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 Respondents

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Michael J. Bommarito, Esq., for Charging Party

DECISION AND ORDER

On December 27, 2000, Administrative Law Judge (hereafter "ALJ") Roy L. Roulhac issued his Decision and Recommended Order After Remand in the above matter finding that the National Labor Relations Board (hereafter "NLRB") would arguably decline to assert jurisdiction in this case and recommending that the Commission deny Respondents' motion to dismiss for lack of subject matter jurisdiction. On January 29, 2001, Respondents filed timely exceptions to the ALJ's Decision and Recommended Order After Remand. Charging Party filed a timely response to the exceptions and brief in support of the ALJ's decision on February 6, 2001.

Charging Party Hotel Employees and Restaurant Employees Union, Local 24, AFL-CIO (HERE) represents a bargaining unit that consisted of food and beverage employees at Hazel Park Harness Raceway (HPHR). In October 1995, HPHR's contract with the company that formerly provided the food service operation to HPHR was terminated, and all employees of record consequently lost their jobs. HPHR, which is owned by Hartman & Tyner, Inc., subsequently

established Racing Concessions, Inc. (RCI) to provide the food service operation. RCI then entered into an agreement with Race Track Operators, Ltd. (RTOL), which designated RCI as the operator of Hazel Park food concessions and RTOL as the employer of all concessions personnel requested by RCI. On March 18, 1996, Charging Party filed a charge alleging that Respondents HPHR and RCI committed an unfair labor practice in violation of Section 16 of the Labor Relations and Mediation Act (hereafter "LMA"), 1939 PA 176, as amended, MCL 423.16, by failing to hire or otherwise discriminating against nine individuals because of their union affiliation and/or activity. This charge was subsequently amended five times, and on May 7, 1997, Respondents filed a motion to dismiss claiming that RTOL was the sole employer of the nine individuals. Following an evidentiary hearing, the ALJ denied the motion to dismiss on October 10, 1997, and found that HPHR and RCI were joint employers with RTOL. Charging Party filed a sixth amended charge on April 8, 1998, which added RTOL as a party, and on September 28, 1998, filed a seventh amended charge adding Hartman & Tyner, Inc. as a party.

After hearings on the merits, the ALJ issued a Decision and Recommended Order on July 21, 1999 in which he concluded that Respondents were actually alter egos, or agents of each other, as opposed to joint employers. He also found that the Respondents were in violation of Section 16 of the LMA by committing unlawful discrimination against the nine individuals named in the unfair labor practice charge as amended.

Charging Party filed "limited exceptions" on August 25, 1999, asserting that the relief ordered by the ALJ should be modified to include James Kett, a discriminatee whose name, according to Charging Party, was erroneously omitted from the remedy provision of the recommended order. Respondent filed timely exceptions on September 17, 1999 and raised for the first time its defense that this Commission lacks subject matter jurisdiction over the instant dispute because it is preempted by the National Labor Relations Act (hereafter "NLRA"), 29 USC 141 *et seq*.

On November 19, 1999, we issued a Decision and Order remanding the case for further hearing, findings of fact, conclusions of law, and a supplemental recommended order as to whether the National Labor Relations Board (hereafter "NLRB") would arguably assert jurisdiction in this matter. In particular, we requested additional findings of fact on 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 operations of the track; (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.

After two hearings and post-hearing briefs filed by Charging Party and Respondents on August 4 and 8, 2000 respectively, the ALJ issued a Decision and Recommended Order After Remand on December 27, 2000, finding that complete functional integration exists between Respondents' food service and horse racing operations, that the workforce is seasonal, and that the

food concessions are accessible only to racetrack patrons. As to the three remaining issues, the ALJ made no specific factual finding as he determined that regardless of his findings they would not alter his conclusion in this case.

Respondents take exception to the ALJ's conclusion of law that in order to meet their burden of proof, Respondents must do more than show that the NLRB would arguably assert jurisdiction in this case. It is well settled that notwithstanding a conclusion that an arguable case for preemption exists, if it can be shown that the NLRB, within in its discretion under the NLRA, has declined or would decline to assert jurisdiction, then a state court or tribunal would be free to assert its jurisdiction. See *Michigan Council 25, AFSCME* v *Louisiana Homes, Inc (On Remand)*, 203 Mich App 213, 219; 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*). 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 22; 48 Cal Rptr 702; 409 P2d 926; 61 LRRM 2261 (1966). In order to avoid fruitless submissions, it is not necessary for a party to initially submit a case to the NLRB for a determination of the jurisdictional question. A party must only show that on the basis of rule of decision or by published rules the NLRB has or would have declined jurisdiction. See *Louisiana Homes* at 220; *Russell* at 25. Thus, we find that Respondents must not only show that the NLRB would "arguably" assert jurisdiction, but also that the NLRB would not decline jurisdiction based on a rule of decision or by published rules.

