

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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Nos. 04-9520 & 04-9532

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DOUBLE EAGLE HOTEL & CASINO

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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**JURISDICTIONAL STATEMENT**

This case is before the Court on the petition of Double Eagle Hotel & Casino (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board’s Decision and Order issued on January 30, 2004, and is

reported at 341 NLRB No. 17, 2004 WL 210355 (2004). (D&O 1-14.)<sup>1</sup> The Order is final with respect to all parties.

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Company filed its petition for review on February 24, 2004. The Board filed its cross-application for enforcement on April 2, 2004. Those filings were timely because the Act imposes no time limits on proceedings for the enforcement or review of Board decisions.

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(1) of the Act by:
  - Maintaining language in the “Gambling/Use of Property” rule of the employee handbook prohibiting employees from being on its property unless working their scheduled shift,
  - Maintaining language in the “Communication” section of the handbook prohibiting employees from providing any information about the Company to the media without prior approval,

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<sup>1</sup> The references in this brief are to the original record, as follows: “D&O” refers to the Board’s Decision and Order, “Tr” refers to the transcript of the unfair labor practice hearing, and “GCX” and “JX” refer to exhibits submitted at the hearing by either the General Counsel or jointly by the parties. References preceding a semicolon are to the Board’s findings; references following a semicolon are to the supporting evidence.

- Removing union literature from the employee lunchroom,
- Threatening to call, and calling, the police to have handbilling union supporters removed from public property, and
- Making numerous threats of reprisal against employees should they engage in activities protected by the Act.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by maintaining language in the rules of its employee handbook entitled "Customer Service," "Confidential Information," and "Communication," as well as the terms of its oral tips rule, that unlawfully prohibit employee discussion of wages and other terms and conditions of employment.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Ingerling, and suspending employees Marthaler and McCoy, for violating its oral tips rule.

### **STATEMENT OF THE CASE**

The Board's General Counsel issued a complaint after conducting an investigation of unfair labor practice charges filed by International Brotherhood of Electrical Workers, Local No. 113 ("the Union"). (D&O 8; GCX 1(c), 1(o), 1(q), 1(bb).) After a hearing, the administrative law judge issued a decision finding that the Company engaged in numerous violations of Section 8(a)(3) and (1) of the Act

(29 U.S.C. § 158(a)(3) and (1)). (D&O 8-14.) On review, the Board affirmed the judge's rulings, findings and conclusions, and adopted his recommended order, as modified. (D&O 1-6.) The Board, however, in disagreement with the judge's dismissal of certain allegations of the complaint, found that the Company also violated Section 8(a)(1) of the Act by maintaining language in the rules of its employee handbook entitled "Customer Service," "Confidential Information," and "Communication" that prohibits employees from discussing wages and other terms and conditions of employment. (D&O 1-4.) The facts supporting the Board's Order are summarized below, followed by a summary of the Board's Conclusions and Order.

## **STATEMENT OF THE FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

#### **A. Background; the Company's No-Discussion Rules Maintained in its Employee Handbook**

The Company operates a hotel and casino in Cripple Creek, Colorado. Among its casino workers, the Company employs slot and security employees who work on the casino floor, interact with customers, and receive tips. (D&O 1, 8; Tr 16, 20-22, 36-38, 82-83, JX 1.)

In its employee handbook, the Company maintains a number of work rules that restrict various topics of employee discussion. Its "Customer Service" rule, for example, tells employees: "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.” (D&O 2; JX 2, at p. 9.)

The employee handbook rule regarding “Confidential Information” provides in relevant part:

Pursuant to Company policy . . . you may be required to deal with many types of information that are extremely confidential and with which 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
  - Amounts 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. . . .

.....

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

(D&O 2-3; JX 2, at pp. 7-8.)

The Company's employee handbook also contains a "Communication" rule that limits employee communication with the press:

. . . . 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.

(D&O 3; JX 2, at p. 23.)

In addition to those no-discussion rules, the employee handbook includes a "Gambling/Use of Property" rule restricting employee access to company property. Specifically, that no-access rule dictates that employees "are not allowed on property unless working [their] scheduled shift," and "are not allowed to gamble on property at any time." (D&O 10; JX 2, at p. 12.)

