavior, but aside from appearing aggravated, he did nothing. According to Gregor, other dealers or at least one, Doug Gotshaw, were in a position to observe Angier's behavior.

Gregor said that he was told by DiRenzo that literature was not to be distributed on election day, although another dealer, Kent Taylor, told him that his shift supervisor, Ernie Isgro, told him to wear a yellow T-shirt, something Taylor did not want to do.

As noted previously, James DiRenzo testified that the casino maintained a general rule prohibiting distributing material on the casino floor, not just on the day of the election, and that he reminded Gregor and Calderon of the rule on May 11.

DiRenzo admitted that he observed the yellow T-shirts (being worn) once—he could not recall the date—on the casino floor by Braithwaite, Angier, and Guiffrida, whom he could not say were working at the time. DiRenzo admitted that he wore an antiunion sticker obtained from the shift manager's office on election day, around the time he confronted Gregor and Calderon and reminded them not to distribute materials on the casino floor.

Ernie Isgro testified that management had instructed him not to allow the distribution of anything—a union flyer or paperwork—on the casino floor on election day.

Phil Conklin testified that he, too, was instructed by management not to allow any solicitation on the casino floor as well as other work areas on election day by either the Union or management. All violations of the policy were to be reported to management with no action to be otherwise undertaken on his part.

Diane Rieck testified that on May 11, she observed dealer Elaine (Catalfano), Nina (Braithwaite), and Guiseppe (Guiffrida) and his girlfriend (Angier) wearing and distributing yellow T-shirts. Rieck stated that she saw Guiffrida and his girlfriend give a T-shirt to Jack Julian and Karen Lew, who gladly accepted them, on election day.[65]

Rieck said that she also saw two dealers (Rachel and "Kelly" or "Knock") whose last names she did not know, wearing antiunion stickers on their dealer shirts. Rieck also noted that on election day, she observed Jack Julian handing out antiunion stickers to "everybody" from a big roll and placing stickers on

[63] Summers stated that she served as a union observer on election day.

Summers said that Donna Townsend and Barbara Greer were a dual-rate dealer and a part-time dealer, respectively. Summers described Townsend and Greer as antiunion and both were working the baccarat table at the time. Summers stated that her affidavit is incorrect where it states they wore prounion stickers. Summers also said that the affidavit contains a mistake where it states that she never saw anyone wearing antiunion items on the casino floor. Summers said that the Board agent made the error which she did not catch because she was rushing to get to work on the date she signed the affidavit.

[64] According to Summers, Cantrell was placing antiunion literature in the pit bin and, in her presence, went to the dealers and spoke to them about the literature in question.

[65] Rieck said that Julian and Lew were laughing as they accepted the shirts from Guiffrida and Angier, who also were wearing the yellow shirts at the time.

pit stands 4 and 6.[66] Rieck stated she also saw these stickers affixed to the railings leading to the polling place.

Karen Lew, casino shift manager, testified that she observed Guiffrida, Angier, and Braithwaite—swing-shift dealers—wearing yellow (antiunion) T-shirts on election day. Lew stated that Guiffrida and Angier were on vacation and Braithwaite was not working that day. She noted that employees, when off duty, can come to the casino to check their schedules.[67]

Lew stated that the casino policy does not permit employees to wear unauthorized pins or other items on their uniforms except in the case of a special events; e.g., wearing an American flag pin to commemorate the 9/11 attack or the (Red Cross) blood drive; or casino promotions.

Lew acknowledged that the Trump Hotels and Casino Resorts employee handbook (CP Exh. 9) during the campaign was and is currently in effect, and that management expects employees to follow the dictates contained therein. Lew noted, however, that management in its discretion makes decisions regarding acceptable emblems and memorabilia that may be worn in the casino.[68]

Union counsel contends with respect to Objections 7 and 8 essentially that the evidence of record establishes that the Respondent allowed its agents and supporters unfettered access to the voters but did not allow nonemployee union supporters access to the casino. She asserts that union activists were repeatedly told to leave the casino floor, but antiunion supporters were given free access to the casino floor and allowed to wear the yellow shirts and other paraphernalia. Union counsel submits that the Respondent's active antiunion campaign, coupled with its fierce effort to keep the Union's supporters out of the casino, constituted objectionable conduct.

Union counsel also asserts that the record clearly establishes that the Respondent allowed antiunion employees to wear antiunion apparel and insignia on the casino floor and allowed supervisors and dealers alike to wear antiunion stickers on their badges and uniforms in violation of its own policies; that by allowing this, the Respondent created an intimidating atmosphere for the employees who reasonably would think that different rules applied to the employees, depending on which side they were on. Union counsel contends that this conduct was objectionable and affected the results of the election.

The Respondent counters, arguing in essence that the Marina, irrespective of its uniform policy (which was not enforced, at least during the campaign) did not deny prounion employees access to other employees or discriminatorily permit proemployer employees to wear the yellow T-shirts in violation of the policy.

The Respondent submits that no employee stated that he or she was denied access to the casino while off duty because they were union supporters or wearing prounion paraphernalia, nor were any employees told to remove prounion shirts or other items. The Respondent also notes that no union supporters ever attempted to engage in the same type conduct as the antiunion T-shirt wearers, thus, eliminating any factual basis for a charge of disparate treatment.

Regarding Objections 7 and 8, I would tend to agree with the Respondent that these objections should not be sustained. As I have pointed out earlier herein, this was a spirited and even contentious campaign between the parties; and it seems in terms of electioneering behavior, each side gave as good as it got. The Objections, here 7 and 8, go to the point that the Respondent essentially discriminated against the union supporters by allowing the procompany supporters access to the casino during worktime and in work areas while denying this to the union supporters. Objection 7 was simply not established on this record in my view. To be sure, it seems clear that the Respondent allowed the yellow T-shirts to be worn and evidently turned a blind eye to these procompany supporters parading around the casino floor. However, it is equally clear that the Union "imported" other unionized (but no casino) dealers who wore prounion shirts to play the games on the casino floor and displayed their support in the process. The Company did not usher these players out or otherwise restrict them in their demonstrated support of the Union. So, given this fact alone, Objection 7 cannot be sustained.

As to Objection 8, while the casino policy (reasonably read) prohibited employees from wearing any apparel over their uniforms or placing items on their badges, it seems this policy was not uniformly enforced even prior to the campaign. For instance, employees wore American flag pins on their badges in commemoration of the 9/11 attack, as well as other items. It seems clear that the uniform policy was not enforced during the campaign as well.

As noted by the Respondent, however, the union supporters among the casino staff evidently chose not to wear prounion paraphernalia except for perhaps the blue bracelets; instead, the Union brought in the "AC Dealers" to show the union colors. Moreover, it is not disputed that union adherents could freely politick in the break and lunchrooms of the casino. So, considering the testimony of record, I would not find that the Respondent, as alleged in Objection 8, engaged in objectionable conduct.

Turning to Objections 13 and 15, the Union contends that on the day before the election and on election day, the Respondent engaged in objectionable conduct by placing antiunion stickers on the escalator railing leading to the polling place and coerced employees on May 10 by distributing antiunion stickers and buttons for employees to wear.

Union counsel submits that the placement of the stickers (along with and exacerbated by the closing of parking lot A), was a highly unusual act, noticeable to all employees, and de-

[66] Rieck stated that Julian distributed the stickers to dealers who were working their games and who wore them on their lapels and that he also gave the stickers to management personnel.

[67] Lew elaborated, noting that dealers are allowed to "walk around" on the casino floor while off duty if they need to; they are not prohibited generally from being on the casino floor while off duty. Lew also stated that management does not tell its employees how to dress when they are off duty, especially when they come in to check their schedules at the scheduling office or to see their shift managers, whose offices require employees to traverse the casino floor.

[68] Notably, the Respondent's employee handbook states that all employees must follow certain company standards, including . . . "8. Appropriate name tags must be displayed at all times. No unauthorized ornaments or pins may be worn on any parts of the uniform or badge."

signed to solidify an atmosphere of intimidation especially on election day. She also submits that the Respondent, through its managers and supervisors, created an intimidating atmosphere for the employees when they were observed both wearing as well as distributing antiunion stickers to supervisors and dealers alike.

The Respondent, noting that there was no evidence adduced that implicated any of its managers and supervisors in the placement of the stickers on the escalator handrails, denied that it engaged in objectionable conduct. While I would agree that there was no direct evidence of company involvement in the placement of the stickers, the evidence is clear the stickers were identical to those handed out and worn by supervisors, like Julian. So it permits of reasonable inference that the Respondent's management had a hand in their placement. I note also that in spite of its denial, the Respondent did not take any steps to remove or cover up the stickers on election day. This at the least suggests to me a knowing acquiescence by the Company to their being on the escalator.

