Double Eagle Hotel & Casino *and* International Brotherhood of Electrical Workers, Local No. 113. Cases 27–CA–17816–2 and 27–CA–18048–1

January 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On March 3, 2003, Administrative Law Judge James L. Rose issued the attached decision. The Respondent and the General Counsel each filed exceptions, supporting briefs, and answering briefs. The Respondent filed a reply brief.

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[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified and set forth in full below.

1. The amended consolidated complaint alleges, inter alia, that several rules in the Respondent's employee handbook violate the Act. The judge found unlawful a section of the handbook's "Communication" rule that prohibited employees from "provid[ing] information about the company to the media."[4] There are no exceptions to this finding and, therefore, we adopt pro forma the judge's finding of a violation. Contrary to the judge, however, we find that another section of the Communication rule is also unlawful and as discussed in sections 2 and 3 below, that sections of the handbook's "Confidential Information" rule are unlawful.[5] Finally, in disagreement with the judge, we find that a section of the handbook's "Customer Service" rule is unlawful.[6]

The Respondent operates a gambling casino in Colorado. It employs slot technicians, slot attendants, security officers, cage cashiers, cocktail waitresses, and bartenders. In performing their duties, these employees interact with customers of the casino on a regular basis including paying out jackpots to them, checking their identification, or serving them drinks.

In connection with these duties, the Respondent's Customer Service rule sets out 12 employee guidelines to be followed when interacting with customers. One of the guidelines states:

> Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware

[1] The Respondent filed no exceptions to the judge's findings that it violated Sec. 8(a)(1) by maintaining a rule prohibiting employees from being on its property unless they were working their scheduled shift; by maintaining a rule prohibiting employees from providing information about the Respondent to the media without its prior approval; and by threatening to call, and then calling, the police to have handbilling union members removed from public sidewalks adjacent to its casino.

The General Counsel filed no exceptions to the judge's dismissal of 8(a)(1) allegations that Slot Director Rodger Hostetler orally promulgated a rule on October 26, 2002, prohibiting employees from discussing tips or company problems, and threatened employees with discharge if they violated the rule; that security lead, Chuck Robertson, promulgated a rule on March 23, 2002, forbidding employee Tina Tonks from speaking to employee Sherry at any time about any subject; that lead key, Leslie Blevins, threatened employee Betty Ingerling with discharge for complaining about employee Henderson keeping her tips rather than placing them in a common tip box; that Hostetler and Blevins impliedly threatened an employee by telling her that another employee was discharged because she was an instigator and spokesperson for other employees concerning working conditions; that Hostetler impliedly threatened employee Ingerling by telling her to cease her attempts to obtain changes in the tip policy; that head key, Denny Warrick, impliedly threatened employees with unspecified reprisals by his remark to Robertson, in the presence of employee Tonks, that "this union thing is getting out of hand;" and that employee Tonks was suspended for violating the unlawful rule concerning the discussion of tips.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, as alleged in par. 5(l) of the amended consolidated complaint, that the Respondent violated Sec. 8(a)(1) by impliedly threatening employees with discharge if they attempted to change the Respondent's policy regarding the distribution of tips. However, as correctly noted by the Respondent, and conceded by the General Counsel (Answer Br. at 18), this allegation was withdrawn at the hearing. Accordingly, we reverse the judge's finding of this 8(a)(1) violation.

The judge found that because Supervisor Robertson did not specifically deny telling employee Tonks that anyone caught talking about employee Ingerling's discharge would be disciplined, Robertson's remark constituted an 8(a)(1) threat. The Respondent argues in exceptions that Robertson did specifically deny making the remark and, therefore, the violation should be reversed. We find it unnecessary to pass on this 8(a)(1) finding, as it is cumulative of other 8(a)(1) threats of discipline which the judge found, and with which we agree, and would not affect the remedy.

[3] For the reasons stated by the judge, we agree that the Respondent violated Sec. 8(a)(3) by disciplining employees Betty Ingerling, Carol Marthaler, and Barbara McCoy. We note that our colleague's analysis of this discipline under the concurring opinion in *Saia Motor Freight Line*, 333 NLRB 784, 785–786 (2001), applies principles contrary to extant Board law. Thus, where discipline is imposed pursuant to an overbroad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule. *Opryland Hotel*, 323 NLRB 723, 728 (1997), citing *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 931 fn. 9 (5th Cir. 1993).

[4] See sec. III,B,3 of the judge's decision.

[5] For the reasons discussed in his partial concurring and dissenting opinion, infra, Chairman Battista finds neither of the disputed sections of these two rules unlawful.

[6] For the reasons set forth by the judge, we agree with the judge that the Respondent's oral rule, proscribing the discussion of tips and its tip policy anywhere on the Respondent's property, is overly broad and unlawful.

that having a conversation in public areas with another employee will in all probability be overheard.

In dismissing the allegation that this provision violated Section 8(a)(1), the judge stated that he found "nothing in this rule which unlawfully prohibits employees from discussing working conditions among themselves on the casino floor." The General Counsel excepts, contending that the rule is not limited to the casino floor; its prohibition against discussing "company issues" and "other employees" reasonably encompasses wages and working conditions; and, contrary to the judge, the prohibition extends beyond the casino floor to all "public areas." Accordingly, the General Counsel argues that this rule is unlawfully overbroad. We find merit in the General Counsel's exception and find the violation.

A rule like the one at issue here, which prohibits employees from discussing working conditions, is viewed by the Board as analogous to a no-solicitation rule for purposes of considering its legality. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 fn. 4 (1995), enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996). Over the years, the Board has carved out, for certain industries, special rules for assessing the legality of employee no-solicitation rules. In the retail industry, for example, the Board has held that because active solicitation in a sales area may disrupt a retail store's business, an employer legally may prohibit solicitation by employees on the selling floor even during the nonworktime of the employees. *J.C. Penney Co.*, 266 NLRB 1223 (1983); *Marshall Field & Co.*, 98 NLRB 88 (1952). But as stated in *McBride's of Naylor Road*,[7] in applying this precedent, the Board "has not allowed the restrictions on solicitation . . . to be extended beyond that portion of the store which is used for selling purposes," such as public restrooms and restaurants.

