STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

HAZEL PARK HARNESS RACEWAY, INC.,
HARTMAN & TYNER, Inc., RACING CONCESSIONS,
INC., and RACE TRACK OPERATORS, LTD.,
Respondents - Private Employers,

Case No. C96 C-52

-and-

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES
UNION, LOCAL 24, AFL-CIO,
Charging Party - Labor Organization.
_____/

APPEARANCES:

Cox, Hodgman & Giarmarco, P.C., by Douglas C. Dahn, Esq., for Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by John Adam, Esq., for Charging Party

DECISION AND ORDER

On July 21, 1999, Administrative Law Judge (hereinafter "ALJ") Roy L. Roulhac issued his Decision and Recommended Order in the above case, finding that Respondents Hazel Park Harness Raceway, Inc., Hartman & Tyner, Inc., Racing Concessions, Inc., and Race Track Operators, Ltd. violated Section 10 of the Public Employment Relations Act (hereinafter "PERA"), 1965 PA 379, as amended, MCL 423.210; MSA 17.455(10), by discriminating against employees on the basis of their prior membership in a labor organization. The ALJ recommended that the Employer be ordered to cease and desist from the conduct found to be violative of the Act, to offer to hire the discriminatees in jobs for which they had applied or substantially equivalent employment, and to post an appropriate notice.

The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA, MCL 423.216; MSA 17.455(16). On August 25, 1999, Charging Party filed "limited exceptions" asserting that the relief ordered by the ALJ should be modified to include James Kett, a discriminatee whose name was, according to the Union, erroneously omitted from the remedy provision of the recommended order. Respondents filed timely exceptions to the Decision and Recommended Order of the ALJ on September 17, 1999. On September 23, 1999, the Union filed a brief in support of its "limited exceptions" and in response to the Employer's exceptions. The Employer filed a reply to Charging Party's brief on October 18, 1999.[1]

On exception, Respondents argue for the first time that the Michigan Employment Relations Commission (hereinafter "MERC") lacks jurisdiction to decide this case because the dispute is subject

to preemption under the National Labor Relations Act (hereinafter "NLRA"), 29 USC 151 *et seq*. When a party asserts that state proceedings are preempted because the conduct at issue is within the purview of the NLRA, the claim is a challenge to subject-matter jurisdiction; it is a claim that the state court or tribunal has no power to adjudicate the subject matter of the case. *Int'l Longshoreman's Ass'n v Davis*, 476 US 380, 381, 393; 106 S Ct 1904; 90 L Ed 2d 389 (1986); *Michigan Council 25, AFSCME v Louisiana Homes, Inc (On Remand)*, 203 Mich App 213, 216-217; 148 LRRM 2290 (1993), cert den sub nom *Michigan Dep't of Mental Health v Louisiana Homes, Inc*, 513 US 1077; 115 S Ct 724; 130 L Ed 2d 629; 148 LRRM 2320 (1995) (*Louisiana Homes II)*. Therefore, such a claim may be raised at any time, *AFSCME v Dep't of Mental Health*, 215 Mich App 1, 4 (1996)*; Ass'n of Businesses Advocating Tariff Equity v Public Service Comm*, 192 Mich App 19, 24 (1991), and parties to an action can neither confer jurisdiction by their conduct or action, nor waive the defense by not raising it. *Winters v Dalton*, 207 Mich App 76, 79 (1994); *Paulson v Secretary of State*, 154 Mich App 626 (1986).[2]

The NLRA is the "supreme law of the land" with respect to the regulation of labor relations in interstate commerce, *Garner v Teamsters Union Local 776*, 346 US 485, 500-501; 74 S Ct 161; 98 L Ed 228; 33 LRRM 2218 (1953), superceding and preempting any state or local action that conflicts directly with its national scheme. *San Diego Building Trades Council v Garmon*, 359 US 236, 242-245; 79 S Ct 773; 3 L Ed 2d 775; 43 LRRM 2838 (1959). State courts and tribunals must defer to the exclusive competence of the National Labor Relations Board (hereinafter "NLRB") when an activity is "arguably" subject to the provisions of the NLRA. *Garmon*, 359 US at 245; *AFSCME v Dep't of Mental Health*, 215 Mich App at 5. Where an "arguable" case for preemption exists, a state court or tribunal may nonetheless assert its jurisdiction if it can be shown on the basis of "rule of decision or by published rules" that the NLRB, within its discretion as provided in § 14(c)(1) of the NLRA, 29 USC 164(c)(1), has declined or would decline to assert jurisdiction. *Louisiana Homes II*, 203 Mich App at 219.[3] See also *Int'l Union of Operating Engineers, Local No 3 v Bing Construction Co of Nevada*, 90 Nev 183, 186; 521 P2d 1231; 86 LRRM 2761 (1974); *Russell v Electrical Workers Local 569*, 64 Cal 2d 25; 48 Cal Rptr702; 409 P2d 926; 61 LRRM 2261 (1966). In ruling on this jurisdictional question, the state court or tribunal would not be determining "'the operative provisions or coverage of the [NLRA],' nor substituting its own view 'for that of the Board.' Rather, it would merely be applying the standards which the Board has already laid down." *Louisiana Homes II*, *supra* at 220, quoting *Russell*, *supra* at 28.

Pursuant to the authority vested in the NLRB under § 164(c), the Board has an established practice of declining jurisdiction over the horse-racing industry. See e.g. *Racing Association of Central Iowa*, 324 NLRB No. 91; 156 LRRM 1251 (1997); *Elliott Burch*, 230 NLRB 1161; 95 LRRM 1467 (1977); *Yonkers Raceway Inc*, 196 NLRB 373; 79 LRRM 1697 (1972); *Centennial Turf Club*, 192 NLRB 698; 77 LRRM 1894 (1971); *Walter A. Kelley*, 139 NLRB 744; 51 LRRM 1375 (1962); *Meadow Stud, Inc*, 130 NLRB 1202; 47 LRRM 1467 (1961); *Hialeah Race Course*, 125 NLRB 388; 45 LRRM 1106 (1959); *Jefferson Downs, Inc*, 125 NLRB 386; 45 LRRM 1108 (1959); *Los Angeles Turf Club, Inc*, 90 NLRB 20; 26 LRRM 1154 (1950). The NLRB's rationale for exempting racetracks from regulation has been that: (1) racetrack operations are essentially local in character so that a labor dispute therein is not likely to substantially disrupt interstate commerce; (2) racetracks are subject to detailed state regulation which, in the absence of Board regulation may, and probably will, be extended to include labor relations; and (3) the sporadic nature of employment in the horse-racing industry encourages temporary part-time workers, much turnover, and an unstable work force. See *Delaware Racing Ass'n*

v United Food and Commercial Workers, 325 NLRB No. 12; 157 LRRM 1149 (1997) (Gould, concurring) (finding no basis for the Board's stance of declining jurisdiction over the horse and dog racing industries); *NLRB v Harrah's Club*, 362 F2d 425, 426; 62 LRRM 2507 (1966).