However, be that as it may, I do not believe the placement of the stickers rises to the level of objectionable conduct in the context of the campaign in question. I do not agree that the mere placement of antiunion stickers on a railing would create in the minds of voting employees an intimidating or threatening environment such that would affect their individual votes. I would not sustain this objection.

As to Objection 15, it is clear that managers like the aforementioned Julian distributed antiunion stickers but on this record, it would appear that he (they) distributed items only to the other managers and supervisors, which is permissible.[69]

As pointed out by the Respondent, its managers having solely distributed the stickers to management/supervisors, the employees were not put in a position of having to make an observable choice between taking or rejecting a sticker and thus exposing their preference for the Union or the Company.[70]

In agreement with the Respondent, I would not sustain this objection.

P. Complaint Paragraph 5(d), Objection 5; Complaint Paragraphs 6(a) and (b), Objections 2 and 3

1. Complaint Paragraph 5(d), Objection 5

Floor Supervisor Frank Mangione's alleged threat on about April 21, 2007, that (part-time) employees would lose their jobs if the Union were selected (voted in) to represent them.

2. Complaint Paragraphs 6(a) and (b), Objections 2 and 3

The Respondent's issuance of a suspension pending investigation to Mario Spina on April 21, 2007; and its issuance to Spina of a final warning and time-served suspension on April 27, 2007. The Respondent's alleged threat to and intimidation of Spina with an investigative suspension in retaliation for his engaging in protected concerted activity on about April 21, 2007. The Respondent's alleged threatening and intimidation of employees following Spina's investigatory suspension by continuing surveillance and constant monitoring of Spina and imposing a final warning and suspension on him.

Before I embark on a discussion of these related complaint allegations and objections, it will be helpful in my view to establish several preliminary points.

First, there is no dispute that Mario Spina, a full-time dealer (as previously described herein), was disciplined—placed on investigative suspension—by the Respondent (through Jack Julian, his immediate supervisor) on April 21, 2007, and that his suspension commenced on that date.[71] It is likewise not disputed that Spina was issued a suspension for time served and a final warning on April 27, 2007, by his immediate supervisor, Karen Lew; Spina's lost time includes the period April 22–27, 2007.[72]

It is also abundantly clear on this record that Spina was well known by both management and the employees as the Union's lead and possibly even the main employee organizer and advocate during the organizing drive.

To a certainty, by his own statement corroborated by many witnesses, Spina undertook in singular fashion the responsibility for educating employees—his fellow dealers—about the Union and the possible benefits of union representation; he also distributed and collected union authorization cards and throughout the campaign answered employees' questions about the Union. Spina also attended union meetings and campaigned actively (in the cafeteria and break room) on behalf of the Union and ultimately served as a union observer on election day. Without question, the employees viewed him as their "go to" source for purposes of getting information, counsel, and advice about the Union.

Moreover, the Respondent's managers, Spina's supervisors in particular, were well aware of his role in the election campaign and, as one supervisor in dramatic understatement testified, Spina did not hide it.

In the discussions to follow, these points will be self-evident, but it is important at the outset preliminarily to note my findings about Spina's role in the organizing drive and the possible significance of that role in conjunction with his discipline and its possible effect on the election results. On this score, as will be discussed in more detail, Spina's discipline was well known among the employees and in fact became a major topic of discussion at the casino in the weeks preceding the election.

Spina testified about the events leading to his discipline.

Spina stated that on April 21, he was on break around 5–6 p.m. and while descending the stairs from the casino floor and heading towards the cafeteria, he encountered floor supervisor

[69] Employers may make antiunion paraphernalia available to employees at a central location (the gaming pit) when such is not accompanied by coercive conduct. *Columbia Alaska Hospital*, 327 NLRB 876 (1999); see also *Barton Nelson, Inc.*, 318 NLRB 712 (1995).

[70] It should be noted that I have not credited Rieck's testimony that she observed Julian giving stickers to the dealers. Julian denied giving stickers to the dealers, and it would appear that since no other employee saw him giving stickers to dealers as opposed to managers and supervisors, Rieck's observations are not corroborated sufficiently to counter my finding.

[71] See GC Exh. 6, a copy of the suspension notice styled "Disciplinary Action Notice."

[72] See GC Exh. 8, a copy of the suspension notice. Spina's normal days off were April 24 and 25. Accordingly, his suspension resulted in the loss of 3 days' pay.

Mangione speaking to Angel Martinez, a dual-rate supervisor.[73] According to Spina, he heard Frank Mangione in a loud, clear voice tell Martinez that "you are all going to lose your jobs" or "you're going to lose your job." Spina said that as he approached the two, he told Mangione that he could not say that. According to Spina, Mangione responded saying, "What?—I was just kidding."[74]

Spina said that he persisted and told Mangione that (irrespective of his kidding) he still could not say what he told Martinez, this was against the NLRB rules. According to Spina, Mangione, his voice rising, said, "Mario, have I ever abused you or intimidated you in all the years I've worked with you?" Spina said that he in turn responded, "[N]o," that Mangione had not done any such thing, but insisted once again (in the response) that Mangione still could not say what he had said to Martinez. Spina stated that because Mangione's voice was rising, he decided to lower his voice and assume a calm demeanor to avoid an escalation of the conversation to a negative level.

However, according to Spina, Mangione appeared to be getting more upset and he (Spina) felt the matter was getting out of hand, with Mangione now scolding him and not listening any longer. Spina stated that he decided to try to get out of the situation and told Mangione that he was sorry he (Mangione) felt that way and simply walked away.

Spina testified that he used no profanity throughout the exchange with Mangione nor did he ever make any threatening gestures. Spina said that he purposely kept his hands in front of his body while carrying his attaché case and stood 4–5 feet away from Mangione.

Spina further testified that he does not generally use profanity; first, because of his religious convictions.[75] Second, Spina said that he would not speak to a supervisor using profanity because he depends on them for support in dealing with difficult customers. He denied, therefore, telling Mangione that he was an "asshole" supervisor, a charge later leveled against him by Mangione.

Be that as it may, Spina said that after the encounter with Mangione he proceeded to the cafeteria and then back to his table. However, around 7:50 p.m., Spina said he was called to Shift Manager Jack Julian's office, where Julian, Mangione, and a higher-level shift manager, George Wilson, were present.

At this meeting, according to Spina, Julian asked him whether he had words with Mangione, and Spina said that he had; Julian then asked if he (Spina) had used profanity. Spina said that he told Julian he had not. In spite of his denial, Julian then and there informed him that he was suspended and directed him to sign a disciplinary action notice (GC Exh. 6), which placed him immediately on investigative suspension for using profanity. Spina stated that while he was in shock, Julian handed him a Trump Marina incident report form and asked him to submit his version of the incident. Julian also asked him for his employee badge. Spina said that the meeting ended and after relinquishing his badge, he left the casino.

As the meeting concluded, Spina said that Julian advised him that management would call him when they were ready. Spina stated that although he was still stunned over the suspension, he went over to the gaming tables before leaving the property and mentioned to a craps dealer, Al Perry, and another dealer, John Dougherty, what had happened.

Spina testified that management called him on April 26 and instructed him to report for work on April 27, 2007. Spina stated that on April 27, he reported for work and went to Day Shift Manager Karen Lew's office to pick up his badge. Spina said that he spoke with Lew who gave him a copy of the suspension for time-served document (GC Exh. 8), which cited not only his use of profanity toward a supervisor, but also accused him of exhibiting overly aggressive conduct. According to Spina, Lew scolded him and warned him that behavior of this type would not be tolerated or condoned and gave him a copy of the suspension document. Spina said he accepted the document, but noted thereon, essentially, that the new accusations of overly aggressive conduct as well as the profanity charge were not true.[76]

Spina testified that he told as few as 20 employees about the suspension but may have told 80 or 100. But after his suspension, Spina testified that he was much more guarded in the pursuit of his campaign activities. According to Spina, his fellow employees were very guarded, very careful, and some looked around to see if they were being observed as he spoke to them. Spina said that for his part, he stopped leaving union literature (anywhere) in the casino after his suspension.

Spina testified that there were other persons present when he and Mangione exchanged words on April 21 and may have witnessed the encounter. Spina identified Martinez; John Dougherty, a dual-rate dealer; Chris Musso, dual-rate floor supervisor; Albert Taclaw, Frank Dante; Lori Ludovich; and a contract craps dealer, Thango Quach (Spina's spelling), who works at another hotel. Spina stated that he did not notice another employee, Ted Taylor, in the vicinity.