Gambling casinos, such as the one that the Respondent operates, have long been considered akin to retail stores for purposes of assessing the legality of employee no-solicitation rules. *Dunes Hotel*, 284 NLRB 871, 875 (1987); *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000). Thus, as with a retail store's selling floor, the Respondent lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino's gambling areas, and adjacent aisles and corridors frequented by customers, but it could not lawfully maintain a general ban on that activity beyond that area. To the extent that the rule pertains to discussions with or around casino guests, it is likely the case that casino guests are in gambling areas or in adjacent aisles and corridors. However, the rule goes further and prohibits discussions in "public areas." Thus, for example, the rule would bar discussions in such public areas as parking lots and restrooms. Although the rule suggests that there is a "probability" that conversations will be overheard by guests in *all* public areas, there is no evidence to support this, and it seems counterintuitive. That is, there are surely times and places in the public areas outside the gaming floor where customers are not in earshot. Nevertheless, conversations are broadly barred in these areas. Accordingly, the rule is unlawful at least to the extent that it bars discussion in places outside the gaming area, such as, for example restrooms, public bars and restaurants, sidewalks and parking lots. See *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999); *Santa Fe Hotel & Casino*, 331 NLRB at 729.

2. We also find merit in the General Counsel's exceptions to the judge's finding that the highlighted provisions in the following two handbook rules are not unlawful:

CONFIDENTIAL INFORMATION

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with the utmost discretion must be observed. It is essential that no information of this kind is allowed to leave the department, other than by activity/job requirements, either by documents or verbally. **A list, which is not all-inclusive, of the types of information considered confidential is shown below:**

- **disciplinary information**
- **grievance/complaint information**
- **performance evaluations**
- **salary information**
- **salary grade**
- **types of pay increases**
- **termination data for employees who have left the company**

Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist. Check with Management if you have any doubt or questions.

Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group.

Working with confidential information on a day-to-day basis requires a continuing effort on your part to ensure that no paperwork is inadvertently left someplace where unauthorized people may gain ac-

[7] 229 NLRB 795 (1977).

cess, and that visitors to the department are not allowed to observe or study confidential information on and/or around your desk.

Any breach or violation of this policy will lead to disciplinary action up to and including termination.

COMMUNICATION

PRESS RELATIONS

Without appropriate approval, under no circumstances shall you provide information about the company to the media.

The external communications of our employees are critical to the way the Company is perceived by guests, business associates, the press, regulators and the general public . . . . **You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President.**

Applying the test set forth in *Lafayette Park Hotel*,[8] the judge rejected the General Counsel's contention that both rules unlawfully prohibit employees from engaging in the Section 7 right to discuss wages and other terms and conditions of their employment. The judge found that neither rule on its face specifically prohibits such discussions and that employees who read the rules would not reasonably conclude otherwise. Contrary to the judge, we find both rules unlawful under the standard set forth in *Lafayette Park Hotel*. It is hard to imagine a rule that more explicitly restricts discussion of terms and conditions of employment than the Confidential Information rule herein.

In that case the Board held that in determining whether the maintenance of work rules in employer-issued handbooks violated the Act:

> the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. [326 NLRB at 825.]

Several work rules were analyzed under this standard in *Lafayette Park Hotel*, including a confidentiality rule that prohibited employees from "[d]ivulging hotel-private information to employees or other individual or entities that are not authorized to receive that information." A Board majority found this rule lawful, noting that it was not facially ambiguous and that employees reasonably would understand that the rule was designed to protect the employer's interest in maintaining confidentiality of its business information, rather than to prohibit discussion of wages and working conditions. Similarly, in *Super K-Mart*,[9] a Board majority found that, under the standard of *Lafayette Park Hotel*, the employer's confidentiality rule, which provided that "[c]ompany business and documents are confidential [and] [d]isclosure of such information is prohibited," did not violate Section 8(a)(1).[10]

However, applying *Lafayette Park*, the Board found unlawful employer confidentiality rules in *Flamingo Hilton-Laughlin*,[11] *University Medical Center*,[12] and *IRIS U.S.A., Inc.*[13] The rule in *Flamingo Hilton-Laughlin*, supra, provided that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel Employees." In finding that the rule violated Section 8(a)(1), the Board majority distinguished it from the confidentiality rule found lawful in *Lafayette Park Hotel* on the basis that, unlike that rule, which made no reference to disclosure of information about employees, the rule in *Flamingo* specifically prohibited employees from revealing confidential information about "fellow employees." *Flamingo Hilton-Laughlin*, supra, 330 NLRB at 288 fn. 3. So too did the confidentiality rule in *University Medical Center* (prohibiting "release or disclosure of confidential information concerning patients or employees"), which the Board, relying on *Flamingo Hilton-Laughlin*, found unlawful "because it could reasonably be construed by employees to prohibit them from discussing information concerning terms and conditions of employment, including wages, which they might reasonably perceive to be within the scope of the broadly-stated category of 'confidential information' about employees." 335 NLRB at 1322. Finally, in *IRIS U.S.A., Inc.*, the disputed confidentiality provision instructed employees that confidential information "about . . . employees is strictly

[8] 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

[9] 330 NLRB 263 (1999).

[10] Member Liebman dissented in both *Layafette Park* and *Super K-Mart*. Contrary to the majority in both of those cases, she found that the respondents' confidentiality rules were unlawfully overbroad. Member Walsh did not participate in *Lafayette Park* or *Super K-Mart*; however, he agrees with Member Liebman's dissenting positions in those cases. *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39 (2003) (dissent). Notwithstanding their positions, Members Liebman and Walsh agree that under either the majority or dissenting views in *Lafayette Park* and *Super K-Mart*, the instant confidentiality rule is unlawfully overbroad.

[11] 330 NLRB 287 (1999).

[12] 335 NLRB 1318 (2001).

[13] 336 NLRB 1013 (2001).

confidential [and] . . . must not be disclosed to anyone . . . ." 336 NLRB at 1015. In finding that the rule violated Section 8(a)(1), the Board relied not only on its similarity to the unlawful rule in *Flamingo Hilton-Laughlin*, but concluded "[m]oreover, the . . . provision [went] further than its counterpart in *Flamingo Hilton-Laughlin* [cite omitted], by additionally instructing employees 'to resolve in favor of confidentiality' '[a]ny doubt about confidentiality' of employee information." 336 NLRB 1013 fn. 1.