In light of the NLRB's practice, this Commission has previously decided numerous cases involving the horse-racing industry -- including several disputes pertaining to the raceway at issue here. See e.g. *Sports Creek Acquisitions, Inc*, 1994 MERC Lab Op 647; *Hazel Park Harness Raceway*, 1994 MERC Lab Op 342; *Sports Creek Acquisitions, Inc*, 1993 MERC Lab Op 609; *Ladbroke DRC*, 1991 MERC Lab Op 163; *Hazel Park Harness Raceway, Inc*, 1982 MERC Lab Op 1117; *Detroit Racing Ass'n*, 1976 MERC Lab Op 289; *Detroit Racing Ass'n*, 1971 MERC Lab Op 310; *Hazel Park Racing Ass'n, Inc*, 1970 MERC Lab Op 394. However, this appears to be the first time that a question has been raised relating to our jurisdiction in such matters. On exception, Respondents contend that the NLRB would arguably assert jurisdiction in this case because the employees in question are food service workers who have no direct involvement in the operation of the race track itself. After carefully examining NLRB precedent with respect to the horse-racing industry, we believe that there may be some merit to this argument.

In *Hotel & Restaurant Employees & Bartenders International Union, Local 343, AFL-CIO (Resort Concessions, Inc)*, 148 NLRB 208; 56 LRRM 1497 (1964), the NLRB addressed a jurisdictional issue similar to that raised herein. In that case, the Board adopted an ALJ's recommended decision declining to assert jurisdiction over Resort Concessions, an employer whose business consisted solely of operating food and beverage concessions at the Monticello Raceway, a horse-racing facility in New York. Resort Concessions leased its space from the raceway and had no ownership interest in the facility itself. However, the employer and the racetrack participated in joint promotional activities. Resort Concessions operated only on days when racing actually occurred, and its customers had to pay admission to the track. Both Resort Concessions and its employees were subject to regulation and control by the New York State Harness Racing Commission. For example, all food service personnel were required to comply with the rules and regulations pertaining to the maintenance of proper decorum at the racetrack, and each worker employed by Resort Concessions had to be photographed, fingerprinted and licensed. Furthermore, Resort Concessions was required to submit weekly personnel reports listing its employees and their compensation.

In recommending dismissal of the complaint, the ALJ in *Resort Concessions* concluded that the extent of integration between the food service and racetrack operations was so substantial that any disruption of the Employer's operations arising out of a labor dispute involving the employees in question would "have a foreseeable, likely, and immediate adverse impact upon the operations of the raceway," a business enterprise in which the State of New York has a "vital interest." *Id.* at 214. The ALJ also found that the Employer's food services were an "integral attribute of a facility such as a racetrack" because the services were expected and demanded by racing patrons, and because the employer had a close identification with the racetrack and the racing industry. Furthermore, the ALJ emphasized the substantial degree of regulation exercised by the state racing commission with respect to the hiring and retention of personnel at the facility. *Id*. See also *Universal Security Consultants*, 203 NLRB 1195; 83 LRRM 1262 (1973) (refusing to assert jurisdiction over guards, watchman and security personnel at a horse racing facility)*; Pinkerton's National Detective Agency, Inc*, 114 NLRB 1363; 37 LRRM 1163 (1955) (finding no jurisdiction over a unit of Pinkerton detectives who worked as ushers and patrolmen

at a racetrack).

Although *Resort Concessions* has not been expressly overruled by either the courts or the Board, it has been distinguished and circumvented to the point where it can longer be said to accurately state the law. See *The Carat Co.*, Case 8-CA-21830, Advice Memorandum dated August 29, 1989. For example, in *Harry M. Stevens, Inc*, 169 NLRB 806; 67 LRRM 1274 (1968), the NLRB asserted jurisdiction over an employer and its subsidiaries who operated food service establishments at various racetrack and non-racetrack establishments in thirteen states. The Board determined that the employer's operations were not integrally related to the operations of the racetracks at which it was located because the food service workers were directly supervised by the employer itself, and because the employer's racetrack employees were extensively interchanged with other non-racetrack employees throughout the county. *Id*. at 807-808. In so holding, the Board contrasted the year-round, multi-state, multi-establishment nature of the employer's operations with the seasonal, single racetrack enterprise at issue in *Resort Concessions* and concluded that any labor dispute involving the concession workers employed by Harry Stevens, Inc., could have a significant impact on interstate commerce. *Id*. at 808. See also *Ogden Food Service Corp*, 234 NLRB 303; 97 LRRM 1190 (1978) (jurisdiction asserted over a corporation engaged in the operation of restaurants and concession stands at both racetrack and non-racetrack establishments); *American Totalisator Co*, 264 NLRB 1100; 111 LRRM 1292 (1980) (asserting jurisdiction over an employer who manufactured and serviced equipment used in pari-mutuel betting at racetracks).

The above cases all involved employees who were working for an employer separate and distinct from the racetrack itself. In the instant case, the ALJ has determined that Respondents Hazel Park Harness Raceway, Inc., Hartman & Tyner, Inc., Racing Concessions, Inc., and Race Track Operators, Ltd. are alter-egos or agents of each other. Therefore, the food service workers and the pari-mutuel employees at issue here are essentially all part of a single business enterprise. We note, however, that the NLRB will not decline to assert jurisdiction over an employer merely because one aspect of that employer's operation is not subject to Board jurisdiction. See *Delaware Racing Ass'n*, 325 NLRB No. 12; 157 LRRM 1149, 1154 n 18 (1997), citing *The Salvation Army of Massachusetts*, 271 NLRB 195; 116 LRRM 1410 (1984), enf'd 119 LRRM 2587 (CA 1 1985); *Denver Post of the National Society of Volunteers of American v NLRB*, 732 F2d 769; 116 LRRM 2035 (CA 3 1982); *Tressler Lutheran Home for Children*, 677 F2d 302; 110 LRRM 2197 (CA 3 1982). In fact, the NLRB has, in at least three cases, asserted jurisdiction over owners of horse racing facilities.