**B. The Company's Oral Tips Rule; the Union Begins an Organizing Campaign; the Company Discharges Employee Ingerling, and Suspends Employees Marthaler and McCoy, for Violating the Tips Rule; Manager Herndon Threatens Marthaler and McCoy with Discharge**

Until May 2001, the Company had a policy that required all slot and security employees to pool and split their tips, with each group dividing 50 percent of the tips no matter how many slot or security employees worked that particular shift. In May 2001, the Company changed the policy to create a common pot of tips divided

equally among all of the slot and security employees on each shift. At that time, the Company also issued an oral tips rule prohibiting employees from discussing tips or its tips policy anywhere on its property. (D&O 1 n.6, Tr 92-96, 119-20, 125-27, 129, 162-65, 171-72, 183-87, 193, 213, 286-89, GCX 6.)

In October 2001, the Union began a campaign to organize the Company's employees. (Tr 196-97.) On October 26, the Company discharged slot employee Ingerling for violating the tips rule. (D&O 12; Tr 83, 85, 91, 107-08, 261-63, 312-13.) On October 29, the Company similarly suspended security employees Marthaler and McCoy for violating the tips rule. (D&O 12-13; Tr 165-69, 261-62, 313, 335-40.) When Don Herndon, the Company's director of security, suspended Marthaler and McCoy, he told them that, after they returned to work, they would be discharged if they talked to other employees about their suspensions. (D&O 11; Tr 168.)

**C. Company Managers Remove Union Literature from the Employee Lunchroom, and Further Threaten Employees with Reprisal**

On December 8, Supervisors Dennis Warrick and Leslie Blevins learned that there was union literature in the employee lunchroom, found it, and removed it. (D&O 12; Tr 141-52, 241-43.) In late December, Chuck Robertson, the Company's manager of security, called employee Tina Tonks into Blevins' office. In that meeting, Blevins told Tonks, "[I]f you are going to get caught up in this slot

mess, I will take care of that problem too.” Blevins’ use of the phrase “this slot mess” was, in part, a reference to the recent discharge of employee Ingerling for violating the Company’s tips rule. (D&O 11; Tr 214-15.)

On January 11, 2002, and the next three evenings, Union Representative Leslie Thompson, Ingerling, and three other union supporters, distributed union literature on public property adjacent to the casino. Director of Security Herndon approached the handbillers on January 11 and told them he was “calling the cops.” Thompson told Herndon that there was no reason to call the police because they were on public property and were not blocking access to the casino. Herndon replied, “I’m calling the cops and you can be arrested for criminal trespass.” After they arrived, the police found “there wasn’t a problem with” where the handbillers were located, and did not issue a citation. (D&O 11-12; Tr 109-16, 130-32, 157-58, 197-203.)

On one of the evenings that the union supporters were handbilling, employee Shelly Ridderman noticed them when she arrived to work. Later that evening, her supervisor, Sarah Tonn, approached her and “warn[ed] [her] that if anybody was caught talking about the Union or handing out pamphlets or reading them or anything, they would be fired.” (D&O 12; Tr 154-56.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On review, the Board (Chairman Battista, concurring in part and dissenting in part, and Members Liebman and Walsh), in agreement with the administrative law judge, found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining its oral rule prohibiting employees from talking about tips or the Company's tips policy anywhere on its property, language in the "Gambling/Use of Property" rule of its employee handbook prohibiting employees from being on its property unless working their scheduled shift, and language in the "Communication" section of the employee handbook prohibiting employees from providing any information about the Company to the media without prior approval. Further, the Board, in agreement with the judge, found that the Company violated Section 8(a)(1) by removing union literature from the employee lunchroom, and by threatening employees with reprisal should they engage in activities protected by the Act. (D&O 1 & nn.1&6, 8-12.)

The Board, in further agreement with the judge, found that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging employee Ingerling, and suspending employees Marthaler and McCoy, for violating its tips rule. (D&O 1 n.3, 13-14.) In disagreement with the judge, however, the Board also found that the Company violated Section 8(a)(1) of the Act by maintaining language in the rules of its employee handbook entitled

“Customer Service,” “Confidential Information,” and “Communication” that prohibits employees from discussing wages and other terms and conditions of employment. (D&O 1-6.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from, 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 (29 U.S.C. § 157). Affirmatively, the Order requires the Company to rescind the unlawful language of the rules, remove that language from the employee handbook, and notify employees in writing that those actions have been taken. The Order also requires the Company to offer employees Ingerling, Marthaler, and McCoy full reinstatement to their former positions and to make them whole for any losses suffered as a result of the Company’s unlawful discrimination against them. The Order further requires the Company to post a remedial notice. (D&O 5.)