As Charging Party points out, there are only two types of cases in which the NLRB has asserted jurisdiction over employees who work at or near racetracks. One type is that which concerns independent businesses that operate without racetrack interference. See *Vernon Downs Food Service*, Case No. 3-CA-21377, Advice Memorandum dated August 14, 1998, (exercise of NLRB jurisdiction over independent food concession business which operated without racetrack interference and had stable, year-round workforce); *American Totalisator Co*, 264 NLRB 1100 (1980) (assertion of NLRB jurisdiction over an independent entity with its own employees who were hired, supervised, assigned, and transferred without any input from the owners of the racetracks); *Ogden Food Service Corp*, 234 NLRB 303 (1978); *Harry M. Stevens*, 169 NLRB 806 (1968) (NLRB assertion of jurisdiction over racetrack food service establishments not integrally related to the operations of the racetracks at which they were located). Compare *Chelsea Catering*, 309 NLRB 822 (1992) (deferral of NLRB jurisdiction where catering business was subject to extensive airline control). As discussed below, the food service and racetrack involved in this case are functionally integrated and the record reflects that there is substantial racetrack interference with the food service operation. Moreover, the employees in question are seasonal in nature. Thus, this category of cases is simply not applicable here.

The other type of case in which the NLRB has asserted jurisdiction over owners of horse racing facilities involves employees of hybrid operations. In these cases, the employers owned and operated large complexes which housed both a racetrack and either a resort or a casino, and were involved exclusively or almost exclusively in non-racing operations that were either (1) the employer's primary enterprise, with horseracing a comparatively minor aspect of the business, or (2)

independent of the racing operations completely. See *Delaware Racing Association*, 325 NLRB No. 12 (1997) (assertion of NLRB jurisdiction over year-round, full-time workforce engaged exclusively in casino operations responsible for 62 percent of racetrack/casino revenues); *Prairie Meadows Racetrack & Casino*, 324 NLRB No. 550 (1997) (NLRB jurisdiction assertion over year-round, full-time employees engaged solely or predominately in operation of casino which accounted for 98 percent of racetrack/casino revenues); *Waterford Park, Inc*, 251 NLRB 874 (1980) (NLRB assertion of jurisdiction over employees of motel not integrally related to operation of racetrack). In the instant case, it is clear from the record that HPHR is not a hybrid operation; it is a racetrack that incidentally provides food and beverages to racetrack patrons. The record reflects that Respondents' main source of revenue is derived from horseracing operations. The racetrack, as opposed to the food service operation, is the primary enterprise such that the food service could not profitably exist without the racetrack. As discussed below, although the food service is open to the public before the track is open, the vast majority of its business is derived from patrons of the track. Moreover, the food service employees are essentially seasonal in nature, and both operations are functionally integrated. Therefore, this category of NLRB cases is also irrelevant here.

Consequently, we find that Respondents have failed to meet their burden of showing that the NLRB would not decline jurisdiction based on rule of decision or published rule, and hold that we are entitled to assert jurisdiction. Our resolution of this issue is not based on our own interpretation of the NLRA, but rather from our application of standards which the NLRB has already set forth. See *Russell* at 28.

Respondents also except to the ALJ's finding of fact after remand that complete functional integration exists between the food service and horse racing operations. In particular, Respondents contend that there is no functional integration because there is no interchange of food service and racetrack employees. As Charging Party notes, however, employee interchange is merely one factor among others in determining whether functional integration exists, and a finding of functional integration can be made despite an absence of employee interchange. See *Centurion Auto Transport, Inc*, 329 NLRB 394 (1999); *Ryder Integrated Logistics, Inc*, 329 NLRB No. 89 (1999). Indeed, when the evidence presented in this case is viewed as a whole, functional integration is quite apparent. Food service applicants, unaware of the existence of RTOL, were interviewed by employees of the racetrack, and after being hired were required to submit W-4 forms indicating HPHR as their employer. These employees were also required to use other employment forms that varied as to the employer indication (some forms stated RCI, while others stated RTOL), and regardless of which employer was indicated, the same address and telephone number were listed on such forms. The contract between RCI and RTOL provides, among other things, that RTOL agrees to furnish all concession personnel requested by RCI for assignment at HPHR; RCI may assist in recruiting, hiring, training, evaluating, replacing, supervising, and disciplining food and beverage employees at HPHR; RCI agrees to reimburse RTOL for all of several actual costs of employment; RCI indemnifies RTOL against any and all liability for providing employment services at HPHR; RCI provides RTOL with space for business operations on the HPHR premises; RCI agrees to provide all necessary uniforms and supplies for food and beverage personnel; and RCI and RTOL agree that RCI operates the food concessions at HPHR. RCI is the holder of both the liquor and food licenses, and was the purchaser of the furniture and other equipment used in food service

operations. Promotional literature for the food service is paid for, developed, published, and disseminated by HPHR, and is used to attract patrons to both live and simulcast racing events. HPHR also handles the entire group reservation process and collects group party ticket money. Food service administrators' offices are housed at the racetrack. Moreover, at least one general manager of HPHR was in the food service area every day asking customers whether they enjoyed their dining experience, and in the kitchen evaluating the preparation and presentation of the food and making comments to food service employees regarding their work responsibilities. The abundant weight of this evidence clearly outweighs any other conflicting evidence, and we adopt the ALJ's determination that no credence should be given to the testimony of the witnesses for Respondents. We find, therefore, that the ALJ did not err in finding that there is functional integration between the racetrack and food service operations.

