Flamingo Hilton-Laughlin *and* Hotel Employees and Restaurant Employees Local 86, Hotel Employees International Union, AFL–CIO. Case 32–CA–15627

November 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On December 11, 1997, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent, the General Counsel, and the Union each filed exceptions and a supporting brief, and the Union filed a brief in opposition to the Respondent's exceptions.

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, and conclusions as modified and to adopt the recommended Order as modified[1] and set forth in full below.

The complaint alleged that various rules in the Respondent's employee handbook violated the Act. The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining:

1. "Code of conduct" and "disclosure" rules that could be interpreted as limiting its employees' right to discuss wages and working conditions.

2. A rule prohibiting employees from wearing unauthorized pins and decals.

3. A rule prohibiting off-duty employees from engaging in solicitation or distribution in public areas of its facility other than gaming areas.

4. A rule prohibiting making "false, vicious, profane, or malicious statements regarding another employee, guest, patron, or the Hotel itself."

5. Rules prohibiting "using loud, abusive or foul language" and prohibiting "disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees."

6. A rule restricting off-duty employees' patronizing of the hotel.

7. A rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the hotel."

8. A rule prohibiting "insubordination, derogatory behavior towards management personnel, refusal of job assignments, or harassment of another employee or guest."

The judge dismissed allegations that the Respondent violated Section 8(a)(1) by maintaining:

1. A rule prohibiting employees from wearing hotel uniforms off hotel premises without management permission.

2. A policy requiring prior management approval before any employee posts a written notice on the hotel's premises.

3. A rule prohibiting nonemployees from soliciting off-duty employees in certain areas of the hotel open to the public.

4. A rule prohibiting "failure to have or maintain in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors."

We agree with the judge's dismissals,[2] reverse his findings that maintenance of the rules described in items 7 and 8 above violated Section 8(a)(1), and adopt his

[1] In the last paragraph of sec. II,F of his decision, the judge found that two of the Respondent's rules concerning abusive or insulting language violate the Act, but he failed to include these violations in either his conclusions of law or his recommended Order. In the last paragraph of sec. II,C of his decision, the judge dismissed an allegation that the Respondent's rule prohibiting the wearing of hotel uniforms off the Respondent's premises violated the Act. Nevertheless, the judge's Conclusion of Law 3(b) inadvertently states that this rule violates the Act, and par. 1(b) of his recommended Order requires the Respondent to cease maintaining this rule. Our amended conclusions of law and our Order, below, correct these inadvertent errors. We also substitute a new notice containing language consistent with these changes.

Additionally, without setting forth any supporting rationale, the judge, in his recommended Order, provided "broad" cease-and-desist 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 Sec. 7 of the Act. We find that broad cease-and-desist language is not warranted in this case. See *Hickmott Foods*, 242 NLRB 1357 (1979). Instead, we have provided in our Order 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 Sec. 7 of the Act. Our new notice also contains narrow cease-and-desist language.

[2] Contrary to her colleagues and the judge, Member Liebman finds that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a rule prohibiting employees from:

Fail[ing] to have or maintain in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors.

In *Lafayette Park Hotel*, 326 NLRB 824, 830 (1998), Members Fox and Liebman, in dissent, found that the employer violated Sec. 8(a)(1) by maintaining a rule, similar to the rule in question here, which prohibited:

Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

Members Fox and Liebman found that this rule was overly broad and ambiguous, that it failed to define the area of permissible conduct in a manner clear to employees, and that, consequently, it had a reasonable tendency to cause employees to refrain from engaging in protected activities, rather than risk being disciplined for violating the rule. Id. at 830. Likewise in the instant case, and for the same reasons, Member Liebman finds that the Respondent's maintenance of the rule in question here violates Sec. 8(a)(1).

other findings of violations,[3] with certain qualifications set forth below.[4] In evaluating the rules at issue here, we apply, where relevant, the Board's decision in *Lafayette Park Hotel*, supra, which issued subsequent to the judge's decision in this case.

1. The judge found, in section II,E of his decision, that the Respondent's no-solicitation policy was unlawful in that it prohibited off-duty employees from soliciting other off-duty employees in all public areas of the hotel. He found that, subject only to certain narrow exceptions, employers may not prohibit off-duty employee solicitation or distribution if the employees are permissibly present while off-duty. In his analysis, however, the judge did not specify the particular language in the Respondent's no-solicitation policy to which this finding pertained. In adopting the judge's finding of a violation, we specify that the language found unlawful is the provision stating: "No employee may solicit other employees at any time in gaming, meeting, convention, exhibit, or recreational areas open to guest and/or the public." We agree that this provision is overbroad to the extent that it bars off-duty employees from soliciting other off-duty employees in public areas of the Respondent's facility other than gaming areas. See *Barney's Club*, 227 NLRB 414, 417 (1976).

2. The judge, in section II,G of his decision, found that the Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook a rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel." The judge found that the rule failed to define areas of permissible and impermissible conduct and that, therefore, employees might reasonably refrain from Section 7 activity in order to comply with the rule. We disagree.