### **SUMMARY OF ARGUMENT**

The Board is entitled to summary enforcement of its uncontested findings that the Company violated Section 8(a)(1) of the Act because it either did not contest those findings before the Board, or did not contest them in its opening brief to the Court. Specifically, the Company does not contest that it committed unfair labor practices by maintaining language in the “Gambling/Use of Property” rule of

the employee handbook prohibiting employees from being on its property unless working their scheduled shift; by maintaining language in the “Communication” section of the handbook prohibiting employees from providing any information about the Company to the media without prior approval; by removing union literature from the employee lunchroom; by threatening to call, and calling, the police to have handbilling union supporters removed from public property; and by making numerous threats of reprisal against employees should they engage in activities protected by the Act.

Further, substantial evidence supports the Board’s findings that the Company violated Section 8(a)(1) of the Act by maintaining language in the rules of its employee handbook entitled “Customer Service,” “Confidential Information,” and “Communication,” as well as the terms of its oral tips rule, that unlawfully prohibit employee discussion of wages and other terms and conditions of employment. With regard to its Customer Service, Confidential Information, and Communication rules, the Company’s assertions must be rejected because they consist of interpretations that differ from the clear text of the rules, and are otherwise contrary to law. With regard to the tips rule, the Company bases its entire argument on the discredited testimony of company managers that the tips rule was, in fact, limited to employee discussion on the casino floor, and not beyond it.

Substantial evidence also supports the Board's findings that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Ingerling, and suspending employees Marthaler and McCoy, for violating its unlawful oral tips rule. The Company concedes that it disciplined the employees for violating its tips rule, arguing only that those adverse actions were not unlawful because they were for discussing tips on the casino floor, conduct that it could have proscribed if the tips rule had not been unlawfully overbroad. That notion is unsupported by law. It is well settled that discipline imposed pursuant to an overbroad no-solicitation rule is unlawful regardless of whether the employer could have prohibited the conduct under a lawful rule.

## **ARGUMENT**

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT**

Before the Board, the Company did not contest a number of findings made by the administrative law judge. Specifically, the Company did not contest that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining language in the "Gambling/Use of Property" rule of the employee handbook prohibiting employees from being on its property unless working their scheduled shift, by maintaining language in the "Communication" section of the handbook prohibiting employees from providing any information about the Company to the

media without prior approval, and by threatening to call, and calling, the police to have handbilling union supporters removed from public property adjacent to the casino. (D&O 1 n. 1, 10, 11-12.)

Because the Company did not file exceptions with the Board to those findings, the Company is now jurisdictionally barred from obtaining appellate review of them. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *NLRB v. L&B Cooling, Inc.*, 757 F.2d 236, 240 (10th Cir. 1985). Nor does the Company contest the Board's affirmance of those findings in its opening brief to the Court. For that reason, too, the Company has waived any defense to those findings, and the Board is entitled to summary enforcement of those portions of its Order. *See Borden, Inc. v. NLRB*, 19 F.3d 502, 507 (10th Cir. 1994); *Intermountain Rural Elec. Ass'n v. NLRB*, 732 F.2d 754, 756 (10th Cir. 1984).

In its opening brief to the Court, the Company also did not contest the Board's affirmance of the judge's findings that it violated Section 8(a)(1) of the Act by removing union literature from the employee lunchroom, by threatening employees Marthaler and McCoy with discharge if they discussed their suspensions with other employees, by making an implied threat of reprisal to employee Tonks if she discussed tips with other employees, and by threatening employee Ridderman with discharge if she talked with union representatives or

distributed or read union literature. (D&O 1, 11, 12.) Accordingly, the Company has waived any defense to those findings, and the Board is entitled to summary enforcement of those portions of its Order. *See Borden, Inc.*, 19 F.3d at 507; *Intermountain Rural Elec. Ass'n*, 732 F.2d at 756.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING LANGUAGE IN THE RULES OF ITS EMPLOYEE HANDBOOK ENTITLED “CUSTOMER SERVICE,” “CONFIDENTIAL INFORMATION,” AND “COMMUNICATION,” AS WELL AS THE TERMS OF ITS ORAL TIPS RULE, THAT UNLAWFULLY PROHIBIT EMPLOYEE DISCUSSION**

**A. Applicable Principles and Standard of Review**

Section 7 of the Act (29 U.S.C. § 157) guarantees the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Employers violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if they “interfere with, restrain, or coerce employees in the exercise of [those] rights.”