In *Waterford Park, Inc*, 251 NLRB 874; 105 LRRM 1398 (1980), the employer owned and operated a large complex which included a 101-room motel, a horse racing track, a swimming pool, tennis courts, golf course and trailer park. Although there was evidence showing the existence of a business relationship between the motel and the racetrack, the employees at issue consisted almost entirely of maids, bartenders and waitresses, all of whom were hired by the motel's manager and paid on a separate payroll. The motel and its facilities were accessible to general public at all times of the year through a separate entrance. Moreover, the motel and its workers were not subject to any state regulation or licensing requirements. Given these facts, the NLRB determined that the motel was not integrally related to the operation of the track, and that any labor dispute at the facility would not have a substantial adverse impact on continued operation of the racetrack. *Id*. at 1399. Accordingly, the Board concluded that it would "effectuate the policies of the [NLRA] to assert jurisdiction over this

case." *Id*. See also *Delaware Racing Association, supra*; *Prairie Meadows Racetrack & Casino*, 324 NLRB No. 550; 156 LRRM 1251 (1997), in which the Board asserted jurisdiction over casinos located on the same grounds as horse racetracks and owned by the same companies that owned the tracks.

Based on the above decisions, it is clear that the NLRB will, under certain circumstances, assert jurisdiction in cases involving workers employed at horse racing facilities. However, we believe that resolution of the preemption issue in the instant case should be made only after the development of a full record with respect to whether the employees in question are directly involved in pari-mutuel operations. In particular, additional findings of facts are necessary with respect to the following issues: (1) whether there is functional integration between the food service enterprise and the horse racing operations; (2) whether the workforce in question is year-round or seasonal; (3) whether a labor dispute involving the food service employees would have a substantial adverse impact on continued operation of the racetrack; (4) whether there is significant state regulation of the food service employees in question; (5) whether the restaurant and concession facilities are accessible only to racetrack patrons; and (6) whether the Employer meets the dollar amounts established by the Board for the assertion of jurisdiction. Accordingly, we remand to the ALJ for further hearing and the issuance of additional findings of fact, conclusions of law, and a supplemental recommended order concerning whether the NLRB would "arguably" assert jurisdiction in this matter. *Garmon*, 359 US at 245; *AFSCME v Dep't of Mental Health*, 215 Mich App at 5.

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1. Commission Rules 66 & 67, R 423.466 and R 423.467, give parties the right to file exceptions or cross-exceptions to an ALJ Decision and Recommended Order and the right to file a brief in support of the ALJ's decision. The rules do not, however, provide for the filing of replies to the latter. *City of Grand Rapids*, 1997 MERC Lab Op 358, 361; *Taylor School District*, 1994 MERC Lab Op 285, 289. Respondents did not request special permission to file a reply brief, nor did they set forth any compelling for doing so. Accordingly, the reply brief filed by Respondents on October 18, 1999, will not be considered in this matter.

2. While we recognize that a challenge to subject-matter jurisdiction may be raised at any time, we are disappointed by the waste in administrative resources in this case, in which the preemption issue was first raised more than three years after the filing of the initial charge and subsequent to seven amendments thereof.

3. 29 USC 164(c) provides, in pertinent part:

> (1) The Board, in its discretion, may, by rule of decision or by published rules . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction . . . .
>
> (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

ORDER

The charges are hereby remanded to the ALJ for further action as set forth above. Following service of the supplemental recommended order on the parties, the provisions of R 423.466 through R 423.470 of the Commission's Rules and Regulations shall be applicable.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

_____
C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

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Respondents - Private Employers

Case No. C96 C-52

- and -

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 24, AFL-CIO
Charging Party - Labor Organization
_____/

APPEARANCES:

For Respondent: Cox, Hodgman & Giarmarco, P.C.
By Douglas C. Dahn, Esq.

For Charging Party: Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.
By Fritz Neil, Esq.

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 16 and 23 of the Labor Mediation Act (LMA), 1939 PA 176, as amended, MCL 423.1 *et seq.*, MSA 17.4541 *et seq.*, this case was heard in Detroit, Michigan on April 23 and June 13,1997 and September 23 and October 9, 1998, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission (MERC). The proceedings were based upon an unfair labor practice charge initially filed by Charging Party on March 18, 1996. Based upon the record, including post-hearing briefs filed by December 30, 1998, I make the following findings of fact and conclusions of law, and issue a recommended order pursuant to Section 23(b) of the LMA:

I. The Unfair Labor Practice Charge and Motion Practice:

The March 18, 1996, charge alleges that since January 1996, Hazel Park Race Track and Race Track Concessions interfered with, restrained or coerced employees in the exercise of their rights guaranteed in Section 8 of the LMA by refusing to hire applicants, discharging employees, and by

otherwise denying work to employees because of their union support or membership.[1] By April 22, 1997, over a year later, Charging Party had amended its charge four times, all but one in response to motions by Respondents Hazel Park and RCI for bills of particulars. In their motions, Respondents Hazel Park and RCI asserted that it was impossible to frame an answer because the charge and/or amended charges provided no description concerning the individual or individuals who allegedly refused to hire or otherwise discriminated against nine bargaining unit members. In its fifth amended charge, Charging Party alleged that "an agents or agents of the employer unknown to Charging Party," or "the kitchen manager, an agent of the employer," refused to hire and/or otherwise discriminated against ten individuals because of the membership in its bargaining unit during their employment as food and beverage service employees by Sportservice, Inc.[2]

On May 7, 1997, Respondents Hazel Park and RCI filed a motion to dismiss. They claimed that neither Respondent was responsible for hiring or employing any individuals named in the fifth amended charge. All, according to Respondents, were hired, employed and/or paid by a separate independent employer who was responsible for providing Respondent RCI the necessary staff so that RCI could maintain the food service operation for Hazel Park.

Also on May 7, Respondents Hazel Park and RCI filed a motion to quash witness subpoenas *duces tecum* which Charging Party served on April 18 and 21, 1997, several days before the April 23, hearing on the merits of the case. Respondents asserted that they were not the responsible employers, they had no control over or knowledge of the existence of the information requested, and therefore, it was impossible to comply with the subpoenas. Charging Party had subpoenaed, *inter alia*, all job applications and personnel files for employees named in its amended charge; all hourly employees hired between January 1996 and May 1997; information concerning the identity, business operations, and locations of Respondents; and the identity of the unnamed party which was allegedly responsible for providing food and beverage services at Hazel Park.

On June 13, 1997, a hearing was held on Respondents Hazel Park and RCI's motions to dismiss and to quash subpoenas. In an October 10, 1997 order denying a motion to dismiss, I found that Hazel Park and RCI were joint employers with Race Track Operators, Ltd. (RTOL). Subsequently, they were directed to comply with the subpoenas within fourteen days. Respondents, however, have refused to produce the requested documents.

On April 8, 1998, Charging Party filed a sixth amended charge which added RTOL as a party

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[1]In a May 7, 1997, motion to dismiss, Respondents' counsel indicated that names Hazel Park Race Track and Race Track Concession should be corrected to read, Hazel Park Harness Raceway, Inc., and Racing Concessions, Inc., respectively.