We find that the two challenged rules in the instant case go even further than the confidentiality rules found unlawful in *Flamingo, University Medical Center*, and *IRIS*. The rules in those cases did not explicitly state that employees were prohibited from discussing their wages and working conditions. Rather, the Board concluded that the rules' broadly stated and undefined proscriptions against discussion of confidential information about employees reasonably could be construed by employees as prohibiting the discussion of wages and working conditions. The instant rule is even more clearly unlawful. The Respondent's confidentiality rule leaves employees with nothing to construe—it specifically defines confidential information to include wages and working conditions such as "disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases and termination date of employees," and then explicitly warns employees that "[a]ny breach or violation of this policy will lead to disciplinary action up to and including termination." We conclude, therefore, that this rule, which on its face and on threat of discipline, expressly prohibits the discussion of wages and other terms and conditions of employment, plainly infringes upon Section 7 rights and violates Section 8(a)(1).

3. We reach the same conclusion with respect to the Respondent's communication rule. This rule specifically references the confidentiality rule, discussed above, and prohibits "communicat[ion of] any confidential or sensitive information concerning the Company or any of its employees to any non-employee" without Respondent's approval. Thus, employees seeking to understand the parameters of this proscription necessarily must consider it in tandem with the fact that confidential information is defined in terms of wages and working conditions. Accordingly, in light of the link between the unlawful confidentiality rule and the communication rule, we conclude that the latter rule also violates Section 8(a)(1).[14]

4. In his recommended Order, the judge included broad language requiring the Respondent to cease and desist from "in any other manner" interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act. The judge provided no supporting rationale for his broad Order and we find that it is not warranted under the test set forth in *Hickmott Foods*, 242 NLRB 1357 (1979). See *Dai-Ichi Hotel Saipan Beach*, 337 NLRB 469, 470–471 fn. 12 (2002); *Kelly Construction of Indiana*, 333 NLRB 1272 fn. 3 (2001). Accordingly, we have provided a new Order and notice which, in addition to conforming with the violations found herein, contains customary narrow language requiring the Respondent to cease and desist from "in any like or related manner" interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Double Eagle Hotel and Casino, Cripple Creek, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule prohibiting employees from discussing tips or the Respondent's tip policy on the casino floor or anywhere on the premises.

(b) Maintaining language in rules in the employee handbook entitled "Confidential Information," "Customer Service," and "Communication" that prohibit em-

[14] Our dissenting colleague would adopt the judge's finding that both rules are lawful because there was no evidence that either was enforced unlawfully and because both rules, rather than being "aimed at Section 7 activity," achieve a reasonable balance between Sec. 7 rights and the need for confidentiality. We disagree on both points.

First, the fact that there is no evidence that either rule was *enforced* unlawfully is irrelevant where, as here, the alleged violation is the unlawful *maintenance* of the rules which, as discussed above, explicitly prohibit employees from exercising their Sec. 7 right to discuss among themselves their wages and other employment terms. *Brunswick Corp.*, 282 NLRB 794, 794–795 (1987). See also *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful).

Second, contrary to our dissenting colleague, the rules here do not achieve a balance, reasonable or otherwise, between Sec. 7 rights and the Respondent's confidentiality concerns. As can be seen from the work rule cases discussed above, a balancing analysis assumes the existence of an articulated employer right or concern (e.g., nondisclosure of "hotel private" information in *Lafayette Park*, nondisclosure of "company business" information in *Super K-Mart*, and nondisclosure of "proprietary" information such as business plans and trade secrets in *Mediaone of Greater Florida*), and determines whether it may lawfully coexist with the separate and distinct Sec. 7 rights of employees. Here, there is no employer side of the balancing equation that enables a balancing analysis to be undertaken. By defining its confidentiality concerns in terms of the most basic of Sec. 7 subjects—the ability to discuss terms and conditions of employment with fellow employees—the Respondent's rules violate Sec. 8(a)(1) per se.

ployees from discussing with nonemployees or among themselves wages, hours, and other terms and conditions of employment.

(c) Maintaining language in the "Gambling/Use of Property Amenities" rule of the employee handbook that prohibits employees from being on the Respondent's property unless working their scheduled shift.

(d) Maintaining language in the "Communication" rule of the employee handbook that prohibits employees from providing information about the Respondent to the media without the Respondent's prior approval.

(e) Threatening employees, directly or impliedly, with discharge, suspension, arrest, or other reprisals should they engage in union or other concerted activities protected by the Act, including handbilling on the public sidewalk.

(f) Removing union literature from the employees' lunchroom.

(g) Discharging or suspending employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind the language in the rules indicated in 1(b) through (d) above, remove the language from the employee handbook, and notify employees in writing that this has been done.

(b) Within 14 days from the date of this Order, offer Betty Ingerling, Carol Marthaler, and Barbara McCoy full reinstatement to their former positions, or if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights, benefits, or privileges previously enjoyed.

(c) Make Betty Ingerling, Carol Marthaler, and Barbara McCoy whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, less interim earnings, plus interest, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and/or suspensions of Betty Ingerling, Carol Marthaler, and Barbara McCoy and, within 3 days thereafter, notify them in writing that this has been done and that this unlawful action will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available to the Board or its agents for examination and copying at a reasonable place designated by them, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Cripple Creek, Colorado facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by 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 any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 1, 2001.

(g) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

CHAIRMAN BATTISTA, concurring in part, dissenting in part.

I agree with the judge and my colleagues except as set forth below.

1. I agree with the judge and my colleagues that the Respondent unlawfully maintained and enforced an overbroad oral policy that prohibited its employees from discussing their tips or the Respondent's tip distribution policy anywhere on the Respondent's property. I further agree that the discipline of employees Betty Ingerling, Carol Marthaler, and Barbara McCoy violated Section 8(a)(3). However, consistent with former Member Hurtgen's concurring position in *Saia Motor Freight Line*, 333 NLRB 784, 785–786 (2001), I would not find that *all* discipline imposed pursuant to an overbroad rule is necessarily unlawful. Thus, where the record clearly

[15] 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."

establishes that the discipline imposed was for conduct that an employer lawfully can proscribe, and the employer makes clear to the employees that their discipline is for this conduct, I would not find that the discipline violates Section 8(a)(3).