In *Lafayette Park Hotel*, supra at 824, the Board recently found a similar rule not to violate the Act. In that case, the employer's standard of conduct 31 prohibited the following:

> Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees,

[3] In agreeing with the finding in sec. II,B of the judge's decision that the Respondent's code of conduct and disclosure rules violate Sec. 8(a)(1) of the Act, Chairman Truesdale notes that the code of conduct prohibits employees from revealing confidential information about customers, hotel business, or "fellow employees." The prohibition on revealing information about fellow employees, in Chairman Truesdale's view, makes these rules distinguishable from *Lafayette Park Hotel*, supra. In that case, the Board found lawful the employer's standard of conduct 17, which prohibited employees from "[d]ivulging Hotel-private information" but contained no provision concerning disclosure of information about fellow employees.

In *Lafayette Park Hotel*, supra at 830, Members Fox and Liebman, in dissent, found that the employer violated Sec. 8(a)(1) by maintaining the rule (standard of conduct 17), referred to above by the Chairman, prohibiting employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information." Member Liebman agrees with the Chairman that the prohibition against revealing information about employees in the rule in question here makes the rule unlawful. In finding this rule to be unlawful, she also relies on the rationale she applied in finding the similar rule unlawful in her joint dissent in *Lafayette Park Hotel*. See also *Super K-Mart*, 330 NLRB 263 (1999) (dissenting opinion).

Member Brame, contrary to his colleagues, would not adopt the judge's finding that the Respondent's code of conduct and disclosure rules violate the Act. In Member Brame's view, these rules are not meaningfully distinguishable from the rule prohibiting disclosure of "Hotel-private information" found lawful in *Lafayette Park Hotel.* Like that rule, Member Brame would find that employees here would not reasonably read the Respondent's code of conduct and disclosure rules as prohibiting discussion of terms and conditions of employment. Rather, in Member Brame's view, employees would reasonably understand the rules as designed to protect the Respondent's interest in maintaining the confidentiality of proprietary and other information that is properly kept private.

Additionally, unlike his colleagues, Member Brame would not adopt the finding, in sec. II,F of the judge's decision, that Sec. 8(a)(1) was violated by the Respondent's rule prohibiting employees from "[m]aking false, vicious, profane, or malicious statements regarding another employee, guest, patron, or the Hotel itself." In *Lafayette Park Hotel,* supra, the Board addressed the employer's standard of conduct 18, which contained virtually identical language. As in *Lafayette Park Hotel,* supra at 828 fn. 15, Member Brame would find that the Respondent's mere maintenance of this rule does not reasonably tend to chill employees' Sec. 7 activity, because "employees would reasonably recognize that the rule . . . is directed at a legitimate employer interest and not Sec. 7 activity."

Further, unlike his colleagues, Member Brame would not adopt the finding, in sec. II,F of the judge's decision, that Sec. 8(a)(1) was violated by the Respondent's rules that prohibited "[u]sing loud, abusive or foul language" and prohibited "[d]isorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees." Member Brame would likewise find that employees reasonably would recognize that these rules are directed at legitimate employer interests and not Sec. 7 activity.

Finally, while joining his colleagues in the remaining violations that they find, Member Brame notes that these violations are highly theoretical in nature. Indeed, it is conceded that the rules at issue in this case were not initiated in response to any union or protected, concerted activity, and there is no evidence that the Respondent disciplined any employee under the rules for engaging in union or protected, concerted activity. As the Fourth Circuit warned in a slightly different context, "[s]omewhere, in the vast human experience, there must be an inconvenience so minimally damaging, so utterly trivial, so profoundly petty, that it should not give rise to a [Sec. 8(a)(1) violation]. If so this is it." *Eastern Omni Constructors v. NLRB*, 170 F.3d 418, 426 (1998), quoting *Beraho v. S .C. State College*, 394 S.E.2d 28, 29 (1990) (Sanders, C. J., concurring). In Member Brame's view, prosecution of trivial violations such as these is not a wise use of the Board's resources.

[4] In the first paragraph of sec. II,F of his decision, the judge set forth two rules that he stated were at issue. The first rule, according to the judge, prohibited "[i]nsubordination, derogatory behavior towards management personnel, refusal of job assignments, or harassment of another employee or guest." This rule, however, does not, in fact, appear in the Respondent's employee handbook (Jt. Exh. 1), which was made part of the record. Accordingly, we reverse the judge's finding that the Respondent violated the Act by maintaining such a rule.

We adopt the judge's finding that maintenance of the second rule, which prohibited "[m]aking false, vicious, profane, or malicious statements regarding another employee, guest, patron, or the Hotel itself" violates Sec. 8(a)(1). See *Lafayette Park Hotel*, supra (standard of conduct 18). As indicated above, Member Brame does not join in adopting this violation.

> supervisors, or the hotel's reputation or good will in the community.

The Respondent's rule at issue here is nearly identical to standard of conduct 31 in *Lafayette Park Hotel*. The Respondent's rule concerns "off-duty misconduct," while standard of conduct 31 concerned "[u]nlawful or improper conduct off the hotel's premises or during nonworking hours."[5] The Respondent's rule is further limited to two types of misconduct. One, misconduct that "materially and adversely affects job performance," is quite similar to standard of conduct 31's limitation to improper conduct "which affects the employee's relationship with the job, fellow employees, [or] supervisors." The second type of misconduct addressed by the Respondent's rule, misconduct that "tends to bring discredit to the Hotel," is quite similar to the second prong of standard of conduct 31, which addressed improper conduct "which affects . . . . the hotel's reputation or good will in the community."

