

**Wyndham International, Inc. and Posadas de Puerto Rico Associates, Inc. d/b/a Condado Plaza Hotel & Casino and Asociacion de Empleados de Casinos de Puerto Rico.** Case 24-CA-7992

February 25, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On May 5, 1999, Administrative Law Judge D. Barry Morris issued the attached decision. The General Counsel and the Respondent, Posadas de Puerto Rico Associates, Inc. d/b/a Condado Plaza Hotel & Casino, each filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

<sup>1</sup> In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the National Labor Relations Act by unilaterally discontinuing its past practice of withholding optional life and cancer insurance premiums from employees' paychecks, we reject the Respondent's argument that the Union did not request bargaining with the Respondent about the announced change. Specifically, Victor Villalba, employee and union president, testified without contradiction that when he was notified by letter of the Respondent's decision to eliminate the insurance premium withholding as of May 1, 1998, he contacted the Respondent's personnel director, Eddie Ortiz, and asked Ortiz "if we could find an alternative in order to resolve this situation" and suggested as a possible solution that the moneys deducted from employees' pay be forwarded to the Union, which would then make the premium payments to the various insurance companies. Ortiz consistently refused to discuss this or any other option during their conversation, maintaining that he was unable to do anything about the decision because it had been made "higher up."

<sup>2</sup> In his recommended Order, the judge required the Respondent to "use its best efforts" to restore the group insurance policies for unit employees. The General Counsel has excepted to the judge's failure to provide a full remedy for the unfair labor practice he found. "Pursuant to the Board's established policy, in cases such as this involving a violation of Sec. 8(a)(5) based on an employer's unilateral alteration of terms and conditions of employment, it is customary to order restoration of the status quo ante to the extent feasible." *Detroit News*, 319 NLRB 262 fn. 1 (1995). Accordingly, we find merit in the General Counsel's exception and shall modify the judge's recommended Order to include standard remedial language.

Member Brame would not modify par. 2(a) of the judge's recommended Order.

The General Counsel has also excepted to the judge's failure to order that the notice be posted in both the English and Spanish languages. Bilingual notices are customary in Region 24, and we shall modify the judge's recommended Order accordingly. *Hospital Del Maestro*, 323 NLRB 93 fn. 2 (1997).

Finally, we shall modify the judge's recommended Order to include a provision requiring the Respondent to preserve records necessary for the computation of backpay.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Posadas de Puerto Rico Associates, Inc. d/b/a Condado Plaza Hotel & Casino, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 2(a) and (c), respectively.

"(a) On written request of the Union, resume its practice of making payroll deductions for the group cancer and life insurance policies, restore those policies for unit employees, and make the employees whole for any losses they may have suffered as a result of the unilateral change, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. mem. 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraph accordingly.

"(d) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facility copies of the attached notice marked 'Appendix.'<sup>4</sup> Copies of the notice in Spanish and English, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 1998."

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

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unilaterally change the practice of withholding premiums for group cancer and life insurance policies for our unit employees.

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

WE WILL, on written request of Asociacion de Empleados de Casinos de Puerto Rico, the Union, resume our practice of making payroll deductions for the group cancer and life insurance policies, restore those policies for unit employees, and make the employees whole for any losses they may have suffered as a result of the unilateral change, with interest.

WE WILL bargain in good faith with the Union concerning any changes in the group cancer and life insurance policies for our unit employees. The appropriate unit is:

All croupiers, cashiers, waiters, slot cashiers and pit clerks that work at the hotel casino, excluding all other employees of the casino and hotel, guards and supervisors, as defined in the Act.

POSADAS DE PUERTO RICO ASSOCIATES, INC.  
D/B/A CONDADO PLAZA HOTEL & CASINO

*Virginia Milan-Giol, Esq. and Efrain Rivera-Vega, Esq.*, for the General Counsel.

*Edwin J. Seda-Fernandez, Esq. and Maria Ubarri-Rodriguez, Esq. (Axtmayer Adsuar Muniz & Goyco)*, of San Juan, Puerto Rico, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in San Juan, Puerto Rico, on January 26 and 27, 1999. On a charge filed on April 23, 1998,<sup>1</sup> a complaint was issued on July 31, and amended at the hearing, alleging that

Posadas de Puerto Rico Associates Inc. d/b/a Condado Plaza Hotel & Casino (Respondent or Condado Plaza)<sup>2</sup> violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on April 9, 1999.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a wholly-owned subsidiary of Wyndham International, Inc. (Wyndham), is a Delaware corporation operating a hotel in San Juan, Puerto Rico. Respondent has admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Asociacion de Empleados de Casino de Puerto Rico (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

*A. The Facts*

1. Alleged unilateral change

In 1978 Respondent took out a group life insurance policy with Maccabees Mutual Life Insurance Company (Maccabees) to enable its unit employees to obtain life and cancer insurance at group rates. For 20 years Respondent made payroll deductions for the premiums from its employees' paychecks and made the payments to Maccabees. Respondent also facilitated its employees obtaining cancer and life insurance policies from other companies, making the payroll deductions from the employees' paychecks and paying the premiums as it did with the Maccabees policy. Respondent made no contributions, but, instead, withheld the requisite amounts from the employees and made a single payment to the insurance companies at group rates.