Spina stated that because he was in shock on April 21 and was asked to leave the casino property immediately, he essentially did not have the presence of mind to provide Julian with the names of witnesses and, in fact, did not know that any investigation of the matter was being pursued by management. Spina said he appealed his suspension to Trump Marino's board of review but the suspension was upheld and his request to remove the discipline was denied.[77]

Spina volunteered that an investigative suspension is the worst discipline (short of discharge) a Trump Marina employee could receive. Spina noted that in this regard over the 20 years

[73] Dual-rate supervisors are employed as dealers and supervisors in the Respondent's employment systems. Dual raters were deemed eligible to vote in the election.

[74] Spina intimated that in the gaming business "What? I'm just kidding" is a bit of common jargon used by craps players and on this game, which is used when you say something you don't really mean or want to be dismissive.

[75] Spina stated that as a Jehovah Witness, he is not permitted to smoke, drink (alcohol), use drugs, or swear, and must be chaste.

[76] On cross-examination, Spina stated the only time in the confrontation with Mangione that he may have even raised his voice was when he initially heard Mangione telling Martinez about the loss of jobs because of the distance between them; he may have raised the volume of his voice to be heard.

[77] See GC Exh. 14, a copy of the June 28, 2007 board of review decision.

he has been employed by the casino, he had never received any disciplines and had, in fact, received numerous awards and recognition for his work at Trump Marina.[78]

The General Counsel and counsel for the Union also called a number of other witnesses to establish the allegations in question regarding Spina's suspension and its effect on the election results.

Angel Martinez described himself as a dual-rate dealer currently employed by Trump Marina since 1994 or 1995.[79]

Martinez testified that he was familiar with the Spina incident which took place in the hallway across from the cafeteria. He recalled that he asked Frank Mangione what would happen to a dual rater such as himself if the Union were voted in. According to Martinez, Mangione said that probably management would do away with the dual rate position—they would "get away" from this—"some of us would be full-time supervisors and some would be dealing full time—full-time dealers."[80]

Martinez said that at about that time Spina arrived on the scene, but his attention was then directed to the scheduling (board) and his back was to Spina. However, Martinez said that he happened to hear Mangione say that he had always treated Mario fairly and asked Spina whether he had ever disrespected him; Spina responded that Mangione had not. Martinez then said that he could not recall all of what Spina might have said although the two men were only about 5–6 feet from him.

Martinez testified emphatically that he never heard Spina cursing and that neither Mangione's nor Spina's voices were raised.[81]

Martinez recalled that he was asked about the matter by management the next day in the office and provided a statement regarding the incident.[82] Martinez said that he was asked by management whether Spina had used profanity and he told them that he had not. Martinez said the managers also asked him whether Mangione had told him that if you vote for the Union, everybody gets fired, and he responded that Mangione had not said that. Martinez noted that he was interviewed only on this one occasion by management.

Martinez testified that at the time of the encounter that another employee, Ted Taylor, was in the area; Martinez could not recall whether dealer John Dougherty was present.

Martinez (on cross-examination) stated that he knew that Spina was an active union supporter and engaged in the organizing effort with a great deal of passion which, according to Martinez, caused a little change in Spina's behavior—"a little more aggressive but not really aggressive," "a little bit different," as he put it. However, Martinez stated that Spina was always a nice guy and respectable.

John (Jack) Dougherty testified that he was currently employed by the casino as a full-time day-shift dealer; he has been so employed for about 20 years.

Dougherty stated that he was aware of the Union's organizing drive and the election held on May 11, and knows Spina as a fellow dealer who "got dealers to sign cards and did [union] homework."

Dougherty recalled that about 10 days before the election as he was about to enter the cafeteria, he observed Angel (Martinez) and Mangione talking and happened to hear Mangione tell Angel, "You know, if the union gets in here, you don't have a job." Dougherty said he kept on walking to the cafeteria. However, then, according to Dougherty, Mario came along and said, "You can't talk like that Frank, you can't talk like that, you're intimidating the man; you're causing a . . .[83] with the NLRB; it's a fallacy." According to Dougherty, Mangione, whose face was flushed, turned around (to face Spina) and said, "Oh, I was only kidding."

Dougherty stated that Spina's approach to Mangione was like a gentleman, and he did not raise his voice at all—"a complete gentleman."

Dougherty said he then proceeded to the cafeteria and later back to his game, but about an hour later, Mario told him that he had been suspended for using profanity. Dougherty recalled saying to Spina that was a lie—an out-and-out lie. Dougherty testified that Spina never curses and had not uttered a single curse word during the 20 years of their acquaintance.[84]

Dougherty said that the next day at the union hall, he heard that Spina had been suspended pending investigation. Dougherty said he provided a statement to the union representatives who he thought were going to present his version of the encounter to management.[85] Dougherty stated that while he was never asked to provide any information regarding the incident by management, he had purposely decided not to tell management his version of the incident, as opposed to the union representatives. Dougherty said that in July 2007, however, he did participate in a board of review hearing and spoke on Spina's behalf, relating the same version of the incident as he was testifying at the instant hearing.

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[78] See GC Exhs. 9-13, various awards and commendations received by Spina over the years covering October 29, 2000, through August 15, 2007.

[79] Martinez stated that as a dual rater, he sometimes supervises employees and is paid at one rate; as a regular dealer, he is paid at another rate.

[80] I asked Martinez what he meant by the phrase "get away from" the dual-rate position and he explained that he meant that management would eliminate that position. (Tr. 322.)

[81] When asked about Spina's use of profanity in the encounter, Martinez said, "No! No! No!" Martinez's demeanor and tone suggested to me that as far as he was concerned, Spina definitely did not use any profanity in the encounter with Mangione. Martinez also testified that he has known Spina for 20 years and said that Spina does not curse at people, that it was not his custom or style to use profanity. Moreover, he has never heard Spina call anyone "an asshole." Martinez did note that to him, Spina was a little bit irate—a little bit upset—during the encounter.

[82] See R. Exh. 2, a copy of Martinez' statement dated April 22, 2007. It should be noted that four-line written statement relates only to whether Mangione said that Martinez could be fired or lose his job if he voted for the Union. Martinez wrote that Mangione did not use those (exact) words.

[83] Dougherty did not complete this statement according to the transcript.

[84] Dougherty said that he and Mario were not social friends or otherwise very close; he considered him a colleague.

[85] Dougherty noted that after he provided his statement to the Union about the incident with Mangione, a charge was filed by the Union with the Board.

Dougherty admitted that in the past, he had a serious substance abuse problem but since 1980, after a rehabilitation stint and the assistance of Alcoholics Anonymous, he has had no problem. He also admitted that he had also been suspended pending investigation during his career at Trump Marina.

Lori Ann Ludovich testified about the incident involving Spina and Mangione.

Ludovich stated that she was working on April 21, 2007, a Saturday, and overheard a conversation between Spina and a manager, Frank Mangione, in the hallway leading to the cafeteria. On this occasion, she observed Spina standing with Mangione, Frank Dante, and Angel Martinez, the latter individuals she knew were a full-time dealer and a dual-rate supervisor, respectively. Ludovich said she did not see John Dougherty on the scene.

Ludovich stated that while passing the group, she heard Mangione say (loudly), "Have I ever disrespected you?" According to Ludovich, Spina was standing there with his brief case in hand and in a calm voice, with his arms at his sides, replied, "No, you haven't." Ludovich stated that was all she happened to hear. Ludovich said she paused to listen for a few seconds, as the group was basically blocking the entrance to the cafeteria but then, excusing herself, went to the cafeteria; Dante opened the door for her.

Ludovich emphatically stated that she had never heard Spina use any profanity—"none at all"—over the 19 years she has worked with him and their becoming friendly coworkers.

Ludovich noted parenthetically that employees "off the floor" use profanity a lot in casual conversations, mainly in the cafeteria and while walking the hallways, but never on the casino floor, which she said would subject one to discharge "in a heartbeat." Ludovich stated that in her experience she has never known anyone to be disciplined for using profanity off the casino floor.

Ludovich also noted in her experience that usually a suspension pending investigation is issued after verbal and written warnings, and that most employees given such a suspension do not return to work.

Ludovich stated that she heard of Spina's suspension from about three to five dealers and during the time between his suspension and the May 11 election, employees were talking about him. According to Ludovich, the general reaction among the employees was one of shock because Spina was suspending for something—using profanity—that, as she put, goes on constantly behind the scenes and that both managers and employees use profanity, usually in the back hallways.

Ludovich noted that in the aftermath of Spina's suspension, the Union's organizing efforts slowed down; everyone was afraid to talk.