[2]Although Charging Party noted in its April 22, fifth amended charge that unknown persons refused to hire named individuals, in its April 11, 1997, response to Respondents' motion for a bill of particulars, it stated, *inter alia*, that one individual spoke to Hazel Park general manager Michael Collins who refused to give him an application and several others submitted applications to Chef Bob, but did not know who specifically was responsible for not hiring them.

and repeated the allegations set forth in its fifth amended charge. Thereafter, on May 4, attorney James Foran filed an appearance on behalf of RTOL, and a motion for a bill of particulars. However, he did not take any other action on RTOL's behalf or represent RTOL at the hearing. A letter I sent to him acknowledging receipt of his motions was returned as undeliverable and he failed to return calls which Charging Party's attorney made to the phone number listed for him in the State Bar of Michigan directory. On September 11, I denied his motion to dismiss.

Charging Party's September 28, 1998, seventh amended charge added Hartman & Tyner, Inc., as a party, and incorporated the allegations set forth in its prior amended charges. It reads:

> Since about January 1996, the respondents refused to hire Bobby Bolton. Since about January 1996 or February 1996, the employers refused to hire Marie Dodge. From February until April 1996, the respondents refused to hire Jim Kett. In or about February 1996, the respondents terminated Irene Tribula. Since in or about February 1996, the respondents refused to hire and constructively discharged Phil Cusmano. In or about March 1996, the kitchen manager, an agent of the respondents, told job applicant Jimmy Knight, while being interviewed for a job, that employees were not allowed to speak the word "union" or they would lose their jobs. Since about March 1996, the respondents refused to hire Jimmy Knight. Since about March 1996, the respondents refused to hire Donna Bialik. From about February 1996 until about March 1997 the respondents refused to hire Cindy Broda.[3] Since about February 1997, the respondents refused to hire Annette Elliott. The employer took the above actions with respect to former Sportservice employees Bialik, Bolton, Broda, Cusmano, Dodge, Elliott, Kett, Knight and Tribula because of their membership in, affiliation with and/or activities on behalf of HERE Local 24 while they were Sportservice employees.
>
> In early April 1997 the respondents told employee Cindy Broda and others that the employer is not a union house and will not be a union house. In April 1997 the respondents, through their agent James Thrasher, made intimidating, threatening and coercive statements to Cindy Broda, or in her presence, concerning the union, the refusal to hire Marie Dodge and others because of their union affiliation, and their refusal to permit union representation in the facility in the future. In April 1997, the respondents constructively discharged Cindy Broda because of her past union affiliation, and because she filed a charged against the employer under the LMA.
>
> By these actions, the employer has interfered with, restrained or coerced employees in the exercise of their LMA Section 8 rights, and discriminated in regard to hire, duration and conditions of employment to discourage union membership, thereby committing unfair labor practices in violation of LMA Section 16(1), (3) and (5).

II. Findings of Fact:

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[3]Charging Party's allegation that Respondents refused to hire Broda from March 1996 until April 1997, was raised for the first time in its April 7, 1997, third amended charge.

A. Background

Respondent Hartman and Tyner, Inc., owns several pari-mutuel facilities - Hollywood Greyhound Track, Inc., in Hallandale, Florida, the Tri-State Greyhound Park in Cross Lanes, West Virginia, and Respondent Hazel Park Harness Raceway, Inc., (hereafter, "Hazel Park"). Hartman and Tyner's principal owners are Bernard L. Hartman and Herbert Tyner. Dan Atkins is responsible for the concessions operations at the three facilities.

For forty-six years, from 1949 to October 1995, Hazel Park contracted with Sportservice Corporation, Inc.(hereafter, "Sportservice"), to provide food and beverage services at Hazel Park For as many years, Charging Party was the exclusive bargaining agent for several classifications of employees, e.g., cooks, bartenders, hosts, waitstaff, etc., employed by Sportservice. The latest agreement between Charging Party and Sportservice was scheduled to end on February 29, 1996.

On October 2, 1995, Charging Party's business agent Carol Bronson wrote to Herbert Tyner on behalf of the one hundred bargaining unit members who worked at Hazel Park for Sportservice. the letter reads, in part, as follows:

> Sportservice has had the concessionaire contract since 1949, and they have notified Local 24 that their contract with the racetrack will end at the end of the October 14, 1995 meet. As of that date, the employees are permanently terminated. All medical benefits will end for those employees as of October 31, 1995.
>
> The majority of the employees have been working at Hazel Park Racetrack for fifteen or more years.
>
> I have met with Sportservice and ... we might be able to relocate approximately 25 of the employees by virtue of their seniority. But, it will still displace many other employees working at both Detroit Race Course and Northville Downs.

Bronson requested Tyner's assistance and asked if there would be a new concessionaire doing business at Hazel Park and whether the new company planned to offer employment to the current employees. After Tyner did not respond to her letter, Bronson spoke with Hazel Park general manager Michael Collins and to Jack Foran (to be discussed, *infra).* Both directed her to Hartman and Tyner. When the 1995 racing season ended in October 1995, all of Sportservice's food service employees represented by Charging Party at Hazel Park were laid off permanently.

At some point, Respondents Racing Concessions, Inc., (hereafter, "RCI") and Race Track Operators, Ltd., (hereafter, "RTOL") were incorporated. RCI's president is Bernard Hartman, who as noted above is one of the two principals of Respondent Hartman & Tyner, which owns Hazel Park. RTOL was incorporated by Jack Foran. According to Foran, for 20-plus years he has been Respondent Hazel Park's labor consultant and has negotiated collective bargaining agreements on behalf of Hazel Park for a bargaining unit of pari-mutuel clerks represented by Service Employees International Union, and for parking and maintenance employees represented by the Carpenters and Teamsters unions.

On February 2, 1996, RCI and RTOL entered into a one-year written agreement which

designated RCI as the operator of Hazel Park food concessions and RTOL as the employer of all concessions personnel requested by RCI. RCI agreed to reimburse RTOL for all costs associated with furnishing concessions personnel (payroll taxes and insurance, workers' compensation, unemployment compensation, bookkeeping, etc., plus $1,500 per month. RCI also agreed to provide space, at no cost, at Hazel Park for RTOL to conduct its business. According to Foran, after February 2, 1996, RTOL was solely responsible for hiring all food service personnel at Hazel Park. Foran testified that he hired Susan Prutz, created an office for her in a building formerly used as a "guard shack," and instructed her to give everyone an application, set up interviews, talk to people, make notes, and report back to him before anyone was hired. Prutz, who had been employed at Hazel Park since 1973, worked for RTOL until September 1996, when she confessed to embezzlement while employed as a Hazel Park cashier. She was subsequently convicted of five counts.