In finding standard of conduct 31 not to violate the Act, the Board majority in *Lafayette Park Hotel* stated:

> [W]e do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity that the Respondent may deem to be "improper." To ascribe such a meaning to these words is, quite simply, far-fetched. Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.[6]

Examination of the language of the Respondent's rule leads us to find, as the Board did in *Lafayette Park Hotel,* that the Respondent's rule cannot reasonably be read as encompassing Section 7 activity and that employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity. Accordingly, contrary to the judge's recommendation, we dismiss the complaint allegation that the Respondent's maintenance of its rule concerning off-duty misconduct violates Section 8(a)(1).[7]

3. The judge, in section II,H of his decision, found that the Respondent's rule proscribing "patronizing the public dining rooms, bars, cocktail lounges, guest rooms, shops, or other guest facilities without prior permission of the employees' department manager" violated Section 8(a)(1) under the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976). The Respondent does not, however, have a rule containing the particular restrictions recited by the judge.[8] Rather, the portion of the Respondent's "Employee Patronage" rule that the complaint alleged as unlawful and that the parties litigated is a provision stating, "Employees are not permitted to patronize the property during the eight hours immediately before a scheduled shift." The General Counsel contends that this provision runs afoul of the principle set forth in *Tri-County Medical Center*. There, the Board held that, "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." 222 NLRB at 1089. The Board further stated that a no-access rule concerning off-duty employees is valid only if it:

> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.[9]

The Respondent contends that its rule prohibiting employees from patronizing the property during the 8 hours immediately before a scheduled shift meets these criteria and is therefore lawful. In particular, the Respondent contends that the rule limits access only to the interior of its facilities, because the Respondent's hotel offers no restaurants or gaming operations which one might "patronize" on the outside portions of its property.

We find that the Respondent's rule prohibiting employees from "patroniz[ing] the property" during the 8 hours immediately before a scheduled shift is unlawful under *Tri-County Medical Center.* The rule on its face is not limited to the interior of the Respondent's facilities but, rather, by its terms, restricts employee access to the Respondent's entire "property." While the Respondent contends that it has no outside restaurants or other exterior facilities that customers could "patronize," this asserted fact is not established by the record. Moreover, implicit in the Respondent's argument is the assumption that the term "patronize" can mean only "be a customer of." Another common definition of the term "patronize," however, is "use."[10] Thus, the Respondent's rule that

[5] Standard of conduct 31 is, in fact, broader than the Respondent's rule, in that standard of conduct 31 concerned not only off-duty misconduct (conduct "during non-working hours") but also conduct "off the hotel's premises," which apparently could be conduct occurring while either on duty or off duty.

[6] Id. at 827.

[7] Contrary to her colleagues, Member Liebman finds that the judge correctly found that the Respondent violated Sec. 8(a)(1) by maintaining the "off-duty misconduct" rule in question. She agrees with her colleagues that the Respondent's rule is largely identical to standard of conduct 31 in *Lafayette Park Hotel*, and in finding a violation here she relies on the reasons for finding standard of conduct 31 unlawful set forth in her joint dissenting opinion in that case.

[8] This case was tried in tandem with a similar case in which the Flamingo Hilton-Reno was the Respondent (Case 32–CA–15626). It appears that the judge inadvertently quoted the rule on employee patronage that appeared in the *Flamingo Hilton-Reno* case.

[9] 222 NLRB at 1089.

[10] Webster's Third New International Dictionary Unabridged 1656 (1981).

"[e]mployees are not permitted to patronize the property during the eight hours immediately before a scheduled shift" can as readily apply to outside portions of the Respondent's property as to interior portions and to use by noncustomers. Moreover, the Respondent has not established a business reason for this rule. Accordingly, we find that the Respondent's maintenance of its rule that "[e]mployees are not permitted to patronize the property during the eight hours immediately before a scheduled shift" violates Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 3(b) of the judge's decision.

"(b) Prohibit abusive or insulting language without making clear that such rules are not intended to bar lawful union organizing propaganda."

2. Substitute the following for Conclusion of Law 3(e).

"(e) Prohibit 'false, vicious, or profane' statements without clearly indicating to employees the boundaries of permissible and impermissible conduct."

3. Delete Conclusion of Law 3(f).

4. Revise Conclusion of Law 3(g) to read as follows and redesignate it as Conclusion of Law 3(f).

"(f) Prohibit employees from patronizing the Respondent's property during the 8 hours before a scheduled shift."

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, Flamingo Hilton-Laughlin, Laughlin, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules limiting its employees' right to discuss wages and working conditions.

(b) Maintaining rules prohibiting abusive or insulting language without making clear that such rules are not intended to bar lawful union organizing propaganda.

(c) Maintaining rules prohibiting the wearing of union insignia.

(d) Maintaining rules prohibiting off-duty employees from engaging in solicitation or distribution in public areas of its facility other than gaming areas.