Here, the Respondent had a lawful basis for prohibiting employees from discussing tips on the gaming room floor.[1] However, the Respondent's discipline of its employees was based on their discussion of tips and not on the locus where the discussion occurred. In this regard, Ingerling testified that she was informed only that she was being terminated for discussing tips. Marthaler testified that when Slot Director Rodger Hostetler informed her that Ingerling had been terminated, Hostetler stated that it was "because of the tip situation . . . and we could not talk about tips anywhere in that building." I recognize that Marthaler additionally testified that, when she and McCoy were suspended, Hostetler made reference to "tips . . . pertaining to Thursday night," i.e., when tips were discussed on the gaming floor. And, later in the discussion, Hostetler referred to "disrupt[ions on] the floor." However, these statements are not sufficient to negate the proposition that the discussions were barred anywhere on company property.

2. I disagree with my colleagues that sections of the Respondent's handbook rules entitled "Confidential Information" and "Communication" are unlawful.

At the outset, it is important to note that the General Counsel does not contend that the rules were used or applied in an unlawful way. Indeed, there is no evidence of any use or application. Rather, the General Counsel contends that these rules are unlawful on their face.

I agree that a rule that clearly proscribes Section 7 activity can be condemned on it face. However, the instant rules are not of that character.

The first rule is not aimed at Section 7 activity. It is aimed at "Confidential Information." Employers have an interest in protecting against the disclosure of such information. In the instant case, disclosure of disciplinary matters, performance evaluations, grievances, pay, and termination data all involve sensitive matters. Disclosure can result in employee friction and invasion of privacy.

The Act seeks to balance Section 7 rights with the need for confidentiality.[2] The rule here seeks to achieve that balance. It permits discussion of employment-related matters with those inside the employee's department, the area in which most employees are likely to have Section 7 conversations. Further, the rule even permits conversations with those outside the department on a "need to know" basis. Since there is no evidence of use or application, it is not known how this is interpreted and applied. In addition, the rule says that if there are any doubts, an employee need only check with management. There is no indication that any employee has ever checked and received an unlawful answer. In this posture of the case, I would not presume that the rule is unlawful.

Concededly, certain discussions are prohibited within the employee's "own group." However, this rule is confined to "personal information" (undefined) and has an exception for "normal needs"(undefined). Again, absent some evidence that this rule has been implemented in an unlawful way, I would not presume that it is illegal.

The handbook's communication rule is also not aimed at Section 7 activity. Rather, it is aimed at "press relations." Arguably, Section 7 includes concerted employee communications to the media about terms and conditions of employment. However, the rule here does not forbid all such communications. It prohibits only the disclosure of "confidential or sensitive information." As discussed above, there is a delicate balance between Section 7 rights and confidentiality concerns. With respect to communications with the media, the concern for confidentiality is particularly heightened. In these circumstances, absent some evidence that the rule has been applied in an unlawful way, i.e., in situations where the Section 7 right would outweigh the confidentiality interest, I would not presume that it is illegal.

3. Finally, I do not pass on the judge's finding that the Respondent violated Section 8(a)(1) because Supervisor Leslie Blevins impliedly threatened employee Tonks with unspecified reprisals if Tina Tonks discussed the Respondent's tip policy. The judge based this finding on Blevins' statement to Tonks that "if you are going to get caught up in this slot mess, I will take care of that problem too." Unlike my colleagues, I find this remark ambiguous. It is not clear whether Blevins was saying that she would take action with respect to the "slot mess" or take action against employees engaged in Section 7 activity. Because of this ambiguity and because finding the statement to be a violation of Section 8(a)(1) it would be cumulative of other 8(a)(1) threats found herein, and would not affect the remedy, I do not pass on this allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

[1] Contrary to the judge, I find that the Respondent, based on "six years of experience" that included "complaints from customers" regarding employee disputes about tips on the game floor, established a legitimate business justification for prohibiting such discussions in this area.

[2] *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule prohibiting employees from discussing tips or our tip policy on the casino floor or anywhere on the premises.

WE WILL NOT maintain language in rules of the employee handbook entitled "Confidential Information," "Customer Service," and "Communication" that prohibits you from discussing with nonemployees or among yourselves wages, hours, and other terms and conditions of employment.

WE WILL NOT maintain language in the "Gambling/Use of Property Amenities" rule of the employee handbook that prohibits you from being on our property unless working your scheduled shift.

WE WILL NOT maintain language in the "Communication" rule of the employee handbook that prohibits you from providing information about us to the media without our prior approval.

WE WILL NOT threaten employees, directly or impliedly, with discharge, suspension, arrest, or other reprisals should they engage in union or other concerted activities protected by the Act, including handbilling on the public sidewalk.

WE WILL NOT remove union literature from the employees' lunchroom.

WE WILL NOT discharge or suspend employees for violating unlawful rules or because they engage in union or other concerted activity protected by the Act.

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

WE WILL rescind the language in the rules noted above, remove the language from the employee handbook, and notify employees in writing that this has been done.

WE WILL, within 14 days of the date of the Board's Order, offer Betty Ingerling reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment, without prejudice to her seniority or any other rights she previously enjoyed.

WE WILL, within 14 days of the Board's Order, rescind the suspensions given to Carol Marthaler and Barbara McCoy.

WE WILL make Betty Ingerling, Carol Marthaler, and Barbara McCoy whole for any loss of earnings and other benefits resulting from our unlawful discrimination against them.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Betty Ingerling and the unlawful suspensions of Carol Marthaler and Barbara McCoy, and WE WILL, within 3 days thereafter notify them that this has been done and that evidence of this unlawful conduct will not be used against them in any way.

DOUBLE EAGLE HOTEL & CASINO

William J. Daly and *Renee C. Barker, Esqs.*, for the General Counsel.

Henry L. Solano, Esq., of Denver, Colorado, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Colorado Springs, Colorado, on November 13 and 14, 2002, upon the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act), including the discharge of one employee and the suspension of three others.

The Respondent generally denied that it committed any violations of the Act, alleged 10 general affirmative defenses, including that the discharge and suspensions were for cause.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged at Cripple Creek, Colorado, in the operation of a hotel and casino. In the course and conduct of its business, the Respondent annually purchases and receives at its Cripple Creek facility goods, products, and materials directly from points outside the State of Colorado, valued in excess of $5000 and annually derives gross revenues in excess of $500,000. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Principally involved in this matter are two of several categories of employees—slot employees (technicians and attendants) and security officers. Both deal with customers who play slot machines, the basic difference being that the slot technicians are also capable of doing repair work on the machines and security officers apparently have additional responsibilities relating to security. Both receive tips from customers in addition to their hourly wage. The security officers wear black polo shirts and the slot employees wear colored ones.