In the meantime, Bronson and some of the former Sportservice employees learned that food concessions employees were being hired at Hazel Park to work during simulcast racing in Michigan.[4] Simulcasting began in February 1996. At least ten former Sportservice employees sought employment at Hazel Park. Each submitted applications to and/or were interviewed by a Chef Bob, who is described in the record as a scruffy looking man with a gray ponytail. However, none of Respondents' witnesses acknowledged knowing anything about Chef Bob - his last name or who employed him. James Scarmeas, Hazel Park's operations manager testified that all he knew about Chef Bob was, "... that he was there, so I don't know what the affiliation was at that time" but there was a "possibility" that he came from Hartman & Tyner's West Virginia race track. Jack Foran, testified that he doubted that Chef Bob was employed by RTOL, but was brought in to bring the kitchen up to code and pass out applications. Despite Irene Tribula's uncontradicted testimony that Foran referred her to Chef Bob or Carrie about securing employment, Foran claimed that Chef Bob had no authority to hire anyone because he, "didn't even know anybody. He was from out of town; he knew nobody." Foran related that he "had some doubts about Chef Bob's abilities and the way he was doing his job, and eventually, he disappeared . . . He either quit or he was fired."

In the meantime, due to difficulties encountered in transferring Sportservice's liquor licenses to RCI, Charging Party negotiated an agreement with Sportservice and Hazel Park to allow its members to work as bartenders while questions concerning the transfer were resolved. Robert Bolton, James Kett and Phil Cusmano worked for a few weeks between mid-February and late March. On March 29, 1996, the Michigan Liquor Control Commission (MLCC) transferred ownership of 12 Months Resort Class C licenses to operate fifteen bars at Hazel Park from Sportservice to RCI. On the contract for license filed with the MLCC, Bernard Hartman, RCI's president, and another person whose signature on the application is unreadable, certified that they were the sole owners of RCI.

On April 1, 1996, Steve Daybird, RCI's controller, filed applications with the Oakland County Health Department on behalf of RCI to operate seven food service establishments at Hazel Park for 1996 (April 1, 1996 until April 1, 1997). On August 24, 1996, Pete J. Barry, in his capacity as general

[4]Simulcast means the live transmission video of and audio signals conveying a horse race held either inside or outside the state to a licensed race course. The legislation was effective January 9, 1996. MSA 18.966(318).

manager of Raceway Kitchen, filed a similar application. The application indicated that Raceway Kitchen was owned by Bernard Hartman and Herbert Tyner.

Between October 1995, before Sportservice's contract was terminated, and April or May 1996, a number of former Sportservice employees went to Hazel Park to apply for employment. Their experiences are set forth below:

B. The Alleged Discriminatees

1. Robert Bolton

Bolton had been employed by Sportservice as a bartender for fifteen years. He had an excellent work record and no discipline. In January, 1996, he went to the administration building at Hazel Park and asked Hazel Park's general manager Michael Collins for an application for a bartending job. Collins asked Bolton who sent him. When Bolton told Collins that his union representative sent him, Collins began yelling and screaming that there would be no union there and Bolton should not mention the word, "union" to him. Bolton was ordered out of Collins office. Collins did not give him an application.

Approximately two weeks later, Bolton went with his union steward, Phillip Cusmano and completed another application to work as a bartender and gave it to Chef Bob. Bolton was never contacted regarding his application. In March 1996, he was called back by Sportservice to work as a bartender. Many times during the few weeks he worked as a bartender, he asked clubhouse manager Dana Jones for an application. She never gave him one.

2. Marie Dodge and James Kett

Marie Dodge was employed at Hazel Park by Sportservice as a waitress from March 1973 until October 1995. She served as Local 24 steward for the last 10 to 12 years of her employment and was a member of the Union's negotiating team in 1995. James Kett was employed by Sportservice from 1985 until October 1995, as a waiter. He was an active member of Local 24 and was alternate steward. Both Dodge and Kett had an excellent work record and no record of discipline.

In January 1996, Dodge and Kett went to the administration building to apply for waitstaff positions. There they were met by James Scarmeas, Hazel Park's operation manager. They gave their completed applications to Chef Bob. According to Dodge, Chef Bob told them they he was from another track owned by Hartman and Tyner and he was there to open the clubhouse and to do the hiring. Chef Bob told them he would get back to them. According to Dodge, she asked Chef Bob if he was going to show them the clubhouse since he had just taken another waitress on a clubhouse tour. He grudgingly showed them around the clubhouse. Neither Dodge nor Kett heard from Chef Bob or anyone regarding their applications. Dodge submitted two additional applications in April, 1996, but heard nothing.

In April, 1996, after submitting three applications, Kett was hired as a waiter by RTOL, but quit after one week. Kett testified that the working conditions were not very good because people with no experience were being placed in better positions. Kett was rehired as a waiter by RTOL in April 1998,

and is still employed.[5]

3. Annette Elliott

Annette Elliott was employed as a waitress from 1959 or 1960, until October, 1995. She had a good work record and often worked six days per week. In March, 1996, she went with a friend, Annie Rector, to the administration building and submitted an application to Chef Bob. According to Elliott she told Chef Bob about her 35 years of experience with Hazel Park and told him she would really like to get back. Elliott testified that she asked him if the operation was going to be "union" and he said, no, it would not be a union house. Chef Bob told Elliott that he would call her and let her know about a job. He never did. Elliott called several times about the status of her application and was told that no one was needed.

4. Donna Bialik

Donna Bialik was employed at Hazel Park as a waitress from 1977 until October 1995. She learned in late February or early March 1996 that applications for food and beverage employment at Hazel Park were being accepted. She called, made an appointment and was instructed to ask for Chef Bob. She completed an application and gave it to Chef Bob who interviewed her. She also gave Chef Bob a letter of recommendation on her behalf from Sportservice's operations manager Peter Zettel. Bialik related that toward the end of the interview, Chef Bob asked her to sign a paper which stated that she would not talk about or promote the union in any way. Bialik told Chef Bob that she could not do that - she had always loved her union. She was told by Chef Bob that they would be calling the ones that they wanted. Bialik has heard nothing about the status of her application.

5. Jimmie Knight

Jimmie Knight was employed by Sportservice at Hazel Park from 1984 until October 1995. He began as a dishwasher, and was a chef when he was laid off. He was an active member of Local 24 and served as alternate steward and was on the 1995 negotiating team.