(e) Maintaining rules prohibiting "false, vicious, or profane" statements without clearly indicating to employees the boundaries of permissible and impermissible conduct.

(f) Maintaining rules prohibiting employees from patronizing the Respondent's property during the 8 hours before a scheduled shift.

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

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

(a) Rescind the rules indicated in 1(a) through (g) above, remove them from its employee handbook, and advise the employees in writing that the rules are no longer being maintained.

(b) Within 14 days after service by the Region, post at its Laughlin, Nevada facility copies, in English and Spanish, of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 32, 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 February 19, 1996.

(c) 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.

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.

WE WILL NOT maintain rules limiting our employees' right to discuss wages and working conditions.

WE WILL NOT maintain rules prohibiting abusive or insulting language without making clear that such rules are not intended to bar lawful union organizing propaganda.

WE WILL NOT maintain rules prohibiting the wearing of union insignia.

WE WILL NOT maintain rules prohibiting off-duty employees from engaging in solicitation or distribution in public areas of our facility other than gaming areas.

[11] 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."

WE WILL NOT maintain rules prohibiting "false, vicious, or profane" statements without clearly indicating to you the boundaries of permissible and impermissible conduct.

WE WILL NOT maintain rules prohibiting you from patronizing our property during the 8 hours before a scheduled shift.

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

WE WILL rescind the rules indicated above, remove them from our employee handbook, and advise the employees in writing that the rules are no longer being maintained.

FLAMINGO HILTON-LAUGHLIN

Gary M. Connaughton, Esq., for the General Counsel.
Joseph E. Herman, Esq. (*Morgan, Lewis & Bockius*), of Los Angeles, California, for the Respondent.
Michael T. Anderson, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Sparks, Nevada, on December 17, 1996. On August 19, 1996, Hotel Employees and Restaurant Employees Local 86, Hotel Employees International Union, AFL–CIO (the Union) filed the charge alleging that Flamingo Hilton-Laughlin (Respondent or the Hotel) committed certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act), as amended. On October 24, 1996, the Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent. Respondent filed a timely answer to the complaint, denying all wrongdoing. On January 9, 1997, the General Counsel amended the complaint to conform the complaint to the proof. Respondent did not oppose the amendment.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a Nevada corporation with offices and a principal place of business located in Laughlin, Nevada, where it is engaged in the operation of a hotel-restaurant-casino complex. During the 12 months prior to issuance of the complaint, Respondent derived gross revenues in excess of $500,000. During the 12 months prior to the complaint, Respondent purchased and received goods and products valued in excess of $5000 directly from sellers or suppliers located outside the State of Nevada. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining rules that prohibit employees from engaging in certain behavior, including: (1) discussing confidential information regarding customers, fellow employees, or hotel business; (2) wearing sunglasses or hats that are not part of the uniform, or unauthorized pins or decals; (3) posting of notices on hotel property without management permission; (4) engaging in solicitation in the gaming, meeting, convention, exhibit or recreational areas open to guests and/or the public, or distributing literature in work areas during worktime: (5) engaging in "derogatory behavior toward management personnel" or insubordination; (6) failing to maintain a satisfactory attitude, satisfactory job performance or relationship with guests, employees and supervisors; using "abusive" or "profane" language; (7) making "false, vicious, profane or malicious statements" regarding another employee, guest patron or the Hotel; (8) engaging in disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting or abusing guests, patrons or employees and; (9) engaging in off-duty misconduct that materially and adversely affects job performance or would bring discredit to the Hotel. The complaint also alleges that Respondent violated the Act by maintaining an invalid no solicitation/no distribution policy.

The parties stipulated that the rules at issue herein have been included in Respondent's employee handbook. In addition to stipulating to the rules at issue, the parties stipulated that the rules in question were not initiated in response to any union and/or protected concerted activity. Further, there is no evidence that Respondent has disciplined any employees under the rules for engaging in any union and/or protected concerted activity. The General Counsel's theory is limited to the contention that Respondent has violated, and continues to violate, the Act by maintaining the rules in question. The General Counsel contends that the rules having a chilling effect on union and protected concerted activities.

B. Code of Conduct and Disclosure

The rules entitled "Code of Conduct and Disclosure" alleged to be unlawful read as follows:

Code of Conduct

> Employees will not reveal confidential information regarding our customers, fellow employees, or Hotel business.

Disclosure

> Much of the Hotel business is confidential and must not be discussed with any party not associated with the Hotel. You should use discretion at all times when talking about your work. The Hotel considers all information not previously disclosed to outside parties by official Hotel channels to be proprietary information. Questions or calls from news media should be immediately transferred and responded to by the Marketing Department or the President of the Hotel. At no time should you talk to the media about Hotel operations.

> If you should discuss or disclose proprietary information, you may be subject to disciplinary action, up to and including termination.

The General Counsel contends that the handbook provisions listed above are unlawfully vague in their description of "confidential" information which may not be disseminated. According to the General Counsel, a reasonable employee could read the handbook as a broad prohibition against discussing wages or other terms and conditions of employment. Respondent contends it had substantial and legitimate business reasons for restricting discussion of confidential and proprietary information. It contends that its rules do not prohibit its employees from discussing terms and conditions of employment with other employees or with third parties.