Theodore Taylor[86] testified that on April 21, 2007, as he was on his way to the cafeteria, he observed Mangione and Spina standing in the hallway near the cafeteria engaged in conversation.[87]

Taylor stated that he overheard Mangione say something to the effect that he did not appreciate something that Spina had said. Taylor said he proceeded to the cafeteria and got something to eat and on the way out, he observed Mangione still standing there. Taylor said that he then jokingly said to Mangione, "What's happening? Did Mario call you an asshole or something?" According to Taylor, he and Mangione joke around a lot with each other at work, but on this occasion Mangione made no response, so he decided to leave the matter alone. Taylor stated emphatically that he did not hear Spina call Mangione an "asshole."

Taylor said he went back to work but later was called to the shift manager's office by Jack Julian. Taylor said that Julian and Mangione were present at this time and Julian asked him what he had heard. Taylor said that he told them what he had testified to at the hearing, that not only had he not heard Spina use any profanity, but to him Spina and Mangione were not even arguing, nor did it sound like an argument to him because no voices were raised, just a normal conversation in his opinion.

Taylor said that he was again called into Julian's office for a second interview because another (unnamed) shift manager wanted to hear what had happened between Spina and Mangione; Taylor said that he repeated what he had said in the earlier interview. While he was never asked to provide a written statement by Julian or any manager, Taylor said that he did participate in a "H.R." hearing at the behest of Spina, at which he again repeated his version of what he had heard.

Taylor stated that he has known Julian for almost 20 years and that in the meetings with him about Spina, it seemed to him that "people" (management) were trying to direct him to say that he knew what Spina had said to Mangione that had prompted Mangione to say that he did not appreciate what Spina had supposedly said, and in turn had upset him. Taylor stated that he insisted and persisted in telling the managers that he did not know what (if anything) Spina had said to Mangione, that he did not hear Spina use profanity and, furthermore, did not hear Mangione say that "you guys would lose your jobs if you go union." Taylor said he made the remark concerning "asshole" off the top of his head and in a joking manner to Mangione; that his remark had nothing to do with Spina because he did not hear what Spina might have said to Mangione.

Taylor stated (on cross-examination) that Spina was active in and excited and impassioned about the union campaign, about the possibility of a union being voted in, and engaged other employees about the union; but there was no (negative) change in Spina's "demeanor."

Delores Summers testified that she has known Spina for about 2 years and to her he was one of the main persons in the union organizing effort. Summers stated that she heard of his suspension from her coworkers, about 15 of whom told her that Spina had been suspended for cursing to or at someone.

Summers noted that before Spina's suspension, the dealers would sit down and talk about the possibility of a union coming in. However, after Spina's suspension, according to Summers, no one wanted to talk about the Union or voice their opinions about voting for it anymore. Moreover, Spina had counseled her to watch herself as she was a known and active union sup-

[86] Taylor stated that he has been employed by Trump Marina as a dealer since about 1987.

[87] Taylor could not recall Ludovich being present at the time, but did recall Angel Martinez being in the area.

porter, that she needed to be concerned because of what had happened to him.

Kathy Perakovich testified that she has known Spina for 20 years and that in terms of his role in the organizing effort, he was to her probably the most important person as he had done all of the research about the Union and was most familiar with the issues associated with the campaign; he was the employees' "go to guy" regarding union matters and issues.

Perakovich stated that she found out that Spina had been suspended pending investigation on April 21, 2007, and that received a suspension and final warning on April 27, 2007. According to Perakovich, Spina's suspension was pretty much a topic of conversation among the employees in the breakroom and cafeteria. Perakovich stated that during her tenure with the casino, not many employees return to work from a suspension pending investigation and ultimately such persons were let go or fired.

Perakovich said that she spoke daily to a lot of dealers about Spina's suspension and she noticed that some of their attitudes about the Union changed, their enthusiasm for the Union wavered; the dealers no longer wanted to talk aloud about the Union as much as before his suspension. Perakovich opined that the employees were intimidated by Spina's suspension and as a union supporter she found it a lot harder to approach employees about the Union, and not as many people sought her out as before.

Perakovich testified that she noticed that there was a fall off of about 25 percent in attendance at the union meetings after Spina was suspended. On balance, Perakovich said that before Spina's suspension, there was a certain enthusiasm and motivation for the Union and employees were looking forward to the Union based on the conversations she had with the employees on her shift.

Diane Rieck testified that she has known Spina for about 10 years and was aware that management had accused him of cursing, and he had been suspended. According to Rieck, this news went around the casino like wild fire—all of the dealers were talking about it. Rieck stated that everyone became afraid to talk about the Union after Spina's suspension.

Rieck also stated that she has never known Spina to curse or even lose his temper over the 10 years of their acquaintance. According to Rieck, Spina is basically a friendly person who did not get excited or overreact.

Charles Gregor testified that he became aware that Spina, whom he has known since 1985, had been suspended pending investigating on April 21 and had received a suspension and final warning on April 27. Gregor stated that Spina was very active in his support of the Union and was a very knowledgeable person who was able to get and pass out a lot of flyers and information.

Gregor said that he had never heard Spina use profanity; he was very polite.

According to Gregor, Spina's suspension worried him when he was approached by his pit boss, Bruce Bell, while working a table game and told by Bell that he was not supposed to pass out flyers on election day. And when Bell came back later that day and told him to go to the shift office to see DiRenzo, Gregor thought he also was going to be suspended also.

Gregor said that quite a few dealers (around 10–20) were talking about Spina's suspension, that they could not believe what the Company was doing to him. Gregor stated that he believed a suspension pending investigation usually meant one would be terminated.

Gregor noted that after Spina's suspension quite a few employees would no longer talk about the Union's organizing efforts; to him, they were afraid to say anything in front of management. Gregor stated that he tried to engage employees in conversation (about the Union) but some simply would not talk about it. Gregor stated this was a complete change.

Gregor also cited the example of an employee who would not come into the building when union meetings were being held because he saw a van circling the building three to four times and felt someone was watching and that he would possibly get in trouble. Gregor also noted that before Spina was suspended, about 15–20 dealers would attend union meetings; afterwards, only a few (perhaps a half-dozen) attended.

The Respondent called Managers Jack Julian, Karen Lew, and Frank Mangione to rebut the Spina-related allegations.

Frank Mangione testified, stating that he has been employed by Trump Marina for 21 years and currently serves as a supervisor whose duties included watching the games, making sure they operate properly, ensuring there is no stealing, and things of that nature. (Tr. 480–481.)

Mangione admitted that around 6–6:30 p.m. in April, he and Angel Martinez had a conversation in the hallway outside of the cafeteria, and that Ted Taylor and Jim Tran were present at the time although Tran left the area after a few minutes. Mangione stated he knew John Dougherty (having worked with him for 21 years) but that he was not present at the time of the conversation with Martinez; likewise, according to Mangione, Ludovich, with whom he has worked for 21 years, "absolutely" was not present during the conversation.

Turning to the conversation, Mangione stated that Martinez, a dual-rate supervisor, asked him what would happen to his position should the Union be voted in. Mangione said he told Martinez that he was not sure how many people are involved as far as the Union's getting in; he did not know how many (dealers) might get promoted to full-time supervisor; that from what he understood, they (management) were going to do away—have to do away—with the dual-rate supervisor. Mangione stated that he went on to tell Martinez that a dual rater would either become a full-time supervisor or (full-time) dealer; that he (Martinez) could go back to the dealer position. Mangione stated that he told Martinez that he was not sure if there was (to be) anyone left over, depending on how many promotions management needed to operate the casino area, that maybe some people would get laid off.[88]

Mangione denied that he threatened Martinez by saying that dual raters would lose their jobs if he selected the Union to represent him. He noted that Taylor came by during his conversation with Martinez.

[88] On cross-examination, Mangione conceded that he really did not know what the effect on the dual rates would be if the Union came in; his view was that there were too many dealers (full and part time) to make all dealers full time.

Mangione stated that Spina came by a few minutes later, towards the end of the conversation with Martinez. According to Mangione, Spina was very irate and started yelling (having evidently overheard his conversation with Martinez regarding possible layoffs) that "nobody's going to get fired, everybody is going to become full time, so you [Martinez] don't have to worry about anything threatening you or anything like that." According to Mangione, Spina then said, "[Y]ou asshole supervisors, just because you wear a shirt and tie, you think you're better than everybody else."

Mangione said he responded to Spina, saying that he had known him for 21 years, why would he say that to him; that he had always treated him (Spina) with respect on the tables; that he (Mangione) had never yelled at him if he made a mistake or whatever. Mangione said he told Spina he had never seen Spina act this way before; he was so calm, such a calm person before.[89]

Mangione said that at the end of the conversation, Spina apologized, saying he was really sorry that he had said what he had and if he offended Mangione, he was sorry. According to Mangione, Spina asked him to accept his apology. Mangione said that he did accept Spina's apology.