After being laid off by Sportservice at Hazel Park, he worked as a sous chef for Sportservice at Northville Downs. In December 1995, according to Knight, a lady named Carrie called him at home and left a message that his services were very much required. He went to Hazel Park and met with then-general manager Gene Capuzzi who asked him if he were interested in leaving Northville and coming to work for him at Hazel Park. Knight expressed interest and went to the administration building at Hazel Park where Carrie gave him an application. After completing the application, Knight was sent over to the clubhouse where he talked to Chef Bob. Chef Bob told him that there were plenty of jobs available and he was looking for good cooks and a good sous chef.

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[5]Kett returned to work for Sportservice from February to March 1996, as a part-time bartender, pending the transfer of Sportservice's liquor license to Racing Concessions.

Knight testified that because the rate of pay he was offered was less than what he was earning at Northville, Chef Bob told him that arrangements would be made to pay him more than he was earning at Northville. According to Knight, he was told that he was hired and he should put in his two-weeks notice. According to Knight, Chef Bob also told him that Hazel Park was now non-union, and Knight could not come in and bring a union because they were trying to weed out the bad union employees there.

Knight related that two days later, he called Hazel Park and spoke to Carrie about the status of his application. According to Knight, Carrie told him that Chef Bob had related to her that Knight did not want a job. When Knight insisted that Chef Bob was lying, Carrie invited Knight in for a second interview. He accepted her offer, but did not hear from Carrie or Chef Bob about the status of his application.

6. Cinthia Broda

Cinthia Broda was employed by Sportservice at Hazel Park as a clubhouse waitress from 1986 until 1995. In February, 1996, she learned that Hazel Park would be opening earlier than usual because of simulcast operations and was taking applications for food and beverage positions. She made an appointment and was told that she would be meeting with Chef Bob. After waiting two hours for Chef Bob, she submitted her application. According to Broda, while attempting to tell Chef Bob about herself, he appeared preoccupied with some paperwork. He explained that things were different, Hazel Park was not a union house anymore, there were no benefits, and he did not know if she were still interested in working there. Broda told him that she needed a job and was still interested. She did not hear anything about her application and submitted two additional applications, one in mid-March and the other at the end of March, 1996. According to Broda, she was not called or told anything about how to receive a job.

However, Broda's sister, Joan Bryant and her nephew's fiancee, Angela Powers, applied for jobs in March, 1996, and were hired by Dana Jones, with whom Broda had also submitted an application. Neither had food and beverage service experience nor prior affiliation with Charging Party's bargaining unit. According to Broda, both Powers and Bryant quit after working two days because they did not believe it was right for them to take jobs from people who had worked there for so long.

A year later, in March 1997, Broda ran into an old friend and told her she was in desperate need of a job. Her friend told her to call Patty Fabiano Johnston, a Hazel Park clubhouse hostess. Broda called, completed an application and was hired. On the day before the racing season began, Alicia held a meeting with the waitstaff and told them that in case they were not aware, Hazel Park was not a union house and it would not be a union house, and if anyone had any different ideas, she wanted to make it clear.

According to Broda, she was assigned to work in a relatively inaccessible section of the dining room where very few people were seated. As a result, Broda testified, her tips were reduced from about $150 per night she earned while employed by Sportservice, to between $8 and $28 per night. After being assigned to the section for six weeks, Broda discussed the problem with Johnston who told her not to worry, just do her job, and do not ask why. Subsequently, Broda quit.

7. Philip Cusmano

Philip Cusmano was employed by Sportservice as a bartender from 1976 until October 1995. He served as union steward for bartenders from 1987 to 1990 and from 1992 until 1995, and on the 1995 negotiating committee. In February, 1996, he learned that applications were being accepted at Hazel Park for food and beverage employees. He went to the administration building, filled out an application, and had an interview with Chef Bob. Chef Bob told him that they were looking to hire as many Sportservice employees as possible, but it would be non-union and the pay would be $7.00 per hour with no benefits. He was never contacted concerning his application.

Cusmano, like Bolton, returned to work as a Sportservice bartender at Hazel Park for a few weeks in February and March, pending the transfer of Sportservice's liquor license to Racing Concessions. On his last day of work for Sportservice, he was told by manager Carrie to call Jack Foran about continued employment. Cusmano testified that Foran expressed interest in hiring him and told him that the concessions operation would be non-union, the pay would be $7.00 per hour with no benefits and asked if he were still interested.

Subsequently, in April, 1996, on the opening day of the outdoor racing season, Cusmano was told to come in to work at 5 p.m. He worked the bar and lounge and trained a woman who was a friend of manager Dana Jones. The woman had no prior bartending experience and no knowledge of how to prepare mixed drinks. At the end of the shift, when Cusmano asked Jones for a schedule for the following day and whether they were going to use him or not, Jones told him, "We're not sure -- maybe part-time." Cusmano was never called and efforts to obtain his paycheck for the day he worked were unsuccessful. Sue Prutz, whom Foran claimed he hired to take applications and make hiring recommendations, testified that one day, Cusmano called the RTOL office and asked her to tell Jones that he quit. Cusmano refuted Prutz's testimony. On rebuttal he testified that he only spoke with Prutz about obtaining his paycheck and she referred him to the administration building.

8. Irene Tribula

Irene Tribula was employed by Sportservice at Hazel Park from the mid-1970's until October, 1995, first as a waitress and for the last 11 years as a hostess. Tribula testified that after being laid off she called Atkins in Florida because she was concerned about her job. According to Tribula, Atkins explained that Herbert Tyner asked him to assure her that she would have a job and made no mention that she needed to talk to anyone else or that Jack Foran was responsible for hiring.

In early February, 1996, Tribula went to the Hazel Park administration building where she spoke with Foran, whom she had known for many years. According to Tribula, Foran told her that he would be hiring his own people and she needed to talk to Carrie and Chef Bob, whom Foran said were in charge. Tribula testified that she was told by Carrie or Chef Bob that Hazel Park would be a non-union house, they would be hiring their own people, and would get back to her. Later in February, Hazel Park's general manager, Gene Capuzzi, whom Tribula also said she had known for many years, called her at home and told her they were having trouble in the clubhouse and needed help with paperwork, scheduling, setting up payroll and books. When she arrived, the hostess on duty, Joanne Braddock,

demanded to know where Tribula had come from, who called her, and why she was there. Tribula responded that Capuzzi called her. According to Tribula, Braddock told her that Foran did not know why she was there, who had called her, or who was going to pay her because he certainly was not. Tribula testified that Capuzzi told her later that people upstairs were concerned about her presence because this is now "a non-union house" and they're just concerned that you're here and you don't understand that this is non-union now."