Generally, a rule prohibiting employees from discussing their wages violates Section 8(a)(1) of the Act. See, e.g., *Waco, Inc.*, 273 NLRB 746, 748 (1984). In *Pontiac Osteopathic Hospital*, 284 NLRB 442, 466 (1987), the hospital expressly forbade its employees from discussing "hospital affairs . . . and employee problems." The Board held that such a rule could be construed by employees to preclude discussing terms and conditions of employment, including wages, which could fall under the broad categories of hospital affairs and employee problems. The Board further found that the respondent-hospital had not established a substantial and legitimate business justification for its policy. Accordingly, the Board found that the rule prohibiting discussing hospital affairs and employee problems violated Section 8(a)(1) of the Act.

In *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995), the employer's manual contained a provision which read, "No office business is a matter for discussion with spouses, families or friends." The Board held "office business" could reasonably be interpreted to include employees' terms and conditions of employment. The Board noted that the provision followed a heading entitled "confidentiality," not "patient confidentiality." As a result, the Board found that the manual provision was ambiguous. The Board then held that where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator. Thus, the Board found that the rule violated Section 8(a)(1) of the Act.

Applying the rationale of *Aroostook County Opthomology* to the instant case, the handbook provision is ambiguous and could be interpreted as limiting employee discussion of wages and other terms and conditions of employment. Under *Aroostook County Opthomology*, the ambiguity must be resolved against the employer. Therefore, I am constrained to find that this provision of the employee handbook violates Section 8(a)(1) of the Act.

C. Apparel and Personal Appearance

The General Counsel contends that Respondent violated the Act by maintaining rules which prohibit uniformed and non-uniformed employees from wearing unauthorized pins and decals. Further the rules provide:

> Management may discipline any employee for failure to comply with the dress code, which may include sending the employee home with loss of pay, or disciplinary action up to and including termination . . . .
>
> Uniformed employees may not wear their uniforms off the Hotel premises, without prior permission of management.

The General Counsel citing *Reno Hilton*, 319 NLRB 1154 fn. 3, 1171, 1172 (1995), contends that absent special circumstances, union pins, buttons, or other insignia cannot be banned by an employer. Respondent contends that there is no evidence that Respondent actually prevented any employee from wearing union insignia. Thus, Respondent argues that absent evidence of interfere with a protected right of employees, its rules should fit the special circumstances exception because it has a history of presenting an image of neatly uniformed and well groomed employees to the general public.

It is well settled that absent some special circumstance, such as maintenance of production and discipline, safety, or preventing alienation of customers, employees have the protected right to wear union buttons at work. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). However, this employee right is balanced against an employer's right to operate its business, and an employer may limit or even prohibit the wearing of union pins or buttons at work if "special circumstances exist." *Albertson's, Inc.,* 272 NLRB 865, 866 (1984); *Albertson's, Inc.*, 319 NLRB 93 (1995). One such special circumstance is where the display of union insignia may "unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *Meijer, Inc.,* 318 NLRB 50 (1995). The Board has consistently held, however, that customer exposure to union insignia alone is not a special circumstance allowing an employer to prohibit display of union insignia by employees.

In *Burger King v. NLRB*, 725 F. 2d 1053 (6th Cir. 1984), the United States Court of Appeals for the Sixth Circuit found that special circumstances existed to justify the prohibition of union buttons where an employer enforces a policy in a consistent and nondiscriminatory manner. The court found that the employer's ban on unauthorized pins was consistently enforced prior to the employees' union activities, and the policy was not created in response to union activities. In *United Parcel Service v. NLRB*, 41 F.3d 1068 (6th Cir. 1994), cited by Respondent, the Sixth Circuit found special circumstances where the employer had a longstanding policy regarding appearance rules for its employees having contact with the public. The employees involved in *United Parcel* were covered by a collective-bargaining agreement which permitted the employer to enforce appearance and uniform rules for the employees.

Here, the policy existed prior to the recent controversy and was not created in response to union activities. However, Respondent offered no evidence of a longstanding policy regarding appearance rules. Moreover, there is no evidence regarding implementation of Respondent's rules in a consistent and nondiscriminatory manner. Respondent knew that the Board had held this rule to be a violation at its sister hotel in *Reno Hilton*, 319 NLRB 1154 (1995). The rules do not appear to be limited to employees having contact with the public and are not limited to uniformed employees. Accordingly, I find that Respondent has violated the Act by prohibiting the display of union buttons and insignia.

The General Counsel contends that the rule against wearing hotel uniforms off the Hotel premises, without hotel permission is an excessive impediment to employee union activity. See *Pepsi-Cola Bottling Co.,* 301 NLRB 1008, 1019–1020 (1991). However, the rule found unlawful in *Pepsi-Cola* was promulgated in response to a union organization drive and specifically stated that employees could not engage in union activities while wearing company uniforms. In the instant case the rule was not

promulgated in response to union activities and the rule applied to all off-duty activities. Accordingly, in the absence of any evidence of discriminatory application of the rule, I find no violation of the Act.