Section 7 “organizational rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees

to engage in union solicitation (*Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945); *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1286 (10th Cir. 1980)), and to solicit and communicate with other employees regarding wages and other terms and conditions of employment. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Indeed, the workplace is a “uniquely appropriate” place for such communications. *Republic Aviation*, 324 U.S. at 802 n.6.

The Board and the courts also have long recognized that, with respect to solicitation, an employer has a legitimate interest in maintaining discipline and production in operating its business. See *Republic Aviation*, 324 U.S. at 797-98, 802 n.8. Therefore, an employer, for instance, “may legitimately prohibit [employee] solicitation in working areas during working time.” *Albertson’s, Inc. v. NLRB*, 161 F.3d 1231, 1236 (10th Cir. 1998). Any restriction on employee solicitation, however, “must be justified by the employer’s legitimate concerns.” *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987).

To strike an appropriate balance between those legitimate employee and employer interests, the Board--taking into account the nature of the employer’s business--has articulated special standards for assessing the legality of employee no-solicitation rules in certain industries. With regard to casinos, the Board applies the standards it developed for retail stores, having found that “the gambling area” of a casino “equates to [the] ‘selling floor’ areas in retail stores.” *Dunes Hotel*, 284

NLRB 871, 875 (1987). *Accord Montgomery Ward & Co., Inc. v. NLRB*, 692 F.2d 1115, 1121 (7th Cir. 1982); *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000).

Under those retail standards, the Board allows an employer to institute a general ban on all employee solicitation on the selling floor, and its adjacent aisles and corridors, because active solicitation in a sales area may disrupt a retail store's business. *See Marshall Field & Co.*, 98 NLRB 88, 92 (1952), *modified on other grounds*, 200 F.2d 375 (7th Cir. 1952). *See also Hughes Properties v. NLRB*, 758 F.2d 1320, 1322-23 (9th Cir. 1985). That general ban on employee solicitation, however, may not "be extended beyond that portion of the store which is used for selling purposes," to areas such as public restrooms and restaurants. *McBride's of Naylor Road*, 229 NLRB 795, 795 (1977). Rather, a restriction on employee solicitation in the public areas beyond the selling floor must be supported by a showing of a legitimate employer interest. *See Hughes Properties*, 758 F.2d at 1321-23; *Montgomery Ward & Co.*, 692 F.2d at 1127-28; *Dunes Hotel*, 284 NLRB at 875-78; *Santa Fe Hotel & Casino*, 331 NLRB at 729. Accordingly, absent such a showing, an employee no-solicitation rule that extends to public areas beyond the selling floor is overbroad and violates Section 8(a)(1) of the Act. *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108-09 (D.C. Cir. 2003); *Hughes Properties*, 758 F.2d at 1321; *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288

(1999); *Dunes Hotel*, 284 NLRB at 878; *McBride's of Naylor Road*, 229 NLRB at 795-96; *Marshall Field & Co.*, 98 NLRB at 92.

In reviewing Board determinations of the legality of employee no-solicitation rules, the courts have recognized that, “[i]n each case, the Board in the first instance must strike ‘the appropriate balance between organizational [rights of employees] and employer rights in the particular industry to which each [rule] is applicable.’” *Montgomery Ward & Co.*, 692 F.2d at 1121 (quoting *Beth Israel Hosp.*, 437 U.S. at 506). “The Board thus adjusts and accommodates both the employees’ rights to organize and the employer’s right to maintain work discipline according to the particular circumstances.” *Hughes Properties*, 758 F.2d at 1322. *See also Times Publ’g Co. v. NLRB*, 605 F.2d 847, 850 (5th Cir. 1979) (each case must be “decided on its own facts,” and not viewed as “a sweeping [per se] holding” applicable to all cases). Therefore, the courts will “defer to the Board’s balancing if it is supported by substantial evidence.” *Montgomery Ward & Co.*, 692 F.2d at 1121. *See also Beth Israel Hosp.*, 437 U.S. at 501 (“the Board’s application of [a rational rule], if supported by substantial evidence . . . must be enforced”).

The Board’s underlying findings of fact are “conclusive” if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951)).