Prior to May 21, 2001,[1] the Respondent's tip policy was such that each employee was required to put any tips received into a common pot and at the end of the shift, the tips would be divided in two, with each slot employee receiving an equal portion of one-half and each security officer an equal portion of the other. Necessarily, if there were more slots on duty than security, then the amount received by each slot would be less than the amount received by each security employee. And this is precisely what occurred on a few occasions in early 2001, when there were more slot employees on duty than security officers. As a result, the slot employees were unhappy.

Thus, by memo of May 21 from Gilbert Sisneros, the Respondent's general manager/owner, this policy was changed. Thereafter, the tip pool would be divided equally among all slot and security employees who worked the particular shift. However, this change in policy caused concern among some slot employees, at least those working the swing shift from 4 p.m. to 2 a.m., because typically there were fewer slots on duty than security (as opposed to the situation in early 2001 which prompted the change). The tip policy was a source of discussion among them.

That employees discussed the tip policy among themselves on the casino floor, and other places on the property, and were told not to do so is the genesis of this dispute. At issue are numerous allegations of the Respondent promulgating oral and written rules forbidding employees from discussing work-related issues among themselves and on company property, threats for not complying with these rules, the discharge of one employee and the suspension of three others for breaching these rules and engaging in other concerted activity protected by the Act. The facts and analysis of each allegation, or of several allegations where they involve generally the same unlawful activity, will be treated seriatim as they appear in the complaint.

B. Analysis and Concluding Findings

1. The no-discussion rules

The Respondent admits that it has maintained a rule prohibiting employees from discussing the tip policy on the casino floor. And the Respondent concedes that as a general proposition, the Board finds unlawful rules which restrict employees from discussing earnings. E.g., *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997), though rules applicable to an industrial setting do not transfer to retail enterprises. Indeed, the Board has long held that rules relating to employee activity on the sales floor of a retail establishment may be more restrictive than those applicable to an industrial enterprise. E.g., *Marshall Field & Co.*, 98 NLRB 88 (1952).

No doubt a casino is similar to a retail store, see *Dunes Hotel*, 284 NLRB 871 (1987), and, as with retail stores, to insure good order a discipline on the sales floor an employer can restrict solicitation in the selling areas. *McBride's of Naylor Road*, 229 NLRB 795 (1977). However, there is a distinction between "talking" and "solicitation." *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977). And to prohibit employees from discussing matters pertaining to unionization while on duty, but allowing discussion of other matters, violates Section 8(a)(1). *Teledyne Advanced Materials*, 332 NLRB 539 (2000). Here, there were no restrictions on subjects employees could discuss, other than attending to the needs of customers. Undeniably, when not busy, employees discussed among themselves a wide variety subjects.

The Respondent argues that the no-discussion policy in regard to tips was restricted to the gaming floor and was necessary because employee discussion of tips could lead to arguments among employees and make the customers' gaming experience an unpleasant one. Therefore, the proscription has a valid business justification and is not unlawful. I reject this argument.

First, as promulgated, the no-discussion rule was not limited to the gaming floor but was general—anytime, anywhere on company property. Such is clearly too restrictive and therefore unlawful. Second, even if the rule was simply limited to the gaming floor, the Respondent has shown no substantial business justification for it. While the Respondent's argument has some appeal in the abstract, there is no evidence that employees in fact discussed the tip policy in such a manner as to upset customers or even did so within hearing of customers. Speculation is no substitute for evidence. Absent some proven basis for prohibiting employees from talking about tips, I conclude that the rule was violative of Section 8(a)(1), as alleged in paragraph 5(a).

The General Counsel also alleges that rules set forth in the "employee handbook" unlawfully restrict employee communication among themselves. Specifically, the General Counsel argues that employees are prohibited from discussing certain subjects under "confidential information." However, the rule as written does not amount to an absolute proscription on discussing these subjects. Thus, "Information should be provided to employees outside the department or to those outside the Company only when a valid need to know can be shown to exist." And, "Unless there is a need for it in the normal course of business, personal information concerning individual employees should not be discussed with members of your own group."

Since discussion among employees of terms and conditions of employment is clearly a valid need in the normal course of their employment, the prohibition set forth would not be applicable. Nor does the rule specifically deny employees this right. Thus, I cannot find it unlawful on its face, nor is there evidence that it was enforced in a fashion more restrictive than written.

[1] All dates are in 2001, unless otherwise indicted.

Accordingly, I shall recommend that paragraph 5(b) be dismissed. *Lafayette Park Hotel*, 326 NLRB 824 (1998).

The General Counsel similarly alleges that the "customer service" section in the handbook unlawfully restricts employees from discussing working conditions. Specifically: "Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard." I find nothing in this rule which unlawfully prohibits employees from discussing working conditions among themselves on the casino floor. Accordingly, I shall recommend that paragraph 5(c) be dismissed.

In paragraph 5(o) the General Counsel alleges that on October 26, Slot Director Rodger Hostetler "orally promulgated a rule prohibiting employees from discussing tips or company problems." The only evidence which might tend to support this allegation is in the testimony of Betty Ingerling concerning her discharge interview wherein Hostetler told her she was being discharged for the "tip policy and that I was, and that's [what] I get for being a spokesperson for the other employees." I find nothing in Ingerling's testimony which would support a finding that Hostetler promulgated an unlawful rule, though this testimony does tend to show that Ingerling was unlawfully discharged, as will be discussed below. I shall recommend that paragraph 5(o) be dismissed.

Finally, the General Counsel alleges that on March 23, 2002, Security Lead Chuck Robertson "promulgated a rule prohibiting an employee from talking to another employee about any subject." The Respondent denies he did so and in any event, he is not a supervisor or agent whose actions would bind it.