D. The Posting of Written Notices

Separate and apart from its no-solicitation/no-distribution rule, which will be discussed infra, Respondent maintains a policy requiring prior approval by Respondent's management before any employee may post a written notice on the Hotel's premises. The General Counsel contends, because prior approval is required, this rule chills employee protected activities. Respondent contends that it has no obligation to permit employees to post notices on company bulletin boards and that there is no evidence of interference with employee rights.

In *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983), the Board stated:

> In general there is no statutory right of employees or a union to use an employer's bulletin board. However, where an employer permits its employees to utilize its bulletin boards for the posting of notices relating to personal items such as social or religious affairs, sales of personal property, cards, thank you notes, articles, and cartoons, commercial notices and advertisements, or, in general, any non-work related matters, it may not validly discriminate against [union messages] which employees also posted. [262 NLRB at 1402.]

In *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), the United States Court of Appeals for the Seventh Circuit reversed a Board finding that an employer was required to allow posting of union notices because it had allowed notices advertising items for sale. The court held that since the employer had only permitted limited postings on its bulletin boards about sale items, and had not allowed the posting of general announcements about meetings, it did not violate the Act when it refused to permit the posting of notices for union meetings.

In the instant case there is no evidence that Respondent permitted the posting of any nonwork related items. Further, there is no evidence that Respondent refused employees permission to post any notices relating to union or protected concerted activity. Thus, it appears that the General Counsel's case is based on speculation that Respondent would discriminate against union or similar notices. I find absent evidence of discriminatory enforcement, Respondent's posting policy has not been shown to be unlawful.

E. The No-Solicitation/No-Distribution Policy

The General Counsel alleges that Respondent maintained a discriminatory no solicitation and distribution policy. The Hotel's no-solicitation rule, published in the employee handbook and posted in employee areas, reads:

> NO SOLICITATION AND DISTRIBUTION POLICYFOR EMPLOYEES AND NON-EMPLOYEES
>
> Persons who are not employees of Flamingo Hilton-Laughlin are not permitted to solicit employees or distribute written material on our property at any time, except as provided below.
>
> No employee may distribute literature in work areas at any time or solicit another employee in any area of the Hotel during his or her working time or during the other employee's working time. No employee may solicit other employees at any time in gaming, meeting convention, exhibit, or recreational areas open to guests and/or the public.
>
> Working time includes all time during which an employee is assigned or engaged in the performance of job duties, but does not include breaks, lunch periods during which time the employee is not assigned to or expected to perform any job duties.
>
> Non-employees who are patrons of restaurants or bars open to the public and off-duty employees may engage in such activities with off-duty employees, provided they act in a non-disruptive manner consistent with the customary use of those areas.
>
> The purpose of these rules is to prevent interference with and disruption of the work of our employees and is to maintain our operation at peak efficiency at all times for the convenience and benefit of our employees, our guests, and the public.

The General Counsel contends that Respondent's rule is overly broad insofar as it bars nonemployees from soliciting off-duty employees in certain areas of the Hotel open to the public. Respondent contends that its rule is a lawful restriction on nonemployees' access to its private property. Further, Respondent argues that there is no evidence that Respondent permitted more access to any other nonemployees or groups.

The United States Supreme Court has held that union organizers may come onto an employer's property under two limited circumstances to communicate with employees: first, if there are no other reasonably available channels of communication; and second, "if the employer's notice or order . . . discriminates against the union by allowing other distribution." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992). In *Lechmere*, the Supreme Court emphasized that the inaccessibility rule was a narrow one, applicable only when "the location of a plant and the living quarters of the employees place the employees beyond the reasonable efforts to communicate with them." 502 U.S. at 539.

In this case, there is no evidence that Respondent's employees lived on the premises of the Hotel or that the employees were otherwise inaccessible. Further, there is no evidence that Respondent had allowed distribution or solicitation by any other nonemployees or group. Accordingly, I find that the rule did not unlawfully prohibit nonemployees from organizing in public areas.

Secondly, the General Counsel contends that no solicitation/no distribution rules are overly broad insofar as they bar off-duty employees from soliciting other off-duty employees in certain areas of the hotel open to the public which do not constitute "selling areas" within the meaning of *Marshall Field & Co.*, 98 NLRB 88 (1951), and its progeny, including but not limited to rest rooms, waiting rooms and exterior areas of the hotel.

In *Marshall Field*, the employer prohibited off-duty employees from soliciting in any areas except "nonselling closed areas" from which the public was excluded. The Board held that this prohibition was overbroad. The Board distinguished between areas of the store open to the public and the narrower category of the sales floor. 98 NLRB at 89–92. "We do not believe, however, that solicitation in areas not used for selling purposes amounts to an undue interference with store business even

though customers may be present in such places." 98 NLRB at 92.