Moreover, this Court has recognized that the Board “is empowered to draw permissible inferences from credible testimony” (*L & B Cooling, Inc.*, 757 F.2d at 241), and will not overturn the Board’s credibility findings “[a]bsent extraordinary circumstances.” *Presbyterian/St. Luke's Med Ctr. v. NLRB*, 723 F.2d 1468, 1477 (1983). *See also International Guards Union, Local 69 v. NLRB*, 789 F.2d 1465, 1467 (10th Cir. 1986) (“We do not sit as a super trial examiner and do not weigh the credibility of one witness against another nor do we search for contradictory inferences.”). Rather, “the determination of credibility is ‘particularly within the province of the hearing examiner and the Board.’” *Webco Indus., Inc. v. NLRB*, 217 F.3d 1306, 1311 (10th Cir. 2000) (quoting *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1299 (10th Cir. 1981)).

**B. The Company’s Rules Are Overbroad and Unlawfully Restrict Employee Discussion of Wages and Other Terms and Conditions of Employment**

Substantial evidence supports the Board’s findings (D&O 1 n.6, 1-4) that the Company violated Section 8(a)(1) of the Act by maintaining language in the rules of its employee handbook entitled “Customer Service,” “Confidential Information,” and “Communication,” as well as the terms of its oral tips rule, that unlawfully prohibit employee discussion of wages and other terms and conditions of employment. The Company’s contentions (Br 16-17, 24-28) with regard to its written rules must be rejected because they consist of interpretations that differ

from the clear text of the rules, and are otherwise contrary to law. Further, with regard to the tips rule, the Company bases (Br 17-21) its entire argument on the discredited testimony of company managers.

As a preliminary matter, the Company mistakenly contends (Br 17, 28) that the Court should find that its written rules are lawful, in part, because they were never enforced against employees and therefore had no impact on the employees' exercise of Section 7 rights. No such evidence, however, is necessary for a finding that an employee no-solicitation rule is facially invalid. *See Hughes Properties v. NLRB*, 758 F.2d 1320, 1321-23 (9th Cir. 1985), and cases cited at pp. 16-17. Moreover, it is well settled that "the mere existence of an overbroad no-solicitation rule may chill the exercise of the employees' Section 7 rights," regardless of whether the rule was ever enforced. *NLRB v. Beverage Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968). *See also NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d 932, 940 n.7 (4th Cir. 1990) (rejecting employer's argument that employers' rule was "saved" because it was never enforced). *Accord IRIS, U.S.A., Inc.*, 336 NLRB 1013, 1013 (2001); *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970).

### **1. The Customer Service rule**

The Board reasonably concluded (D&O 2), based on well-settled principles of law, and the clear language of the employee handbook, that the Company's

Customer Service rule is overboard, and therefore unlawful. As noted at p. 5, the rule instructs employees as follows:

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.

(D&O 2; JX 2, at p. 9, emphasis added.)

Applying the special standards applicable to retail establishments and casinos (see pp. 15-16), the Board found (D&O 2) that “as with a retail store’s selling floor, the [Company] 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.” The Board noted (D&O 2), however, that the Customer Service rule “goes further and prohibits discussions in ‘public areas,’” and would prohibit employee “discussion in places outside the gaming area, such as, for example, restrooms, public bars and restaurants, sidewalks and parking lots.” Accordingly, the Board reasonably concluded (D&O 2) that the language of the Customer Service rule was overbroad, and therefore unlawful. *See Ark Las Vegas Rest. Corp. v. NLRB*, 334 F.3d 99, 108-09 (D.C. Cir. 2003), and cases cited at p. 16-17.

The Company complains (Br 16-17) that the Board read its Customer Service rule “more broadly than it is written,” and attempts to diminish the effect

of the phrase “in public areas” by claiming that it appears in a sentence that is only a “note of caution,” and not part of the rule itself. (Br 17.) No such distinction, however, is articulated in the employee handbook. Rather, the handbook describes the Customer Service rule, and a number of other work rules relating to customer service, simply as “guidelines [that] apply to all employees.” (JX 2, at p. 9.)

On its face, the Customer Service rule instructs employees that, when they are in public areas, they should not discuss company issues, other employees, or personal problems. Accordingly, the Company’s interpretation of the rule must be rejected because it varies from the rule’s written text. *See Ark Las Vegas Rest. Corp.*, 334 F.3d at 99, 108-09 (rejecting employer’s interpretation of an employee no-solicitation rule that was different from the meaning stated on its face).