Mangione stated that Taylor, who was on the scene, spontaneously said, "Didn't he just call you an asshole?" Mangione said that initially he did not respond. But about a minute later, Taylor repeated his question and Mangione responded this time and said that Spina had indeed called him an "asshole."

Mangione stated that he decided to report Spina and after breakfast went to Shift Manager Julian's office where Julian asked him to prepare an incident report.[90] Mangione stated he believed that this was the right thing to do, to let management know he had been called an asshole. Mangione stated that while he was not (100 percent) sure, he believed the casino conducted an investigation of the matter, but he was not involved in any such investigation beyond providing the incident report. Mangione noted that he did attend the board of review hearing on this matter.

Mangione conceded that he had never heard Spina curse anyone—saying that ordinarily Spina was not the type to use profanity. However, according to Mangione, over the previous months Spina seemed stressed out and was even making a lot of mistakes on the games. For example, according to Mangione, Spina either overpaid a customer or "shorted" (underpaid) a customer. Mangione said that Spina made these kinds of mistakes on his games more than one time, but several different times, and his head did not seem to be in the game; in Mangione's view, Spina was not thinking straight.[91] Mangione noted that Spina was not belligerent but, in his view, something was wrong with him. Mangione stated that he did not report these discrepancies (or Spina's problems) to management; Mangione said that in those kinds of situations, "We kind of take care of it ourselves. If the amount is small, less than $100, management lets us take care of the problem ourselves. If the amount is over $100 we report the matter to the pit boss."

Mangione acknowledged that he used the term "lay off" in his conversation with Martinez. He also acknowledged that Spina at the time had a little suitcase in his hands and, as Spina initially approached him (Mangione), he made no physical gestures to him.

Jack Julian testified about the incident involving Spina and Mangione with which he was familiar.

According to Julian, Mangione told him that Spina had approached him outside the cafeteria and in the presence of Angel Martinez and Ted Taylor, accused him of saying that a dealer could be fired if he voted for the Union; and that Spina called him an "asshole" in the discussion in the presence of Martinez and Taylor.

Julian parenthetically noted that Spina had always been generally very mild-mannered, soft-spoken, quiet, and stayed to himself. However, during the campaign, he was definitely more boisterous, outgoing, and talkative. Julian stated he noticed these changes about a month before the election.[92]

Julian testified that he met in his office with Mangione about the matter and Taylor was present in this initial meeting because Mangione had placed him on the scene when the offending remarks were made.[93] According to Julian, Taylor in the first meeting said that he was present when Mangione and Spina conversed but that he did not hear Spina utter any profanities. Julian said he then went back to Mangione and told him that Taylor did not hear Spina make the profane remark.

[89] Mangione related (parenthetically) that to him Spina had changed his demeanor a few months before, and that with all the meetings Spina had with some of the employees—just the union situation—(as he put it) he seemed like he was not his usual self, his demeanor just changed all of a sudden.

[90] See R. Exh. 3, a copy of Mangione's typewritten incident report dated April 21, 2007, relating to his encounter with Spina. See also R. Exh. 4, a copy of Mangione's handwritten incident report dated April 21, 2007, relating to his encounter with Spina on April 21. Mangione stated that the handwritten incident report was prepared on April 21, immediately after (within a half-hour) the incident; the typewritten report was prepared by him on the computer a couple of days after the incident. Mangione believed that on April 21, George Wilson may have been present in Julian's office. Mangione could not explain why he typed the second report but Karen Lew asked him to do so. Mangione noted that he told Julian that Taylor, Martinez, and Tran were present at the time, although they are not mentioned in these reports.

[91] Upon my examination, Mangione stated that over a couple of months, Spina made a lot of mistakes both in overpaying and underpaying customers.

[92] Julian elaborated on Spina's boisterousness, saying that we would see him walking around with groups of dealers and talking more than he normally would, just being more talkative, but that he did not know what Spina was talking about. Julian stated that he did not see Spina distributing cards but knew he was for the Union. Julian conceded that while Spina's behavior was changing, Spina was not rude to customers or his supervisors; moreover, there were no complaints about his behavior.

[93] Julian could not recall whether Taylor was present when Mangione supposedly told Martinez something about dealers losing their jobs if they voted the Union in. Julian said that he recalled that Martinez had asked Mangione what might happen to dual raters if the Union were voted in and Mangione said that he told him he did not know what could possibly happen to the dual-rate positions should the Union get voted in. (Tr. 536.) Julian conceded that he did not pursue this part of the conversation in this meeting because Mangione denied making this statement to Martinez, who also corroborated Mangione's denial.

According to Julian, Mangione insisted that Taylor indeed did hear Spina's remark and had asked him a question about it.

Julian stated that he interviewed Taylor a second time, this time in the presence of George Wilson, the night-shift manager, and Mike Mascio, Wilson's assistant. On this occasion, Taylor admitted that he asked Mangione if Spina had called him an "asshole," but he persisted in his denial that he had heard Spina make the profane remark.[94] Julian conceded that Taylor also said that he was just joking around when he asked Mangione whether Spina had just called him an "asshole."

Julian testified that he interviewed Spina on April 21 at around 5 p.m. before he interviewed Martinez and Taylor and concluded all interviews around 8 p.m. According to Julian, Spina denied making the profane remark to Mangione and at the same time accused Mangione of telling Martinez that he could lose his job if he voted for the Union. Julian noted that Spina provided no witnesses to support his version of the encounter.

Julian said that he decided to place Spina on investigative suspension (before speaking with Martinez and Taylor) that day[95] because the allegation was too serious to allow Spina to continue working while he conducted his investigation, and he also was concerned about repeat behavior on Spina's part. Julian noted that in similar situations, a dealer would be placed on investigative suspension until the investigation was completed and would either be returned to the job or terminated. Julian also noted that Mangione was not placed under suspension because the casino's policy is not to penalize the maker of the charge.

Julian said that although his part in the investigation ended on April 21, the casino made its final decision 2–3 days later to uphold the suspension and issue to Spina the time-served suspension and final notice.[96]

Julian stated that in the end, management came to the conclusion that Spina had indeed made the offending remarks, essentially believing Mangione's version of the encounter. Julian said that while Taylor on two occasions said he did not hear Spina utter a profanity, Taylor had admitted that he did ask Mangione whether Spina had called him an "asshole." Julian said that management concluded that it made no sense that Taylor would choose that one word out of the entirety of the English language. Accordingly, management deduced from the "entire scenario" that Spina had indeed used the profanity as charged by Mangione.

Julian noted that as part of its investigation, the Company examined Spina's personnel record and determined that he had no prior incidents, that in fact, "he had a great record." (Tr. 544.) Accordingly, management—he and Karen Lew—decided that in spite of his behavior, Spina would be returned to his job because the casino liked to hold on to good workers. However, Spina was told that his conduct—basically making a harassing remark of significant severity—would not be tolerated in the future.

Karen Lew testified that she has been employed by Trump Marina for about 22 years and during the union campaign served as a casino shift manager whose responsibilities included oversight of the gaming tables at the casino.

Lew stated that she has known Spina for about 20 years and was familiar with the incident involving Spina and Mangione, having been informed of such by Julian; Lew stated that on the day of the incident, she was not working.

Lew said upon her return to work, she investigated the matter and learned that Spina had been suspended pending investigation because Mangione had alleged that Spina had become confrontational with him, "almost threatening" to him, and had used profanity, calling him an "asshole supervisor."

Lew testified that as part of her investigation, she interviewed Taylor and Martinez. Lew said that Taylor, while reluctant at first, told her that he had asked Mangione whether Spina had called him an "asshole," indicating (to her) that he thought he had heard Spina say something; so he asked the question.[97] Lew stated that she concluded that Taylor had perhaps heard Spina call Mangione the name. Lew testified it was "too coincidental" that Mangione would allege that Spina had called him the name and Taylor would ask him if he had just been called the same name. According to Lew, the question for her was why one would pick that particular profanity out of the whole (English) vocabulary; to her, this was simply "too coincidental" not to have taken place.

Lew stated that she could not recall the date she interviewed Martinez but she did so within a few days of the incident and before the time-served/final notice was issued to Spina. Lew said that she asked Martinez whether Mangione had said that he would be fired, that he would lose his job, and Martinez responded in the negative. Lew denied that Martinez had mentioned to her his concern that Mangione had told him that management might eliminate dual-rate positions.