On April 14, 1998, Respondent notified the insurance companies that effective May 1 it would no longer make the payroll deductions for the policies and on April 15 Respondent so notified the employees. Also on April 15 Respondent notified Victor Villalba, president of the Union, that effective May 1 it would no longer make the payroll deductions. By letter dated April 22 from Krans Associates, a general insurance agency which represented several of the insurance companies, Respondent was urged to extend the May 1 effective date "in order to allow present participants to secure their individual coverage." The Krans request was not granted and the effective date of the change in the withholding practice was May 1.

The law is well settled that unilateral changes of "wages, hours and terms and conditions of employment" by an employer obligated to bargain with a representative of its employees in an appropriate unit, violates Section 8(a)(1) and (5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Master Slack*, 230 NLRB 1054 (1977), enf. 618 F.2d 6 (6th Cir. 1980). Uni-

<sup>2</sup> The complaint originally named Patriot America Hospitality Group as a Respondent. The parties stipulated that the caption should be amended as indicated.

<sup>1</sup> All dates refer to 1998 unless otherwise specified.

laterally changing health and welfare benefits, without bargaining with the Union, is unlawful. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970); *Exxon Co., U.S.A.*, 315 NLRB 952, 955 (1994). Respondent argues that since cancer and life insurance benefits were not covered in the collective-bargaining agreement, any unilateral change would not be unlawful. However, Respondent's practice of withholding such payments was in effect for approximately 20 years. A unilateral change of an established "past practice" constitutes a violation of Section 8(a)(5). *Dow Jones & Co.*, 318 NLRB 574, 576 (1995). In addition, Respondent contends that it did not eliminate a "benefit" by discontinuing its practice of withholding, since the insurance plans were noncontributory and Respondent merely made deductions from employees' paychecks. In un rebutted testimony, Elsie Santana, a Krans representative, credibly testified that group policies are less expensive than individual policies. I believe that Respondent's withholding premium payments so that the unit employees were able to participate in a group plan constitutes a benefit which Respondent eliminated unilaterally, without offering the Union the opportunity to bargain concerning the change. This constitutes a violation of Section 8(a)(1) and (5) of the Act.

## 2. Liability of parent

As noted above, Respondent is a wholly-owned subsidiary of Wyndham International, Inc. While Respondent's counsel agreed that the caption be amended to include Wyndham, he specifically stated at the hearing that he did not concede the liability of the parent. The General Counsel maintains that Wyndham should be included in the order remedying the unfair labor practice. For a parent to be liable for the unfair labor practices of its subsidiary, there must be a showing of the parent's "direct participation" in the unlawful conduct. *Swift Independent Corp.*, 289 NLRB 423, 429 (1988); *Esmark, Inc.*, 315 NLRB 763, 767 (1994). Villalba testified that Eddie Ortiz, Respondent's human resources director, told him that the change in withholding policy came from "higher up" and that Ortiz could not do anything about it. The General Counsel argues that this testimony shows Wyndham's "direct participation." I disagree. The record does not show what was meant by the term "higher up." Ortiz was human resources director. He clearly was not the highest officer of Respondent. The term "higher up" could have referred to an official higher up in the corporate structure of Respondent, Condado Plaza. Accordingly, I find that the General Counsel has not satisfied its burden of showing the direct participation of the parent, Wyndham International, in the unfair labor practice. My finding, however, does not preclude the General Counsel from establishing Wyndham's role, if any, in a supplementary proceeding.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By making a unilateral change without affording the Union an opportunity to bargain concerning the change, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.
4. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having ceased withholding payments for the group cancer and life insurance policies, I shall order that, upon the Union's written request, Respondent resume its withholding practice and use its best efforts to have the group cancer and life insurance policies reinstated. Respondent shall reimburse unit employees for any expenses ensuing from the unilateral change, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), as computed in the manner stated in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

## ORDER

The Respondent, Posadas de Puerto Rico Associates, Inc. d/b/a Condado Plaza Hotel & Casino, San Juan, Puerto Rico, its officers, agents, successors, and assigns, shall

### 1. Cease and desist from

(a) Unilaterally changing the practice of withholding premiums for group cancer and life insurance policies for unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) On written request from the Union, resume its practice of making payroll deductions for the group cancer and life insurance policies, use its best efforts to restore said policies for unit employees and make the employees whole for any losses they may have suffered as a result of the unilateral change, with interest, in the manner set forth in the remedy section.

(b) Bargain in good faith with the Union concerning any changes in the group cancer and life insurance policies for unit employees. The appropriate unit is:

All croupiers, cashiers, waiters, slot cashiers and pit clerks that work at the hotel casino, excluding all other employees of the casino and hotel, guards and supervisors, as defined by the Act.

(c) Within 14 days after service by the Region, post at its facility in San Juan, Puerto Rico, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 14, 1998.

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