During the material time, Robertson was the security lead on the swing shift, which meant that he was the highest-ranking security employee. He was paid $1 more than the average of other security employees and his duties included, according to Director of Human Resources Arthur Gomez, offering technical direction to:

> Any security officer that may have a question pertaining to compliance issues with gaming regulations, Mr. Robertson would be expected to know the answers and provide guidance on that. He would also be the individual that a security officer may report to if that officer needed to leave the zone that they were working in for restroom breaks or whatever the case may be. They would report that to Mr. Robertson and he would either cover that section himself or find someone else to do it for them.

While Gomez testified that Robertson had no direct disciplinary authority, he was listened to and did sign corrective action notices. Indeed, he was the person who was directly involved in telling Tina Tonks not to talk to another employee (see infra), and it was he who suspended. The issue is whether Robertson was a mere conduit for disciplinary and other supervisory decisions, as contended by the Respondent. *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998). Or whether he exercised independent judgment. As to Tonks, and generally directed security personal on his shift, I believe Robertson exercised independent judgment.

From these facts, I conclude that Robertson in fact responsibly directed employees, assigned them to specific zones when needed, and was responsibly involved in the discipline of employees. As such he was a supervisor within the meaning of Section 2(11) of the Act and his statements bound the Respondent.

I discount the Respondent's argument that since he accepted tips, and Colorado gaming laws prohibit "key employees" from doing so, he must not have been a supervisor. I conclude there is a distinction between a "key employee" and lower-level employees who nevertheless have supervisory authority under Section 2(11). As argued by the Respondent a "key employee" "is any executive, employee, or agent of the gaming licensee having the power to exercise a significant influence over decisions concerning any part of the operation of the gaming licensee. C.R.S. §12-47.1–103(14)." Such definition clearly refers to higher management and not to line supervisors.

In support of the allegation in paragraph 5(z), the General Counsel argues that on March 23, 2002: "By forbidding Tonks to speak to Sherry (an employee in another classification) at any time on any subject, Robertson was attempting to solve the problem of a love triangle, but he restricted Tonks from discussing protected subjects, such as terms and conditions of employment." This, I conclude, is a stretch. Tonks testified that Robertson told her that night not to talk to Sherry, because of a perceived love triangle problem. (According to Robertson, Sherry and another woman were dating the same man.) It is difficult to conclude that Tonks and other employees would therefore believe that they were unlawfully forbidden to discuss terms and conditions of employment. No doubt companies have the management right to keep personal problems among employees in check. Regardless of whether Robertson's proscription to Tonks was reasonable, I do not find it to have interfered with the exercise of Section 7 rights. Accordingly, I will recommend that paragraph 5(z) be dismissed.

2. The no-access policy

Unquestionably, the Respondent has a rule prohibiting employees from being on company property during their off-duty hours. Specifically, in the employee handbook: "You are not allowed on property unless working. (With permission, employees can, apparently, take meals in the restaurant.) You are not allowed to gamble on property at any time." The General Counsel contends this rule infringes on employees' Section 7 rights because on its face it denies to employees access even to parking lots and other nonworking areas. The Respondent maintains that such a construction is "hypertechnical" and that "'on property' means the interior of the facility." Thus, Arthur Gomez, the Respondent's director of human resources, testified that "on property" in the written rules means "the buildings, the gaming area, the hotel." He distinguished between "on property" and "on premises" which would include outside areas such as the parking lots. But he further testified, that this distinction was "[i]n my mind." It is not set forth in any written document offered by the Respondent.

I reject the Respondent's argument. The rule says what it says. If the Respondent had wanted to exclude parking lots and other no-work areas from its no-access rule, it could have done so. However, as written, the rule infringes on employees' Sec-

tion 7 rights and therefore violates Section 8(a)(1) as alleged in paragraph 5(d). *Lafayette Park Hotel*, supra.

3. Proscription against talking to the media and others

In material part, the "communication" section of the employee handbook states: "Without appropriate approval, under no circumstances shall you provide information about the company to the media." "You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President."

With caveats not applicable here, the Board has generally concluded that rules barring employees from discussing matters relating to their terms and conditions of employment with news organizations as well as other third parties is unlawful. E.g., *Leather Center*, 312 NLRB 521 (1993). I, therefore, conclude that the blanket prohibition from providing any information about the company to the media is an unlawful infringement on Section 7 rights and violates Section 8(a)(1) as alleged in paragraphs 5(e) and (f).

However, whether the proscription in the second sentence violates the Act is another matter. I conclude not. In *Lafayette Park Hotel*, supra, the Board found a similar rule permissible, concluding that employees reading the rule would not reasonably conclude that they were prohibited from discussing their wages and other terms and conditions of employment among themselves and with others. And the employer did have a legitimate interest in protecting confidential information. Accordingly, I conclude that paragraph 5(g) should be dismissed.

4. Alleged threats

In paragraphs 5(h), (j), (k), (l), (m), (n), (p), (t), (w), (x), (y), and others which were withdrawn at the hearing, the General Counsel alleges that various agents of the Respondent threatened employees in violation of Section 8(a)(1).

On a Saturday night in late October, Lead Key Leslie Blevins asked an employee in security, Lisa Henderson, to serve as a cocktail waitress. Some employees observed Henderson keeping tips she received rather than putting them in the common tip box, and they so informed Betty Ingerling who said she would take this up with management. And she did tell Hostetler what she had heard. Then the next day, according to Ingerling, Blevins called Ingerling into her office and "wanted to know what the big deal was" with regard to Henderson and the tips. Ingerling told her what she had heard and Blevins said, "[W]ell it was only a few dollars and she (Blevins) was the one that had asked her to cocktail." Blevins went on to say "that maybe I would be happier working someplace else." Ingerling further testified that Blevins "said that if the three of, any of us would have went up to Gilbert's (Sisnero) office, we would have, he would have automatically fired us on the spot."

That Ingerling and others questioned the Respondent allowing Henderson to keep the cocktail tips she received was clearly concerted activity protected by the Act, even if their concern was trivial. However, to find a violation alleged in paragraph 5(h) would require crediting Ingerling over Blevins' denials, which I decline to do.