Insofar as the Company suggests (Br 16-17) that the rule could be considered ambiguous--which it is not--the Board and courts have long held that “ambiguities must be resolved against the promulgator of the rule rather than the employees who are required to obey it.” *J.C. Penny Co., Inc.*, 266 NLRB 1223, 1224 (1983) (citing cases). *See NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 533 (9th Cir. 1986) (same). As one court has explained, although a “rule might be the subject of grammatical controversy,” “employees are not grammarians,” and “the risk of ambiguity must be held against the promulgator of the rule.” *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965).

To the extent that the Company appears to contend (Br 16-17) that it may lawfully ban employee discussion in all public areas because guests probably will be present, the Board reasonably dispensed with that notion (D&O 2), noting that “there is no evidence to support” it. Indeed, at hearing, the Company failed to develop any specific evidence demonstrating that customers are present in every public area of its business, nor has it shown that any customers have, in fact, overheard such employee discussions. In any event, as the Board explained (D&O 2), such a suggestion is “counterintuitive,” because “there are surely times and places in the public areas outside the gaming floor where customers are not in earshot,” but the Customer Service rule nevertheless “broadly bar[s]” employee discussion in those areas as well.

## **2. The Tips Rule**

The Board reasonably concluded (D&O 1 n.6) that the Company’s “oral rule, proscribing the discussion of tips and its tip policy anywhere on [its] property, is overly broad and unlawful.” As previously noted at p. 20, the Board explained (D&O 2) that the Company could have maintained an employee no-solicitation rule that applied to the casino’s gambling areas and adjacent aisles and corridors, but that it could not lawfully maintain such a general ban beyond that area. Because the Company’s tips rule applies beyond the casino floor, to “anywhere on [its] property,” the rule is obviously overbroad.

The Company raises (Br 17-21) only a factual challenge to the Board's finding, contending that the tips rule was, in fact, limited to employee discussion on the casino floor, and not beyond it.<sup>2</sup> As support, the Company relies (Br 17-18) on the testimony of four of its managers, in which they state that the tips rule was limited to the casino floor. The Board, however, rejected (D&O 1 n.6, 9) that view of the facts, and found (D&O 1 n.6) that the tips rule barred employee discussion "anywhere on [company] property." That finding is amply supported by the testimony of employee witnesses.

Employee Marthaler, for instance, testified (Tr 165) that, after the tips policy changed in May 2001, the employees "were told [they] couldn't discuss tips . . . on the floor, in the break room, locker room, anywhere." Marthaler further testified (Tr 171) that Slot Director Roger Hostetler "told [her] that [the employees] could not talk about tips anywhere in th[e] building," and that they "couldn't say anything," "if you want to keep your job." Employee Ingerling similarly testified (Tr 95, 129) that Supervisor Blevins informed her in May 2001 that the tips rule meant that the employees "were not allowed to talk about [tips] in the casino, which included . . . the break room, the bathrooms and the locker room," or

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<sup>2</sup> Given that the Company asserts (Br 17-21) that the tips rule was, in fact, limited to employee discussion on the casino floor, and not beyond it, we do not address the Company's hypothetical claims (Br 10-14) that it potentially could have extended its tips rule to other areas.

“anywhere on the premises.” Further, employee Lowell Moses testified (Tr 187) that it was his understanding that employees “were not to talk about tips on the premises.” Employee Larry Custer testified (Tr 193) that employees “were not to discuss [tips] on the floor, break room, out back in our smoking area, anyplace within the building.” And employee Tonks testified (Tr 213) that the employees, simply, “weren’t allowed to discuss tips.”

To no avail, the Company attempts (Br 18-21) to attack the credibility of employees Marthaler, Ingerling, and Moses, but provides the Court with no basis to disturb the Board’s findings based on their credited testimony. With regard to Marthaler, the Company argues (Br 19-20) that her testimony is inconsistent. To the contrary, there is no inconsistency between Marthaler’s testimony (Tr 165) that she could not recall who informed her of the tips rule in May 2001, and her testimony (Tr 170-71) that, about 2 weeks after Ingerling’s October 26, 2001 discharge, Slot Director Hostetler told her that the employees were not allowed to discuss tips anywhere in the building. With regard to Ingerling, the Company cites (Br 18-19), out of context, the judge’s discrediting (D&O 12) of her testimony about another possible reason for her discharge. In any event, Ingerling’s testimony (Tr 95, 129) about the tips rule is fully consistent with the testimony of employees Marthaler, Moses, Custer, and Tonks.