After Tribula worked three days the track was temporarily closed. When it reopened, around Valentine's Day, Tribula received a call from Carrie who told her that her services were no longer needed and she should not return to work. Tribula then spoke to Adkins, Hazel Park's operation manager. She testified that he offered her a job as an accountant which she did not consider because she was not qualified. Adkins did not refute Tribula's testimony that he offered her a job as an accountant. However, Foran testified that he offered Tribula a job as a waitress which she refused because she wanted to be a hostess. According to Foran, Tribula was not hired as a hostess because they already had one and she did not fit in as a hostess.

In March 1997, Pete Barry, an old friend of Tribula who was at the time Hazel Park's general manager, called her and asked if she were interested in returning to Hazel Park. When Tribula said she was interested, Barry told her that she "would have to drop this lawsuit." Tribula had no further contact with Hazel Park after telling Berry that she would not drop the charge.

III. Conclusions of Law:

A. Employer Identity

After a June 13, 1997, hearing on Respondent Hazel Park and RCI's motion to dismiss, I issued an order finding that Respondents Hazel Park, RCI, and RTOL were joint employers. In its post-hearing brief, Respondents argue that when I issued my October 10, 1997 order, Respondent RTOL had not been named as a party and had presented no evidence regarding its status. While acknowledging that between October 1995 and January 1996, the identity of the employer is "unquestionably somewhat grey," Respondents argue that evidence produced during subsequent hearing overwhelmingly establishes that since at least February 2, 1996, RTOL, Sportservice's successor and its agents, Foran and Prutz, have been solely responsible for hiring, firing, paying, and in general directing the food service workers employed at Hazel Park.

The record, however, does not support Respondents' assertions. In making a determination of whether a new employer is a successor, "the focus is on whether there is a 'substantial continuity' between the enterprises," meaning "the new company has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations. *Fall River Dyeing & Finishing Corp*, 482 US 27 (1987). See also *Straight Creek Mining, Inc.* v *NLRB*, 164 F. 3rd 292; 159 LRRM 2704 (6th Cir. 1998); *MEA* v *Dearborn Hgts Schools*, 169 Mich App 39 (1988). Respondents have failed to demonstrate that RTOL possess any of the attributes of a successor employer. None of Sportservice's assets were purchased by RTOL. Rather, Sportservice's food service permit and liquor licenses were transferred to RCI which is owned by Bernard Hartman, a principal in Hartman & Tyner, the owner of Hazel Park..

Neither was Sportservice's operation continued unchanged. The February 2, 1996 contract between RTOL and RCI indicated that RTOL's role would be vastly different from that of Sportservice. For forty-six years, Sportservice was totally responsible for all aspects of Hazel Park's food service operation. According to the contract, RTOL's role is described as being akin to a manpower agency unlike Sportservice's responsibilities during its long history of operating the food concessions at Hazel Park.

Moreover, after a careful review of the entire record, I find that the relationship between Respondents more accurately lends itself to a finding of an "alter ego" or agents of each other rather than as joint employers. The alter ego doctrine focuses upon a Respondent's attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or mere technical changes of operation. See *Crawford Door Sales Co*, 226 NLRB 1144; *BMD Sportswear Corp*, 283 NLRB 142, 142 (1987), *Korn Baker*, 326 NLRB No. 82 (1998); *West Ottawa Ed Ass'n* v *West Ottawa Public Schools*, 126 Mich App 306 (1983).

The evidence establishes that there is no true independence between the corporations. Bernard Hartman has ownership interest in Respondents Hazel Park, Hartman & Tyner, and RCI. Sportservices' liquor licenses for the fifteen bars at Hazel Park were transferred from Sportservice to RCI, which is solely owned by Hartman. Foran, the sole incorporator of Respondent RTOL is a long-time employee of Respondent Hazel Park. Each of the Respondents are represented in this proceeding by the same attorney. For this and the reasons set forth below, I find that the formation of RTOL and RCI to operate and staff the food concessions operation at Hazel Park was little more that a scheme to get rid of Charging Party's bargaining unit.

C. Charging Party's *Prima Facie* Case

The issue presented is whether Respondents refused to hire the former Sportservice employees set forth in the seventh amended charge because of their affiliation with Charging Party's bargaining union in order to discourage them from engaging in protected activities and to avoid a bargaining obligation with Charging Party.

Where it is alleged that discharge or other discriminatory action is motivated by anti-union animus, the burden is on the charging party to demonstrate that protected conduct was a "motivating or substantial factor" in the employer's decision. *MESPA* v *Evart Public Schools*, 125 Mich App 71, 74(1983). Thereafter, the burden shifts to the employer(s) to demonstrate that it would have taken the same action even in the absence of the protected conduct. An employer cannot simply present a legitimate reason for its actions but must persuade, by a preponderance of the evidence, that the same action would have taken place even in absence of protected conduct. The elements of a *prima facie* case are union activity, employer knowledge, timing and anti-union animus. See *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, *enf'd*, CA Case No. 214734 (11/30/98); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6; *Residential Systems*, 1991 MERC Lab Op 394; 125 Mich App 65 (1983); and *Napoleon Education Ass'n* v *Napoleon Community Schools*, 124 Mich App 398 (1983).

The record contains sufficient evidence to find that Respondents refused to hire or otherwise

discriminated against former Sportservice employees Bolton, Dodge, Kett, Elliott, Bialik, Knight, Broda, Cusmano, and Tribula because of their union membership. Respondents' agents and the alleged discriminatees had long-term relationship. Most of the applicants had been employed at Hazel Park over 10 years and one worked there for over thirty-five years. Each of them testified in a credible and believable manner and gave me no reason to believe that their testimony was in any manner contrived. I therefore credit all of their testimony.

The record is also replete with unrebutted evidence of union animus by Respondents agents, including:

- Testimony that Chef Bob, who according to Foran was brought in from out of town to get the kitchen operational, told Elliott, Knight, Broda, and Tribula that Hazel Park would be a non-union house.

- Bolton's testimony that Hazel Park's general manager Michael Collins told him in January or February that there would be no union and not to mention the word, "union" to him.

- Testimony that Chef Bob asked Bialik to sign a documents stating that she would not talk about or promote a union in any way. The Commission has long recognized that the mere offering of such a document for signature upon application for re-employment is inherently coercive of the employees' rights guaranteed by Section 8 of the LMA. *Shorty's Wrecker Service*, 1970 MERC Lab Op 1039, 1047; *Pantele's Ultracuts*, 1986 MERC Lab Op 829, 939.

- Testimony that Hazel Park general manager Pete Barry conditioned a job offer to Tribula on the condition that she drop her unfair labor practice case against Respondents.

- Testimony that Foran told Cusmano that Hazel Park would be non-union.

- Testimony that Hazel Park general manager Gene Capuzzi told Tribula that "people upstairs" were concerned about her presence because she was a former Sportservice employee who might not understand that Hazel Park was non-union.