I conclude that Ingerling's testimony was of questionable credibility, and where in direct conflict with others, I do not credit her. In October, as the issues involved in this matter were active, including the tip matter, and a few days prior to her discharge, Ingerling and three other slot employees wore black (security) polo shirts rather than their green ones. Ingerling adamantly claimed that doing so was not a concerted protest. She testified that she wore the black shirt out of modesty concerns and the fact that other slot employees also wore black was a mere coincidence. After months of wearing the green shirt, "I found the green shirts were not very becoming to women." "They were very thin." But one of them, who apparently had no similar concerns, told Robertson "as long as we're going to have to split the tips with the security the way we are, we're just going to come dressed like security." Ingerling's testimony about wearing the black shirt is simply so incredible that I believe that she sought to mislead me on what she thought was a material issue. Accordingly, I discredit her and conclude that the Respondent did not violate Section 8(a)(1) as alleged in paragraph 5(h).

It is alleged in paragraph 5(j) that Hostetler and Blevins told an employee that the reason for the employee's discharge was because that employee was an instigator and spokesperson for other employees, thereby impliedly threatening employees. This apparently relates to Ingerling's discharge interview at which only she was present. If credited, which I do not, it would be some evidence that her discharge was for the unlawful reason that she had engaged in protected, concerted activity. However, even then it is questionable that this would be independently violative of Section 8(a)(1) since there is no evidence it was communicated to other employees. In any event, I do not credit Ingerling and conclude that paragraph 5(j) should be dismissed.

In paragraph 5(k) it is alleged that on or about October 26, Hostetler "impliedly threatened an employee by telling the employee to cease engaging in protected concerted activities of attempting to obtain changes in the Respondent's tip policy." This allegation is apparently based on the testimony of Ingerling who had discussed with Hostetler arranging a meeting between her and management on behalf of several employees. I cannot find in her testimony that Hostetler made the implied threat alleged. Accordingly, I shall recommend that this paragraph be dismissed.

The alleged implied threat in paragraph 5(l) (discharge if employees attempt to change the tip policy) seems subsumed in the allegation prohibiting discussion of the tip policy in paragraph 5(a). There is no independent evidence of such a threat. Nevertheless, that the Respondent prohibited employees from discussing the tip policy, as found above, implies some kind of discipline if employees violate the prohibition. Accordingly, I conclude that the Respondent did impliedly threaten employees should they attempt to change the tip policy.

Paragraph 5(m) alleges that Robertson threatened employees should they discuss the discharge of Ingerling. Tonks testified that about 45 minutes after Ingerling was discharged, Robertson said, "I just want to let you know that anyone caught talking about the situation with Betty will be suspended or fired." Robertson testified that he was working just 3 days a week and

was not present the day Ingerling was terminated. He further testified that he did not discuss the fact of Ingerling's discharge with "the security staff on duty" or any of the slot staff.

Although Robertson seemed credible, and has no apparent stake in the outcome of this matter since he is no longer employed by the Respondent, he was not asked to specifically deny the assertion of Tonks. His testimony, while seemingly in direct conflict with Tonks, really was not. He was simply asked in general terms whether he discussed Ingerling's discharge with any of the security staff on duty. Such, I conclude, is not sufficient to rebut the testimony of Tonks, whom I found also to be a generally credible witness. Accordingly, I conclude that Robertson made the threat alleged in paragraph 5(m).

Don Herndon is the director of security. On October 29, he suspended Carol Marthaler and Barbara McCoy (discussed below), and at that time, according to Marthaler, "[H]e told us that if we came, when we came back, we were not to say one word to anybody about our suspension, because if we did we would be fired, and it was going to be kept confidential and nobody was to know." Herndon testified to the events leading to the suspension of Marthaler and McCoy, however, he was not asked to affirm or deny the statement attributed to him by Marthaler. I therefore conclude that he did in fact tell them not to discuss their suspensions and if they did, they would be discharged. An employee's suspension is clearly a term or condition of employment which employees have the protected right to discuss. Thus, Herndon's admonition was clearly a threat in violation of Section 8(a)(1) as alleged in paragraph 5(n).

In paragraph 5(p) it is alleged that Hostetler "threatened employees with discharge if they violated the rule described above in paragraph 5(o)." Inasmuch as I concluded above that Hostetler did not promulgate the rule alleged in paragraph 5(o), nor have I been directed to testimony in support of the alleged threat, I conclude that the allegation in paragraph 5(p) has not been established by a preponderance of the credible evidence and should be dismissed.

It appears that the threat alleged in paragraph 5(t) is based on the testimony of Tonks. She recalled an incident occurring a few days before Christmas wherein Robertson called her into Blevins office. "Well Leslie (Blevins) said that she had a problem, that I was snubbing, and I said no, I'm not snubbing you, and she said well, if you are going to get caught up in this slot mess, I can take care of that too. And I said no, ma'am. I'm not. And she just reiterated, I suppose, if you are going to get caught up in this slot mess, I will take care of that problem too." Blevins was not asked to affirm or deny the testimony of Tonks. Thus I find that Blevins made the statement attributed to her by Tonks. Since this occurred following the discharge of Ingerling and much discussion of the tip policy change, I conclude that Blevins did make an implied threat of reprisals to Tonks should she discuss the tip policy. Accordingly, I conclude that the allegation in paragraph 5(t) has been established.

For 4 nights beginning on January 11, 2002, Union Representative Leslie Thompson, Ingerling, and three members of the Union passed out handbills at the Respondent's premises. Two of the handbillers were stationed in the public alley and two on the public sidewalk in front of the casino. According to Thompson, whose testimony I credit, after they had been handbilling a short time, Herndon "stuck his head out front and said he was calling the cops and so I stepped there to talk to him." Thompson denied that the handbillers had blocked access to the casino, had been in the alcove, or had stood anywhere other than the public sidewalk. Nevertheless, Herndon said, "[W]ell I'm calling the cops and you can be arrested for criminal trespass." In fact the police came and said, "[I]t would probably be best if we spent the rest of—that there wasn't a problem with us being on the other side, but it was probably best if we spent the rest of the night on the far side of the street." They were not given a citation by the police and returned to handbill the next 3 evenings.

The Respondent contends that Herndon saw the handbillers block the entrance door and told them they could not. He further testified that they did not seem agreeable and he therefore called the police. Ingerling and Thompson deny that they blocked the entrance to the casino or were stationed anywhere other than the sidewalk. On this I credit Ingerling and Thompson and I discredit Herndon. I conclude that Herndon called the police to have the handbillers removed from in front of the casino, but which was public property. The police would not do so and the handbilling continued another 3 days without incident. The threat to have the police remove them from the public sidewalk, followed by attempting to do so was violative of Section 8(a)(1) as alleged in paragraph 5(w) of the complaint. *Snyder's of Hanover, Inc.*, 334 NLRB 183 (2001).