Next, Respondents except to the ALJ's findings of fact after remand regarding the other five factors about which we requested that he develop a record. We adopt these findings as appropriate. Although with the advent of simulcast racing some food service operations continue throughout the year, when Respondents' payroll records are considered, it becomes clear that the food service continues to be seasonal in nature as it operates primarily only during the live racing season. According to the payroll records, total employee hours in 1996 were reduced by 312% during the simulcast season, while the number of workers was reduced by 289%. Certain food service workers are employed only during the live racing season. Moreover, the kitchen and grandstand area was closed during the simulcast season, while the dining area was typically closed as well. In regards to the accessibility of the food service operation, we find that its purpose is to serve racetrack customers. Even though one does not have to bet at the racetrack to eat at the restaurant, the restaurant is only open during the hours that the racetrack is open. No separate entrance to the clubhouse exists, and there is visible access to the track from all dining areas. Further, with the exception of the hours between 12:00 noon to 2:00 p.m., a patron must purchase an admission ticket and enter through the gate in order to enter the clubhouse where the restaurant is located. While there is insufficient evidence in the record to make conclusive factual findings on the remaining three factors, we find that this or any evidence to the contrary would not change the outcome of this case.

We now turn to the substantive issue of this case. On exception, Respondents contend that the ALJ erred when he made a finding of discrimination with respect to their refusal to hire various Charging Parties even though 25 people employed by the former food service company were hired by the current food service operation. We disagree. A new owner of a business is not required to hire any of its predecessor's employees, but may not refuse to hire the predecessor's workers solely because they were represented by a union. See *Laro Maintenance Corp*, 312 NLRB 155 (1993); *NLRB* v *Burns Security Services*, 406 US 272 (1972); *Howard Johnson's* v *Detroit Local Joint Executive Board*, 417 US 249 (1974). The fact that Respondents may have hired 25 of the predecessor's employees is irrelevant to the issue of whether each of the various Charging Parties was unlawfully discriminated against. It is each individual's right to engage in concerted activity which is protected; not the bottom line number of hires who are union sympathizers. See e.g. *Connecticut* v *Teal*, 457 US 440 (1982) (bottom line result that created a racially balanced work force did not immunize employer from liability for discrimination against individual members of

minority group). Furthermore, the record contains substantial evidence showing that each of these individuals was not hired or otherwise discriminated against solely because he or she was represented by the union. Therefore, we find that the ALJ did not err in concluding that Respondents violated Section 16 of the LMA.

Finally, Charging Party seeks to have James Kett, a discriminatee whose name was, according to Charging Party, inadvertently omitted from the remedial provision of the ALJ's recommended order, included in our remedial order. In light of the record before us which reflects that Kett was indeed discriminated against because of his previous union membership, we find that his inclusion is appropriate. Further, Respondents have failed to object or proffer any argument against his inclusion. We therefore modify the ALJ's recommended order to include this individual.

All other arguments raised by the Respondents have been carefully considered and do not warrant a change in the result.

ORDER

Pursuant to Section 23 of the LMA, we hereby adopt the supplemental order of the ALJ denying Respondents' motion to dismiss for lack of subject matter jurisdiction. We also adopt the ALJ's recommended order in its entirety, except to modify it to include James Kett, as follows:

Respondents Hartman & Tyner, Inc., Hazel Park Harness Raceway, Inc., Racing Concessions, Inc., and Race Track Operators, Ltd., and 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 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, James Kett, 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, plus interest at the statutory rate.

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Chair

_____
Harry W. Bishop, Member

_____
C. Barry Ott, Member

DATED: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING BEFORE THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION, **HARTMAN & TYNER, INC., HAZEL PARK HARNESS RACEWAY, INC., RACING CONCESSIONS, INC., AND RACE TRACK OPERATORS, LTD., JOINTLY AND SEVERALLY**, HAVE BEEN FOUND GUILTY OF AN UNFAIR LABOR PRACTICE UNDER SECTION 16 OF THE LABOR RELATIONS AND 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 Relations and Mediation Act.

WE WILL offer to Robert Bolton, Donna Bialik, Marie Dodge, Annette Elliott, James Kett, 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, plus interest at the statutory rate.

WE WILL ensure that all of 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., Racing Concessions, Inc., and Race Track Operators, Ltd.

_____

By

Dated:_____

(This notice must remain posted for a period of thirty (30) consecutive days. Questions concerning this notice shall be directed to the Michigan Employment Relations Commission, 1200 Sixth Street, 14th Floor, Detroit, Michigan 48826, (313) 256-3540.)

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:

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 and repeated the allegations set forth in its fifth amended charge. Thereafter, on May 4,

[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.

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

[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.

committing unfair labor practices in violation of LMA Section 16(1), (3) and (5).

II. Findings of Fact:

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.

[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).

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 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.

[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.)