With regard to the testimony of employee Moses, the Company complains (Br 20) that it is unreliable because, as Moses testified (Tr 187-91), no manager ever directly informed him of the substance of the tips rule, and he instead learned of it from other employees. No such showing, however, is necessary. It is well settled that “the validity of a[n employee] no-solicitation rule is measured” “through the eyes” and understanding of the employees (*Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1231 (5th Cir. 1976); *see also NLRB v. Florida Med. Ctr., Inc.*, 576 F.2d 666, 670 (5th Cir. 1978); *Fasco Indus., Inc. v. NLRB*, 412 F.2d 589, 590-91 (4th Cir. 1969)), and, as shown, “ambiguities must be resolved against the promulgator of the rule rather than the employees who are required to obey it.” *J.C. Penny Co., Inc.*, 266 NLRB 1223, 1224 (1983), and cases cited at p. 21. Indeed, where the actual terms of an oral rule differ from the employees’ understanding of the rule, the Board will uphold the interpretation understood by the employees. *See McBride’s of Naylor Road*, 229 NLRB 795, 796 & n.11 (1977) (where there is no evidence that the employer communicated the actual terms of its oral rule to the employees, the Board will use the employees’ understanding of the rule to determine its lawfulness).

### **3. The Confidential Information rule**

The Board found (D&O 2-4) that the Company’s rule entitled “Confidential Information” in the employee handbook is unlawful because it “explicitly restricts

[employee] discussion of terms and conditions of employment.” That conclusion is reasonably based on well-settled principles of law and the clear language of the employee handbook.

The Board has recognized that employers have a “legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.” *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Accordingly, the Board has upheld employer confidentiality rules that protect that interest, and do not implicate employee Section 7 rights. *See, e.g., Super K-Mart*, 330 NLRB 263, 263 (1999) (rule prohibiting disclosure of “[c]ompany business and documents”); *Lafayette Park Hotel*, 326 NLRB at 826 (rule prohibiting disclosure of “Hotel-private information to employees or other individuals or entities that are not authorized to receive that information”). *See also Aroostook County Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212-13 (D.C. Cir. 1996) (rule prohibiting employees from discussing “office business” with “spouses, families or friends”).

However, an employer’s no-solicitation rule violates Section 8(a)(1) of the Act where it “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB at 825. *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 106-07 (D.C. Cir. 2002), *cert. denied*, 537 U.S.

1105 (2003); *NLRB v. Southern Maryland Hosp. Ctr.*, 916 F.2d at 940 & n.7. As shown at pp. 14-15, employees' Section 7 rights include the right to communicate with other employees regarding wages and other terms and conditions of employment.

The Board therefore has found confidentiality rules unlawful if they explicitly prohibit employees from revealing "confidential information" about "employees." *IRIS, U.S.A., Inc.*, 336 NLRB at 1013; *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3 (1999). As one court has explained, such rules are unlawful because they "have the tendency to cause [employees] who read [them] to believe [they] restrict [their] right to discuss hours, wages, and other terms and conditions of employment." *Brockton Hosp.*, 294 F.3d at 106-07. *Accord Lafayette Park Hotel*, 326 NLRB at 826.

Applying those principles, the Board reasonably found (D&O 3) that the Company's Confidential Information rule "explicitly restricts discussion of terms and conditions of employment." The Board stated (D&O 4) that the rule "is even more clearly unlawful" than the rules found unlawful in cases such as *IRIS, U.S.A., Inc.*, 336 NLRB 1013, and *Flamingo Hilton-Laughlin*, 330 NLRB 287, which simply prohibited employees from revealing "confidential information" about "employees." Rather, as the Board explained, the Company's 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 explicitly warns employees that ‘[a]ny breach or violation of this policy will lead to disciplinary action up to and including termination.’” (See pp. 5-6.) Accordingly, the Board reasonably concluded (D&O 4) that the “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).”