The Board has long held that gambling casino and hotel facilities, such as those operated by Respondent, are analogous to retail stores for purposes of considering the validity of enforcement of no-solicitation/no-distribution rules in asserted working areas. *Dunes Hotel*, 284 NLRB 871, 875 (1987); *Barney's Club*, 227 NLRB 414 (1976). From this, it is clear that the working areas of a gaming establishment, such as operated by Respondent, encompass the gambling areas of the casino and adjacent aisles and corridors, areas which the Board equates to the selling area of a retail store, but exclude the public bars and restaurants. *Harolds Club*, 267 NLRB 1167 (1983); *Barney's Club*, supra at 417. Further, just as in a retail store where there are other areas, including the public restrooms, in which distributions of literature have no affect upon the business of the store and may be undertaken, there are areas of a gambling establishment in which off-duty employee distributions of literature clearly have no adverse effect upon the main business of the facility—the operation of games of chance. I do not believe that Respondent may legitimately interfere with distribution and solicitation in the public nonselling areas of the gaming complex. On this point, specifically analogous to the *Marshall Field & Co.* case, an outside private street, which was open to the public for pedestrian use and as to which the Board could discern "no cogent reason for denying employees the right to solicit . . . for union membership," are the outside areas, including the parking lots of Respondent's facility, as to which there is no record evidence that off-duty employee distributions of literature in these areas had any detrimental effect upon Respondent's gaming operations or the passage of patrons through the affected entrances. Moreover, while counsel for Respondent argues that the parking lots are working areas given that work tasks are performed there by security personnel, valet parkers, courtesy bus drivers, maintenance personnel, gardeners, and housekeeping employees, a similar contention was summarily rejected by the Board as one " that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks . . . are performed at some time in almost every area of every company." *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976).

In *Harold's Club*, the Board permitted solicitation in a public bar, despite the fact that it was a "working area" for cocktail employees and a public area open to guests. In this case, off-duty employees are permitted to socialize with nonemployees as patrons. The Board has held that employers may not prohibit off-duty employee solicitation and distribution if the employees are permissibly present at the Hotel while off-duty. See *Harvey's Wagon Wheel*, 271 NLRB 306, 316 (1984); *Mandarin*, 221 NLRB 264, 264 (1975). The ban on solicitation in all public areas, including nonselling areas, is therefore unlawful. See *Dunes Hotel*, 284 NLRB at 876–878.

F. Rules Against Derogatory and Disruptive Behavior

The General Counsel further challenges disciplinary rules which prohibit disruptive conduct such as insubordination, derogatory behavior, harassment, profanity, threats, fighting, and horseplay. Respondent argues that there is no evidence that the rules were discriminatorily enforced or that the rules were promulgated in response to union activity. Respondent argues that the General Counsel is alleging a violation on speculation that Respondent might interfere with employee rights. The rules at issue prohibit:

> Insubordination, derogatory behavior towards management personnel, refusal of job assignments, or harassment of another employee or guest . . . .
>
> Making false, vicious, profane, or malicious statements regarding another employee, guest, patron, or the Hotel itself.

In *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989), the hospital maintained a rule which prohibited "malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representatives." The Board held that a prohibition on malicious gossip was lawful. However, the Board held that the prohibition of derogatory attacks on hospital representatives was a violation of Section 8(a)(1). The Board reasoned that the term "derogatory" meant "expressive of low estimation or reproach . . . disparaging, detracting, degrading, deprecatory." Thus, the Board held that an assertion that an employer overworks or underpays its employees, which would constitute the most elementary kind of union propaganda, could reasonably be regarded as "derogatory" toward the employer. The United States Court of Appeals for the Fourth Circuit enforced the Board decision explaining that "by permitting the punishment of employees for speaking badly about hospital personnel, the employer failed to determine the area of permissible conduct in a manner clear to employees and thus caused employees to refrain from engaging in protected activities." Further, the court stated that "the values of free speech and union expression outweigh employer tranquility in this instance. *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 940 (4th Cir. 1990).

In *Cincinnati Suburban Press*, 289 NLRB 966 (1988), the Board held that employers may proscribe "maliciously false" statements, but may not proscribe and punish for publication of false statements. Punishing employees for distributing merely "false" statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities.

Thus, in the instant case, to the extent that the Hotel's rule against derogatory behavior prohibits permissible union propaganda, that is "merely false" or inhibits truthful propaganda, the rule violates Section 8(a)(1) of the Act. Further, Respondent's rules to the extent that they that prohibit false statements in addition to vicious, profane, and malicious statements violate Section 8(a)(1) of the Act.

Respondent's rules further provide:

> Failure to have or maintain in management's sole judgment, satisfactory attitude . . . and/or relationships with other guests, employees, including supervisors.

The General Counsel contends that a requirement that employees maintain a "satisfactory attitude" is unlawful as that term could reasonably be interpreted as prohibiting permissible union propaganda. However, there is no evidence that the rule was ever enforced in such a manner. There can be no doubt that an employer in a service industry may require that employees maintain a satisfactory attitude. There is no basis to presume or speculate that the term satisfactory attitude would be used to discriminate against pro-union employees.

Simplex Wire & Cable Co., 313 NLRB 1311 (1994), cited by the General Counsel is inapposite. In *Simplex,* an acting supervisor maintained a list of employees perceived to have negative attitudes. There were rumors in the plant that the list contained the names of union supporters and that one of the employees had

been terminated because he was on the list. The Board found that the employer could not lawfully prohibit employees from discussing that list. The case did not deal with a rule requiring a satisfactory attitude or a rule prohibiting a bad attitude.