Shelly Ridderman, a bartender, testified that she observed union representatives passing out literature at the front entrance to the casino 2 days. The first day, according to Ridderman, her supervisor, Sarah Tonn, "[T]old me she just wanted to warn me that if anybody was caught talking about the Union or handing out pamphlets or reading them or anything, they would be fired."

Tonn generally denied making such a statement to Ridderman, but did admit having a discussion with her about the handbilling. On this I credit Ridderman and discredit Tonn. I found Ridderman's version more believable and consistent with the Respondent's actions toward the employees' union activity. Accordingly, I conclude that the Respondent made the threat alleged in paragraph 5(x).

Tonks testified that "maybe in February" "Chuck and Denny, Chuck Robertson and Denny Warrick were walking by the cage, and as they rounded the cage, Denny said this union thing is getting out of hand, and that was all I heard." This is alleged in paragraph 5(y) to have been an unlawful threat. I disagree. First, whatever Warrick said, according to Tonks, it was not addressed to her or any other employee. She simply overheard the remark. Secondly, I do not believe this brief comment contained any kind of an implied threat of reprisals. Accordingly, I conclude that paragraph 5(y) should be dismissed.

5. The removal of union literature

It is alleged that on December 8, Dennis Warrick and Leslie Blevins removed union literature from the Respondent's lunchroom in violation of Section 8(a)(1). The parties are in general agreement concerning the facts of this allegation. On December 8, Lowell Moses was terminated (apparently for cause and his termination is not in issue here). When Moses was being

escorted from the premises, he placed an item of union literature on Hostetler's desk. Warrick then learned that there were items of union literature in the employees' lunchroom. He retrieved these and Blevins gave them to Sisneros, who in turn, sent them to his attorney.

The General Counsel argues that removing this literature was violative of Section 8(a)(1) because doing so tended to interfere with employees' right to distribute union literature in nonwork areas on nonworking time. I agree. *Venture Industries*, 330 NLRB 1133 (2000).

The Respondent contends that the union literature related to the discharge of Moses for threatening another employee, was therefore evidence and cannot be considered covered by Section 7. Essentially the Respondent argues that if an employee is discharged for cause, any protected activity he might have engaged in loses its protection as to other employees. I find no basis in the Act to support this assertion, nor has the Respondent cited any supporting authority or even offered facts (as opposed to argument) that the literature placed by Moses in fact related to the threats he made leading to his discharge.

Accordingly, I conclude that by removing union literature from the employees' lunchroom, the Respondent violated Section 8(a)(1) as alleged in paragraph 5(q).

6. The discharge of Betty Ingerling

On October 26, Ingerling was discharged allegedly because she requested a meeting with the Respondent's general manager to discuss wages, hours, and other terms and conditions of employment and/or because she violated the Respondent's rule prohibiting discussion of the tip policy on the casino floor. Although there is conflicting testimony concerning Ingerling's participation in concerted activity, and whether such had a causal relationship to her discharge, no doubt a motivating reason was the fact that she had discussed the tip policy on the casino floor.

Thus Blevins testified, in answer to the reasons Ingerling was discharged, "Betty had several situations that she was involved in and discussing tips on the floor was one." Blevins further testified that McCoy and Marthaler were suspended rather than discharged because "we hadn't called them in on a tip issue."

There is no doubt from Respondent's admissions that absent Ingerling discussing the tip policy on the casino floor she would not have been discharged. My conclusion that Ingerling was unlawfully discharged is based on these admissions and not on Ingerling's credibility, which I find singularly lacking.

Since I have concluded that the rule violation for which Ingerling was discharged was unlawful, it follows that her discharge was also unlawful as alleged in paragraph 6(c) of the complaint.

7. The suspensions of Carol Marthaler and Barbara McCoy

The Respondent admits that Marthaler and McCoy were discharged because they talked on the gaming floor about the Lisa Henderson tip decision which was a violation of the Respondent's rule prohibiting such discussions. Prohibiting the discussion of tips generally, and the Henderson situation specifically, clearly violates Section 8(a)(1), absent some evidence that such was necessary to maintain good order and discipline and avoid negative customer reaction. As noted above, I conclude that the Respondent did not offer sufficient persuasive evidence that prohibiting employees from discussing tips on the gaming floor was justified. Nor did the Respondent offer evidence that the specific discussion of the Henderson tip situation was justified.

Clearly, the Respondent's decision relating to Henderson being allowed to keep her tips rather than share them affected the wages of other employees, even if minimally. To have prohibited employees from talking about this on the gaming floor was clearly violative of Section 8(a)(1). The suspension of Marthaler and McCoy for breaching this proscription was necessarily also violative of Section 8(a)(1).

8. The suspension of Tina Tonks

The General Counsel alleges that Tonks was unlawfully suspended for violating the unlawful rule prohibiting discussion of tips (paragraph 5(a)) "and/or the rule described above in paragraph 5(x) and to discourage employees from engaging in these or other concerted activities."[2]

The General Counsel argues that Tonks was suspended when she breached a rule promulgated by Herndon to the effect that she was not to talk to fellow employee Sherry because of a "love triangle" at work.

As the General Counsel argues, and as the evidence shows, the basis of Herndon's proscription to Tonks did not relate to wages, hours, or other terms and conditions of employment. Without regard to the reasonableness, or lack thereof, of Herndon's attempt to head off a situation involving employees' personal problems, such did not relate to concerted activity protected by the Act. In short, I conclude that Tonks was not suspended for violating the unlawful rule concerning discussion of tips. Accordingly, I conclude that the General Counsel failed to prove that Tonks was suspended in violation of Section 8(a)(1) of the Act and I shall recommend paragraph 5(x) be dismissed.

IV. REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I conclude that it should be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act, including offering reinstatement to Betty Ingerling[3] to her former job, or if that job no longer exists, to a substantially equivalent position of employment and make her and Carol Marthaler and Barbara McCoy whole for any loss of earnings and other benefits they may have suffered in accordance with the provisions *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[2] As noted above, par. 5(x) alleged a threat by Tonn, not an unlawful rule.

[3] Notwithstanding that I generally did not credit Ingerling, she should be reinstated with backpay in order to vindicate public rights.