The Company complains (Br 25) that the Board ignored the intent of its Confidential Information rule, which, it claims, was only “designed to address the situation in which an employee . . . has access to confidential information about other employees.” On its face, however, the rule does not articulate any such limitation. Rather, it broadly prohibits *all* employees from discussing a wide range of explicitly itemized types of wage information and other terms and conditions of employment. Therefore, again, the Company’s interpretation of the rule must be rejected because it varies from the clear language of the rule’s written text. See *Ark Las Vegas Rest. Corp.*, 334 F.3d at 108-09.

The Company does not further its position by relying (Br 27) on *Aroostook County Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212-13 (D.C. Cir.

1996), which is easily distinguishable. As the D.C. Circuit has explained, in *Aroostook*, the employer’s confidentiality rule “prohibited discussion only of ‘office business,’ which the court expressly understood not to cover the wages, hours, and working conditions of employees.” *Brockton Hosp.*, 294 F.3d at 107. In contrast, here, the Company’s rule *explicitly* prohibits employee discussion of wages and other terms and conditions of employment.<sup>3</sup>

#### 4. The Communication rule

The Board found (D&O 4) that the Company’s Communication rule is unlawfully overbroad because it restricts employee discussion protected by Section 7 of the Act. As the Board found (D&O 4), the rule specifically references “confidential information,” which is defined in the Company’s unlawful Confidential Information rule, and prohibits “communicat[ion of] any confidential or sensitive information concerning the Company or any of its employees to any non-employee” without prior approval. (*See* pp. 6-7.)

Therefore, as the Board explained (D&O 4), “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

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<sup>3</sup> The Company adopts (Br 26), by reference, Chairman Battista’s dissenting opinion (D&O 6-7) in support of its assertion that its Confidential Information and Communication rules are lawful. Given, however, that the Company makes no specific argument that amplifies that dissenting opinion, we rely on the response articulated by the Board majority. (*See* D&O 4 n.14.)

working conditions.” As the Board reasonably concluded (D&O 4), “in light of the link between the unlawful confidentiality rule and the communication rule, . . . the latter rule also violates Section 8(a)(1).”

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE INGERLING, AND SUSPENDING EMPLOYEES MARTHALER AND MCCOY, FOR VIOLATING ITS TIPS RULE**

The Company concedes (Br 22) that it discharged employee Ingerling, and suspended employees Marthaler and McCoy, for violating its tips rule.

Accordingly, given that the Company’s maintenance of its tips rule violated Section 8(a)(1) of the Act (see pp. 22-25), the Board reasonably found (D&O 1 n.3, 12-13) that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by taking those adverse actions.<sup>4</sup> It is well settled that discipline imposed pursuant to an overbroad no-solicitation rule is itself unlawful. *See NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 931 n.9 (9th Cir. 1993); *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 233 (11th Cir. 1982); *Florida Steel Corp. v. NLRB*, 529 F.2d 1225, 1231 (5th Cir. 1976); *NLRB v. Daylin, Inc.*, 496

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<sup>4</sup> Section 8(a)(3) of the Act makes it unlawful for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” A Section 8(a)(1) violation is “derivative” of a violation of Section 8(a)(3). *See Painters Local 277 v. NLRB*, 717 F.2d 805, 808 n.4 (3d Cir. 1983).

F.2d 484, 487 (6th Cir. 1974); *Saia Motor Freight Line, Inc.*, 333 NLRB 784, 785 (2001) (collecting cases); *McBride's of Naylor Road*, 229 NLRB 795, 795 (1977).

Citing no authority, the Company asks (Br 22-23) this Court to hold that its discipline was lawful because it disciplined the employees for discussing tips on the casino floor, conduct that it could have proscribed if its tips rule had not been unlawfully overbroad. As the Board reasonably explained (D&O 1 n.3), however, that notion is unsupported by law. Rather, as the Board stated (D&O 1 n.3), it is well settled that discipline “imposed pursuant to an overbroad rule . . . is unlawful regardless of whether the conduct could have been prohibited by a lawful rule.” *See, e.g., Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1270-71 (7th Cir. 1980) (discipline was unlawful under invalid no-solicitation rule, even “where the employers . . . would have [otherwise] been correct in cautioning the employees,” had the rule been lawful); *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1050-51 (5th Cir. 1979) (employee conduct that otherwise could have been a reason for lawful discipline “cannot stand” to “overshadow[]” an employer’s imposition of an invalid no-solicitation rule). Accordingly, the Company provides this Court with no basis to create such an exception.

**CONCLUSION**

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company' petition for review and enforcing the Board's Order in full.

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