The General Counsel contests Respondent's rules against abusive or foul language and disorderly conduct such as fighting, horseplay etc.

> Using loud, abusive or foul language.
>
> Disorderly conduct in the Hotel, including fighting, horseplay, threatening, insulting, abusing, intimidating, coercing or interfering with any guests, patrons, or employees.

In *Linn v. United Plant Guards*, 383 U.S. 53 (1966), the United States Supreme Court held that propaganda during a union campaign is protected and does not lose the protection of the Act even when it includes "intemperate, abusive and inaccurate statements" during attempts to organize employees. In *Great Lakes Steel*, 236 NLRB 1033, 1036–1037 (1978), the Board held that a rule prohibiting distribution of literature which was "libelous, defamatory, scurrilous, abusive or insulting or any literature which would tend to disrupt order, discipline or production within the plant" was unlawful. The rule was held to unlawfully inhibit Section 7 activity. In the instant case, because the rules do not define abusive or insulting language or conduct, under *Great Lakes Steel*, the rules could reasonably be interpreted as barring lawful union organizing propaganda.

G. Off-Duty Misconduct

The General Counsel contends that the rule proscribing off-duty misconduct is ambiguous and broad enough to include employees' protected concerted activity which may be critical of the Hotel. The handbook prohibits "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel."

In *Cincinnati Suburban Press*, 289 NLRB 966 fn. 2 (1988), an employee was discharged for publishing an article critical of his employer. The article was written and published during ongoing union organizing efforts. The Board held that even though the employee may be acting alone, an employee attempting to form, join, or assist a labor organization is nevertheless protected by the Act. The Board held a rule prohibiting improper or unseemly conduct unlawful because it could well have caused employees to refrain from engaging in protected activities. The Board stated, "Respondent may adopt rules in which the content of the rules is necessary to the credibility of the institution and/or the quality of its product, and the rules themselves are narrowly tailored, unambiguous, and designate the category of employees to whom the rules are applicable; provided, however, that such rules do not improperly impinge on the relevant rights of the affected employees." Id. at fn. 2.

In the instant case, the rule fails to define the areas of permissible and impermissible conduct. Thus, employees could reasonably refrain from Section 7 activity in order to comply with the rule. Accordingly, I find that this rule violates Section 8(a)(1) of the Act.

H. Patronizing the Hotel

The General Counsel contends that the rule proscribing patronizing the public dining rooms, bars, cocktail lounges, guest rooms, shops, or other guest facilities without prior permission of the employees' department manager violates the Act.

In a companion case, *Reno Hilton*, Cases 32–CA–15310 and 32–CA–15512 the evidence showed that notwithstanding this rule, Respondent's employees were invited and encouraged to use the Hotel's public facilities. However, in the instant case no evidence was produced to show the enforcement or application of this rule.

In *Westinghouse Electric Corp.*, 204 NLRB 78 (1975), off-duty employees ignored a rule requiring the employer's permission to be on the premises outside working hours. The Board held the assertion that employees do not require their employer's permission to exercise their rights under Section 7 demonstrates a misconception of the right involved. The right at issue is not employee access to an employer's premises for organizational purposes, but rather the right of an employee to nondiscriminatory treatment. The nondiscriminatory enforcement of an unambiguous rule against union adherents is not an unfair labor practice unless the rule itself is unlawful.

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that a no-access rule concerning off-duty employees will be deemed valid if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activities. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

Respondent's rule does not comply with the guidelines of *Tri-County Medical Center*. The policy is included in the employee handbook which is given to all employees. However, the rule applies to public bars and restaurants, and guest rooms located inside the facility in addition to the gaming areas. There is no evidence as to how the rule was enforced. However, the other rules imply that employees are invited and encouraged to patronize the Hotel's restaurants, bars and showrooms. I find that the requirement of prior permission could well have the effect of inhibiting employee protected concerted activities. I further find that Respondent has not established a business justification for its rule. See *Harolds Club,* 267 NLRB 1167 (1983*)*; *Harvey's Wagon Wheel*, 271 NLRB 306, 316 (1984); *The Mandarin*, 221 NLRB 264 (1975).

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the purposes and policies of the Act.

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. Respondent violated Section 8(a)(1) of the Act by maintaining rules which: (a) limit its employees' right to discuss wages and working conditions; (b) limiting its employees' rights to wear uniforms or curtailing their union activity; (c) prohibit the wearing of union insignia; (d) prohibit off-duty employees from solicitations and distributions in public areas of its facility other than gaming areas; (e) prohibit "false, vicious, or profane" statements and "derogatory" conduct without clearly indicating to employees the parameters of permissible and impermissible con-

duct; (f) prohibit conduct which tends to bring discredit to the Hotel without clearly indicating to employees the parameters of permissible and impermissible conduct; and (g) require off-duty employees, encouraged to patronize the Hotel's restaurants and entertainment areas, other than gaming areas, to obtain permission before patronizing such nongaming areas.

4. Respondent did not otherwise violate Section 8(a)(1) of the Act as alleged in the complaint.

[Recommended Order omitted from publication.]