Lew stated that she asked Martinez specifically what Mangione had said. According to Lew, Martinez said that Mangione told him that he did not know what would happen with and to the dual-rate position. Lew stated that she concluded that Mangione's answer, "I don't know what's going to hap-

[94] Julian stated that he did ask Martinez about Spina's use of profanity and Martinez said that he did not hear Spina using any profanity or curse.

[95] See R. Exh. 5, a copy of Julian's incident report which placed Spina on investigative suspension. Julian noted that this document was prepared on April 21, 2007, not 2006. Julian said that he typed the first part of the letter and then the second part after his second interview with Taylor. Julian said that he actually prepared Spina's suspension notice (GC Exh. 6) in advance of the meeting because he truly believed then that Spina had been rude to Mangione. Julian said he allowed Spina the opportunity to give his version in writing at this time (GC Exh. 7). Julian said that the general practice of the casino is to prepare the suspension in advance but that if the investigation warranted, he could withdraw the suspension.

[96] Julian volunteered that the shift manager, Karen Lew, may have conducted further investigation of the Spina matter.

[97] On cross-examination, Lew stated that Taylor "implied kind of" that he had not heard Spina making any profane remarks; that Taylor told her he was not sure of what he had heard. Notably, Lew's interview of Taylor was not reduced to writing.

pen," led to Spina's aggressive outburst; she believed, or came to the belief, that Spina thought he heard something else.[98]

Lew said her next step was to confer with Julian and Don Brown, vice president of casino operations, and the three of them concluded that in fact there was a verbal altercation between Spina and Mangione, and that Spina had called Mangione an "asshole." Spina then was brought back from his suspension and issued the final warning by her.

Lew stated that Spina's misconduct was in management's view a "serious" event, Mangione was clearly upset, visibly so, over the entire episode, and Spina's behavior could not be condoned; therefore, a mere written warning would not be sufficient. However, it was management's view that because Spina had no other incidents on his record, he was to be issued the time-served suspension but accompanied by a final warning notice.[99] Lew acknowledged that a suspension pending investigation in the vast majority of cases often results in an employee's termination.

Lew also acknowledged that Spina, from the beginning, denied that he used profanity and that ordinarily Spina was indeed mild-mannered and calm as far as she knew. However, Lew noted that several months before the election, she had noticed a change in Spina; saying that he used to be "sort of" quiet and basically kept to himself before the union drive. Lew was careful to say, however, that she did not assume his change was attributable to the union campaign, even when she observed him talking to dealers ("with all these people" (Tr. 572)) or that his activities in this regard were connected to the union campaign.

Lew stated that she knew Spina was for the Union—he made his support quite obvious—but she did not know he was one of the leaders. Lew stated that other dealers told her that Spina was "very pushy" with them and actually very aggressive toward them about the union cause. Lew stated that by "pushy," she interpreted this to mean that Spina (according to the dealers who spoke to her) was insistent with the dealers and would not let the matter drop; asked people to attend meetings and provided literature; and did not take "no" for an answer. Lew acknowledged that none of these other dealers ever actually complained that Spina ever used profanity as he "aggressively" dealt with them. (Tr. 580.)

In response to my examination, Lew stated that if a dealer repeatedly either overpays or underpays a customer, his manager should report this to higher management because this is a matter relating to the revenues of the casino, and in her view connotes such "severity," requiring action by the pit manager. Lew noted that the casino management does not utilize a dollar amount criterion to trigger the reporting requirements in such cases. A dealer's repeated overpaying and underpaying is always to be reported to upper management—a shift manager such as herself—by the floor supervisor. A failure to report these incidents would in itself be a violation of casino rules. (Tr. 594.)

The General Counsel contends that the Respondent (through Mangione) not only unlawfully threatened an employee (Martinez) with loss of job were the Union to be voted in, but also unlawfully issued Spina an investigative suspension costing him 3 days' pay because Spina challenged a supervisor's unlawful threats; to retaliate against him; and to discourage the other employees from selecting the Union in the coming election.

The General Counsel submits that Mangione was clearly upset over being caught in and accused of making unlawful statements to an eligible voter by Spina. This caused Mangione to make unsubstantiated charges against Spina. Julian (and Lew), compounding the matter, then decided to discipline Spina based on these unsubstantiated assertions. The General Counsel asserts this action was taken because Spina had over the course of the campaign been transformed from the quiet loner to an effective leader and advocate for the union cause.

The General argues that the Respondent's investigation of the incident was summarily swift and one-sided with no serious effort on its part to ascertain (the truth of) Spina's position, any witnesses that would support his steadfast denials of cursing or to give him any opportunity before suspension to elaborate on the allegation that left not only Spina shocked and dismayed, but the entire dealer cadre.

On balance, the General Counsel asserts that Spina was disparately treated as compared to other employees disciplined for similar behavior. She asserts that Spina did not, as the others cited by the Respondent, misbehave in front of customers and, moreover, his allegedly offending behavior was not corroborated. The General Counsel further contends that the Respondent also did not follow its own disciplinary procedures in Spina's case, accelerating his alleged misconduct to the draconian suspension and termination warning level, as opposed to the normally imposed lesser disciplines.

The General Counsel argues that it is clear that Spina's well known activities on behalf and in support of the union cause were motivating factors in the Respondent's imposition of discipline and that based on its history of the treatment of other employees who may have used profanity, his discipline was extreme. She argues that were it not for Spina's union activities, he would not have received the investigative and time-served suspension for the conduct in which he allegedly engaged. Therefore, the Respondent's defense that he would have been disciplined as he was irrespective of his union activities fails.

The Respondent argues essentially that it lawfully suspended and issued Spina a discipline for improper behavior on April 21. The Respondent concedes that it knew of Spina's prounion activity but that it did not discipline him out of any animus to

[98] Lew said that she spoke to Spina who implied that Mangione had told Martinez that he was going to lose his job as a result of the Union. Accordingly, she interviewed Martinez along these lines.

[99] Lew noted that the casino follows a progressive discipline policy which ordinarily includes a record of discussion, a written warning, a suspension, a final warning, and then termination. Lew said that in "severe" cases such as in the case of Spina, however, this sequence of disciplines may not be followed and termination may result after investigative suspension. See R. Exhs. 6, 7, 8, 9, 10, and 11, records of six employees discharged after investigative suspension for behavior similar to that with which Spina was accused. I have examined these disciplinary action reports ad would note that none of the incidents took place in the context of a union organizing campaign or otherwise implicated any Sec. 7 issues.

his activities or the Union; and that Spina's discipline was not issued out of his having engaged in protected activity. The Respondent asserts that the accusations against Spina were investigated by the Company and as a result, it was properly determined that Spina had engaged in aggressive behavior and had used profanity in dealing with a supervisor.

The Respondent further asserts that even if it mistakenly disciplined Spina for cursing, it did so in the good-faith belief that he had engaged in objectionable conduct. The Respondent notes that management had noticed a change in Spina's demeanor over the campaign—he had become more aggressive about the Union—and its deduction—that the term asshole was uttered by him—was reasonable under the circumstances. The Respondent asserts that in spite of this, Spina was not disciplined as harshly as others who had committed similar infractions, which demonstrates a lack of animus against him or his activities. In fact, the Respondent asserts that Mangione had covered up for Spina's mistakes on the games during the union campaign and this, too, evinces that he harbored no antiunion sentiments toward Spina.

Regarding Mangione's alleged threat to Martinez that he would lose his job, the Respondent contends that this charge simply was not established.

The Respondent contends that Spina came in at the end of the conversation between Martinez and Mangione and misunderstood what was said by Mangione. The Respondent submits that Mangione's denial that he said that dual raters like Martinez would lose their job if the Union came in should be credited. The Respondent notes that Martinez himself credibly testified that Mangione never threatened him or said he could lose his job. The Respondent asserts that Mangione's admitted statement about a possible layoff was protected speech under the Act because it was a mere statement of his belief that there were not enough positions to make every dealer a full-time employee; Mangione's statements in total context did not constitute a threat, but were simply an expression of his opinion.

When one distills the undisputed facts associated with the Spina incident, the following scenario emerges.

Mangione and Martinez were engaged in a discussion instigated by Martinez who asked Mangione what would happen to dual-rate dealers such as himself if the Union were voted in. Mangione's response was that there could be layoffs of dual raters because the casino could not support making all dealers full timers.

Spina, overhearing this conversation, then told Mangione in the presence of Martinez that he (Mangione) should not say this, that it was against the NLRB (rules). Spina was subsequently placed on suspension under investigation and then issued a time-served suspension for cursing at Mangione and engaging in aggressive behavior. So essentially, Spina's discipline emanated from his taking issue—expressing his opinion in essence—with a statement made by a supervisor to a possible voter in the upcoming election regarding the effects of a union victory at the casino.