Charging Party also presented convincing evidence of Respondents' inconsistent hiring practices. Broda's testimony is uncontradicted that in March 1996, while refusing to employ her, Respondents hired her sister and her nephew's fiancee, Joan Bryant and Angela Powers, neither of whom had ever been employed by Sportservice and had no prior union affiliation. Cusmano's testimony was also unchallenged. He testified that in April 1996, at the beginning of the racing season, he worked one day during which time he trained manager Dana Jones' friend, who also had no prior bartending experience.

D. Respondents' Rationale for Refusing to Hire the Alleged Discriminatees

Respondents make several arguments. All are connected to the idea that RTOL is Sportservice's successor and at no time did Foran delegate his authority regarding the food service operation to any non-RTOL employee. As set forth above, this assertion is totally without merit because RTOL is not Sportservice's successor.

Respondents attempts to convince this tribunal that it was not motivated by anti-union animus because it has hired twenty-five former Sportservice employees, of whom nineteen are still employed and it has never hired an individual that had not been previously employed by Sportservice and thus, affiliated with Charging Party. For this assertion, they rely on the general and uncorroborated testimony of Foran and Prutz. I accord little weight to their testimony. Respondents adamantly refused to comply with the subpoena *duces tecum* to produce applications of individuals who submitted employment applications or employment records of individuals who were hired in Hazel Park's food service operation in 1996 and thereafter. Applications and employment records are the best evidence of the prior affiliation of applicants and of the status of persons actually hired. Even if Respondents have hired twenty-five individuals previously represented by Charging Party, an employer cannot defeat a finding of discriminatory refusal to hire merely by pointing to union hires. See *Champion Rivet Co.*, 314 NLRB 1097 (1994); *Laro Maintenance Corp.*, 312 NLRB 155, 161 (1993).

Respondents also claim that several of the alleged discriminatees - Dodge, Bialik, and Elliot - failed to follow the procedure for submitting an application for employment and thereby reduced their chances for ever obtaining employment with RTOL. According to Respondents, after February, 1996, applications were to be turned into to Sue Prutz who was stationed in a building designated with a, "Race Track Operators" sign. I find this argument to be less than credible. The record establishes that at least seven of the alleged discriminatees - Bolton, Dodge, Kett, Elliot, Bialik, Knight, and Broda - were directed to the administration building to complete applications, before and after February 1996, and not one submitted an application to Prutz. Without exception, the applicants all had some contact with Chef Bob who expressly told many of them that the food service operation at Hazel Park would be *sans* a union. If as Respondents contend a system were in place to accept applications and hire employees at a former guard shack, it was not communicated to any of the alleged discriminatees in this case. Invariably, they were referred to Chef Bob or to the administration building.

I draw an adverse inference from Respondents' failure to call Chef Bob, Michael Collins, Pete Barry, Gene Capuzzi, Managers Alicia and Carrie, and Dana Jones as witnesses, to dispute evidence that they made anti-union remarks. I also drawn an adverse inference from Respondents' failure to question Atkins about offering Tribula an accountant's position and Foran about his anti-union remarks to Cusmano. See for example, *Northpointe Behavioral Systems*, 1998 MERC Lab Op 530, 551-2.

All other arguments raised by Respondents have been carefully considered and do not warrant a change in the result. Included is their attempt to disassociate themselves from Chef Bob who interviewed most of the applicants and who made it clear to each of them that former Sportservice employees were not welcome. Respondents feigned ignorance about Chef Bob's identity or who employed him is but one example of their desire to rid the Hazel Park's food service operation of "bad union" employees.

The record contains substantial evidence of union animus, inconsistent hiring practices, and suspicious timing. I conclude that Charging Party has established that the nine former Sportservice employees' prior membership in Charging Party bargaining unit was a motivating and a substantial factor in Respondents' failure to hire or otherwise discriminate against them. I also conclude that Respondents have not met their burden in showing that they would have taken the same action complained of even in the absence of the protected activity. Respondents have offered no credible explanation for hiring

inexperienced applicants and not hiring the allegedly discriminatees who had excellent work records during the many years of loyal service.

Based on the above findings of fact and conclusions of law, I recommend that the Commission issue the order set forth below:

Recommended Order

Respondents Hartman & Tyner, Inc., and Hazel Park Harness Raceway, Inc. and Racing Concessions, Inc., and Race Track Operators, Ltd., their officers, agents, successors, and assigns, jointly and severally, shall:

1. Cease and desist from refusing to hire or in any other manner interfering with, restraining, or coercing employees in their exercise of rights guaranteed in Section 8 of the LMA.

2. Cease and desist from discriminating against employees in regard to hire, term or other conditions of employment because of the prior membership in a labor organization or other concerted activities protected by Section 8 of the LMA.

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

A. Offer to hire Robert Bolton, Donna Bialik, Marie Dodge, Annette Elliott, Jimmie Knight, Cinthia Broda, Phillip Cusmano, and Irene Tribula in jobs for which they applied, or substantially equivalent employment, without prejudice to any rights and privileges previously enjoyed and make them whole for any loss of pay and benefits suffered as a result of the discrimination practiced against them, less interim earnings, with interest at the statutory rate.

B. Post, for thirty (30) days, copies of the attached Notice to Employees in conspicuous places, including all places were notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated:_____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, **HARTMAN & TYNER, INC., AND HAZEL PARK HARNESS RACEWAY, INC. AND RACING CONCESSIONS, INC., AND RACE TRACK OPERATORS, LTD., JOINTLY AND SEVERALLY**, HAVE BEEN FOUND GUILTY OF AN UNFAIR LABOR PRACTICE UNDER SECTION 23 OF THE LABOR MEDIATION ACT. PURSUANT TO THE ORDER OF THE COMMISSION WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to hire or otherwise discriminate against employees because of their activities protected by Section 8 of the Labor Mediation Act.

WE WILL offer to Robert Bolton, Donna Bialik, Marie Dodge, Annette Elliott, Jimmie Knight, Cinthia Broda, Phillip Cusmano, and Irene Tribula jobs for which they applied, or substantially equivalent employment, and make them whole for any loss of pay, seniority or benefits previously enjoyed, as a result of the discrimination, less interim earnings, with interest at the statutory rate.

WE WILL insure that all our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 8 of the Labor Mediation Act..

.

Hazel Park Harness Raceway, Inc. , Hartman & Tyner, Inc., and Racing Concessions, Inc., and Race Track Operators, Ltd.

_____

By

Dated:_____

(This notice must remained posted for a period of thirty (30) days. Questions concerning this notice shall be directed to the Michigan Employment Relations Commission, 1200 Sixth Street, 14th Floor, Detroit, Michigan 48226, (313) 256-3540.)