It is also undisputed that the Respondent at the time knew of Spina's high profile activities in support of the union cause and his electioneering activities; in fact, his behavior was being observed for some time by the casino management, including his supervisors who came to the belief that he was undergoing a profound change in his demeanor, from a mild-mannered, quiet employee to an aggressive "pushy" advocate for the Union.

It is beyond dispute that the Respondent conducted an investigation of the Spina incident, which included interviews of Spina, Mangione, Martinez, and Taylor. As a result of the investigation, management determined that in spite of their being no corroboration of Spina's alleged use of a profanity in his encounter with Mangione—the gravamen of the misconduct—that Spina had in fact uttered a profanity, and in spite of the absence of proof, he had also engaged in overtly aggressive behavior.[100]

For purposes of *Wright Line*, in my view the General Counsel has overwhelmingly met her burden to show the Respondent's knowledge of Spina's having engaged in protected activities, and the Respondent readily concedes this point. There is, of course, no issue that Spina suffered an adverse action affecting his employment. The question remains whether the General Counsel established prima facie that Spina was disciplined out of an improper motive. I believe that she has.

Clearly, beyond its opposition to the union cause, the Respondent, through its agents, expressed hostility to the union cause generally, and in my view to Spina personally. As noted, I have found previously herein violations of Section 8(a)(1) by dint of the conduct of the Respondent's supervisors in their dealings with other employees during the campaign, which in turn support a finding of animus against the Union and its supporters, and derivatively supplies the motivation connection for Spina's case.

Then, too, it is most significant to me that Spina's discipline occurred in the context of his engaging in protected activity—correcting (expressing) what he thought was an erroneous and possibly unlawful statement by a supervisor to an eligible voter in the upcoming election and which activity incidentally took place in a nonwork area. Spina's discipline emanated from that context and, in my view, this fact also supplies the necessary connection to the *Wright Line* motivation element.

The remaining issue is whether the Respondent has met its burden to show that its discipline of Spina was lawful, that in this case the Company did not treat Spina disparately or it would have taken the action it did against him irrespective of his having engaged in protected activities. I believe that it has not on both counts.

Based on this record, I do not view this case in the strict sense as one involving disparate treatment. Rather, in my view, this case sounds in pretext. Therefore, it is irrelevant to discuss how Spina was treated vis-a-vis other employees who were disciplined for arguably similar on-the-job misconduct. My reasons are as follows.

I have carefully considered the testimony of Mangione on whose complaint Spina received his discipline. I believe that Mangione was not truthful when he made his complaint against Spina to Julian, specifically alleging that Spina had cursed him.

[100] Spina's "overtly aggressive behavior" on April 24 with Mangione was not delineated in the written discipline, nor was it elucidated at the hearing.

First and foremost, no one within earshot of the conversation between Spina and Mangione heard Spina utter a profane remark. Martinez was the focal point of the conversation between Spina and Mangione and involved directly in the encounter. I found Martinez to be a clearly nervous and reluctant witness. As I observed him, he seemingly did not want to be at the hearing and tried to be on both sides of the controversy between his employer and the Union. Martinez claimed not to hear all of what went on between Mangione and Spina because he was suddenly distracted to the scheduling board. Yet, he did allow that Mangione responded to his question about the effect of a union on his job and that Spina, while a "little irate," did not curse at Mangione. So it would seem, contrary to his testimony, he was not distracted by the scheduling board. I believe that he heard the entirety of the conversation between Spina and Mangione but out of fear did not tell the whole of what happened, either to his managers or at the hearing. However, he did in my mind truthfully tell management that Spina did not utter any profanities in his discussion with Mangione.

All of the other witnesses, those known to the Respondent at the time as well as those who testified at the hearing, also stated unequivocally that Spina did not curse in the encounter. Actually, the offending profanity—"asshole"—was uttered not by Spina but by Taylor who claimed that he only did so in jest as he saw Mangione standing in the hallway alone.[101]

It was at this point that Mangione, in my view, seized upon Taylor's jocular remark to pin on Spina the accusation of aggressive behavior and using profanity and to report this to management. Mangione claimed that Spina was undergoing some sort of transformation in behavior and demeanor that even adversely affected his work. However, Mangione, acting out of what I believe was a feigned concern for him, failed to report his discrepancies to management. While this was to me a self-serving statement and not altogether credible because Spina indisputably was regarded as a very good, temperate and reliable employee and had no complaints about his work, it was a plausible tale. However, Mangione destroyed his credibility by burnishing his charitable acts of concern by falsely saying that he did not report Spina for repeatedly underpaying and overpaying customers because management gave him discretion to handle such matters. Lew, of course, denied that any such policy existed and that such infractions should have been reported.

So after all is said and done, if Mangione is to be believed, Spina for a period of time was acting out of sorts and making serious mistakes at his tables and was undergoing serious demeanor changes, but these were not of such serious nature to be reported to management. However, according to Mangione, calling him a profane remark was a reportable incident. Frankly, I believe that Mangione made the whole charge up, perhaps because he was chagrined or embarrassed over Spina's calling him to task for trying to influence Martinez or perhaps because he feared that Spina would report the matter to the Union or casino management, and a charge might be filed against him;[102] or perhaps he lied to gain favor with management and to get the "union boy." So Mangione had ample motive to lie about his encounter with Spina to management, and lie he did in my view.

As to Spina's managers, it is clear that Julian was opposed to the Union and, as I have found, was the subject of unlawful conduct in his dealings with other dealers during the campaign. Notably, in spite of no corroboration of Spina's actually having used profanity on April 21, coupled with Spina's denials and his widespread reputation for not being one to engage in such behavior in an environment where other dealers evidently routinely and casually used profanity, Julian (and Lew), nonetheless, deduced that Spina had cursed at Mangione, a strained conclusion at best. The Respondent, I would also note, did not adduce evidence of Spina's allegedly aggressive behavior toward Mangione except for the cursing. It would appear that management's investigation did not include the aspect of Spina's discipline. I would agree with the General Counsel that this was indeed a shoddy investigation. However, my decision does not rest on this conclusion.

Nonetheless, contrary to the Respondent, under such circumstances, I cannot conclude that Spina was the unfortunate victim of management's good faith but mistaken belief that he violated company policy and deserved to be severely disciplined. I would find and conclude that the Respondent's discipline of Spina was pretextual, based on a willful misrepresentation of a supervisor and acted on not in good faith by Spina's managers, who were hostile to the union cause. Rather, Spina's discipline was based on his activities and support for the Union and to discourage the employees in their support of the Union.

Regarding the allegation that Mangione threatened Martinez with loss of his job should the Union be voted in, I would find and conclude that Mangione, while not using the exact language, "loss of jobs," certainly conveyed that meaning to Martinez in the discussion between the two. Contrary to the Respondent, Mangione's remarks[103] were not merely an expression of his opinion. It bears reminding that one of the main topics of discussion among the employees (and possibly management) during the campaign was the effect on the number of dealers the casino could support if the Union were selected. Mangione, while certainly expressing his opinion, did not provide any objectifiable facts to support his view. In context, Martinez, clearly intimidated on the witness stand, reasonably could conclude that he and other dual-raters would be "laid off" if the Union were selected. Mangione's remarks in my view conveyed a threat that the dual raters would lose their jobs, and I would so find and conclude that the Act was violated.

[101] I have credited Spina who testified that because he felt the situation was getting out of hand, he broke off the discussion with Mangione and left Mangione standing in the hallway where Taylor then made the offending remark.

[102] In all likelihood, Mangione was aware of the Respondent's stated but undocumented policy which rewards the first employee to make a complaint against another employee. By reporting Spina, it is conceivable that Mangione avoided a suspension should Spina have reported him for violating an NLRB "rule" during the sensitive election campaign.

[103] "Layoff," if Mangione used that term, as opposed to "loss of jobs" or "you will lose your job," or that management would get away from the dual-rate positions if the Union came in, connotes in my mind essentially the same notion which associates the selection of the Union by the employees with the loss of their present jobs.

I would also find that Spina's discipline as well as Mangione's remarks to Martinez constitute sustainable objectionable conduct.[104]

VII. DISCUSSION AND CONCLUSIONS REGARDING THE UNION'S OBJECTIONS TO THE ELECTION

As noted previously herein, the Board employs an objective standard for evaluating the conduct of a party in the context of representation elections. Stated simply, the objecting party must show that a Board-supervised election should be set aside because the conduct of a party affected the employees in the voting unit and such conduct had a reasonable tendency to affect the outcome of the election. Also, as previously noted, the Board considers a number of factors in determining whether the alleged misconduct had the tendency to interfere with the employees' freedom of choice.

I have considered applicable Board law and applied these principles aforestated to the case, fully recognizing that Board-supervised elections should not be lightly set aside. It would be my recommendation that the May 11, 2007 election results be set aside and another election scheduled as soon as possible because of the objectionable conduct of the Respondent in this matter.

I have determined that the Respondent has violated the Act on several occasions during the course of the election campaign. I have also found that the Respondent did not commit certain unfair labor practices and did not engage in otherwise objectionable conduct. However, on balance, I believe that the violations I have determined to be violative of the Act were serious and vitiated the laboratory conditions the Board requires in its elections.

In agreement with the Union, I am persuaded that the Respondent's suspension of Spina, clearly the Union's lead organizer and advocate, on April 21 amounted to misconduct sufficient in itself to overturn the election. In my view, the negative effect of this action, which I have determined was unlawful, was not merely devastating to the union cause, but was virtually tectonically negative in its impact on the employees' right to make a free choice of whether to select the Union to represent them.

I will not repeat the testimony of the witnesses who spoke to the issue, but suffice it to say that after Spina's suspension, discussion about the Union, let alone open and free support of the Union, was much reduced. The credible testimony suggests that after Spina's punishment, employees became wary, even fearful, of broaching the union matter or possibly even being observed in the company of union supporters. Employees like Dougherty said that employees would not talk about the Union anymore in the aftermath of Spina's punishment. Union supporters like Perakovich and Summers resorted to making each other witnesses in their contact with management because of what happened to Spina. Notably, Spina's suspension became the topic of conversation among the employees, spreading like wildfire according to several witnesses, who said they themselves spoke to many dealers about the matter as did Spina himself.

As argued by the Union, Spina's discipline caused a fear of reprisal among the voters, some of whom stopped attending union meetings and were watchful of what they said and did regarding the topic of the Union or the campaign.

Notably, Spina, the "go-to guy," testified that after he was suspended, he reduced his activities and told union supporters like Summers to watch out in their dealings with management because of what happened to him. Gregor testified that he was fearful for his job after his encounter with managers because of Spina's experience.

I note that not only did Spina's suspension negatively affect the employees' right to choose, it seems that his punishment seemingly emboldened managers and other employees in their opposition to the Union. It is significant to me that the unfair labor practices violations that I have determined herein occurred after Spina was disciplined. For instance, Julian, after suspending Spina, took it up himself to warn Summers and Perakovich, and another employee, of what he might not be able to do for them if the Union were voted in. Also after the suspension, Julian was gladly handing out stickers on the floor and, while there was insufficient proof, it seems highly likely he had a hand in putting the stickers on the hand rails. Management, in my view, knew that with Spina's suspension, it had gained the upper hand.

While I have found that certain unfair labor practice allegations were not established and the objections in each case not sustainable, it is clear to me that around the time of Spina's suspension and its aftermath, the Respondent's managers, like Sych and Julian, believed they could go a little further in their opposition to the Union with the employees because of Spina's punishment. This in my view contaminated the electoral process.

I note that after Spina's suspension, even the casino employees who opposed the Union became bolder in their opposition. Before Spina's suspension, it seems that employees did not demonstrate or politick on the casino floor, because in point of fact all knew that this was prohibited. Moreover, as was the case with Gregor, the casino enforced this rule. However, after Spina's suspension, employees—like Guiffrida, Angier, and Catalfano—evidently believed they were at liberty to wear their antiunion T-shirts on the casino floor. Here again, supervisor Julian was implicated in the condonation of this violation of the casino's own rules.

This was admittedly a hotly contested and contentious election with a close result out of the Union's favor. However, in my view, Spina's unlawful suspension, along with the Respondent's other unlawful conduct, unfairly tipped the balance in the casino's favor.

I have at some length and pains set out the testimony of the various witnesses. On balance, the credible evidence leads me to conclude that this election should be set aside, and I would so recommend.

[104] Objection 3 alleges essentially that after Spina returned to work on April 27, the Respondent continued to threaten and intimidate employees by surveilling and constant monitoring of Spina, and imposing a final warning and suspension on him. While I have found that Spina was unlawfully disciplined to include the final warning and time-served suspension on April 27, I cannot find that the Respondent either surveilled or constantly monitored him after that date. I would not on this record sustain this objection.

CONCLUSIONS OF LAW

1. The Respondent, Trump Marina Associates LLC d/b/a Trump Marina Hotel Casino, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO 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 conduct:

(a) Interrogating employees regarding their sympathies for the Union.

(b) Threatening not to grant employees' requests for time off, approve schedule changes, or correct no-call/no-show designations if they were to select the Union to represent them.

(c) Threatening that employees would lose their jobs if the Union were selected to represent them.

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

(a) Issuing employee Mario Spina a suspension pending investigation because of his support for and activities on behalf of the Union.

(b) Issuing employee Mario Spina a final warning and time-served suspension because of his support for and activities on behalf of the Union.

5. The Respondent engaged in objectionable conduct affecting the results of the May 11, 2007 election as set forth in 3(a), (b), and (c) and 4(a) and (b) sufficient to warrant that the representation election results in this matter be set aside and a new election be scheduled and held by the Region.

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

7. The Respondent has not violated the Act in any other manner or respect.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices and objectionable conduct, I find that it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

1. The Respondent, having discriminatorily issued employee Mario Spina an investigative suspension, and having issued him a time-served suspension and final warning in violation of Section 8(a)(3) of the Act, I shall recommend that it be ordered to make him whole for any losses he may have suffered as a consequence of the action taken against him in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

2. The Respondent having discriminatorily issued a written disciplinary warning to Mario Spina in violation of Section 8(a)(3) of the Act, I shall recommend that it be ordered to rescind the disciplinary warning and expunge all references thereto from its records.

3. The Respondent, having discriminatorily suspended Mario Spina in violation of Section 8(a)(3) of the Act, I shall recommend that it be ordered to rescind the suspension warning and expunge all references thereto in its records and make him whole for all losses he may have incurred as a result of the actions taken against him.

4. The Respondent, having engaged in certain objectionable conduct during the representation election sufficient to warrant that the election results be set aside, the Regional Director for Region 4 shall set aside the election results and schedule a new election as soon as is reasonably possible.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[105]

ORDER

The Respondent, Trump Marina Associates LLC d/b/a Trump Marina Hotel Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees about their union membership, activities, sympathies, and support.

(b) Threatening employees with loss of their jobs if they selected the Union as their bargaining representative.

(c) Issuing written disciplinary warnings to employees because of their support and activities on behalf of the Union.

(d) Issuing suspensions to employees because of their support and activities on behalf of the Union.

(e) Issuing disciplinary warnings to employees because of their support and activities on behalf of the Union.

(f) Engaging in objectionable conduct during a Board-regulated and administered representation election.

(g) In any other 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) Make discriminatee Mario Spina whole for any loss of earnings and other benefits they suffered as a result of the unlawful action taken against him, as computed in accordance with *F. W. Woolworth Co.*, supra, with interest as computed in *New Horizons for the Retarded,* supra.

(b) Within 14 days from the date of this Order, remove from its records all references to the unlawful actions taken against the discriminatee, Mario Spina, and within 3 days thereafter, advise him in writing that this has been done and that these actions shall not be used against him in any manner in the future.

(c) 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.

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[105] 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.

(d) Within 14 days after service by the Region, post at its facility in Atlantic City, New Jersey, copies of the attached notice marked "Appendix."[106] Copies of the notice, on forms provided by the Regional Director for Region 4, 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 March 30, 2007.

(e) The Regional Director for Region 4 shall set aside the results of the May 11, 2007 election and schedule as soon as is reasonably possible a new election.

(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.

Dated, Washington, D.C. July 18, 2008

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 interrogate our employees about their union membership, activities, sympathies, and support.

WE WILL NOT threaten our employees with loss of their jobs if they selected International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO as their bargaining representative.

WE WILL NOT issue written disciplinary warnings to our employees because of their support and activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

WE WILL NOT issue disciplinary suspensions to our employees because of their support and activities on behalf of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO.

WE WILL NOT engage in objectionable conduct during representation elections regulated and administered by the Board.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make discriminatee Mario Spina whole for any loss of earnings and other benefits he suffered as a result of our unlawful action against them, with interest.

WE WILL remove from our records all references to the unlawful action taken against the discriminatee, Mario Spina, and advise him in writing that this has been done and that these actions shall not be used against them or him in any manner in the future.

TRUMP MARINA ASSOCIATES LLC D/B/A TRUMP MARINA HOTEL CASINO

[106] 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."