JD(SF)–12–03
Colorado Springs, CO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DOUBLE EAGLE HOTEL & CASINO

and

Cases 27-CA-17816-2
27-CA-18048-1

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL NO. 113

William J. Daly and Renee C. Barker, Esqs.,
of Denver, Colorado, for the General Counsel.

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

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Colorado Springs, Colorado, on November 13 and 14, 2002, upon the General Counsel's complaint which alleged that the Respondent committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*, including the discharge of one employee and the suspension of three others.

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

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

I. JURISDICTION

The Respondent is a corporation engaged at Cripple Creek, Colorado, in the operation of a hotel and casino. In the course and conduct of its business, the Respondent annually purchases and receives at its Cripple Creek facility goods, products and materials directly from points outside the State of Colorado, valued in excess of $5,000 and annually derives gross revenues in excess of $500,000. The Respondent admits, and I conclude, that it is an

employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts.

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

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

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

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

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

B. Analysis and Concluding Findings.

1. The No-discussion rules.

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

No doubt a casino is similar to a retail store, see *M&R Investments, Inc., d/b/a Dunes Hotel and Country Club,* 284 NLRB 871 (1987), and, as with retail stores, to insure good order a discipline on the sales floor and employer can restrict solicitation in the selling areas. *McBride's of Naylor Road,* 229 NLRB 795 (1977). However, there is a distinction between "talking" and "solicitation." *W.W. Grainger, Inc.,* 229 NLRB 161, 166 (1977). And to prohibit employees from discussing matters pertaining to unionization while on duty, but allowing discussion of other matters, violates Section 8(a)(1). *Teledyne Advanced Materials,* 332 NLRB No. 53 (2000). Here there were no restrictions on subjects employees could discuss, other than attending to the needs of customers. Undeniably, when not busy, employees discussed among themselves a wide variety subjects.

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

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

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

Since discussion among employees of terms and conditions of employment is clearly a valid need in the normal course of their employment, the prohibition set forth would not be

applicable. Nor does the rule specifically deny employees this right. Thus, I cannot find it unlawful on its face, nor is there evidence that it was enforced in a fashion more restrictive than written. Accordingly, I shall recommend that paragraph 5(b) be dismissed. *Lafayette Park Hotel,* 326 NLRB 824 (1998).

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

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

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

During the material time, Robertson was the Security Lead on the swing shift, which meant that he was the highest ranking security employee. He was paid $1.00 more than the average of other security employees and his duties included, according to Director of Human Resources Arthur Gomez, offering technical direction to:

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

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

From these facts, I conclude that Robertson in fact responsibly directed employees, assigned them to specific zones when needed, and was responsibly involved in the discipline of

employees. As such he was a supervisor within the meaning of Section 2(11) of the Act and his statements bound the Respondent.

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

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

2. The No Access Policy.

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

I reject the Respondent's argument. The rule says what it says. If the Respondent had wanted to exclude parking lots and other no-work areas from its no-access rule, it could have done so. However, as written, the rule infringes on employees' Section 7 rights and therefore violates Section 8(a)(1) as alleged in paragraph 5(d). *Lafayette Park Hotel, supra.*

3. Proscription Against Talking to the Media and Others.

In material part, the "Communication" section of the Employee Handbook states: "Without appropriate approval, under no circumstances shall you provide information about the company to the media." "You are not, under any circumstances, permitted to communicate any

confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President."

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

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

4. Alleged Threats.

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

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

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

I conclude that Ingerling's testimony was of questionable credibility, and where in direct conflict with others, I do not credit her. In October, as the issues involved in this matter were active, including the tip matter, and a few days prior to her discharge, Ingerling and three other slot employees wore back (security) polo shirts rather than their green ones. Ingerling adamantly claimed that doing so was not a concerted protest. She testified that she wore the back shirt out of modesty concerns and the fact that other slot employees also wore back was a mere coincidence. After months of wearing the green shirt, "I found the green shirts were not very becoming to women." "They were very thin." But one of men, who apparently had no similar concerns, told Robertson "as long as we're going to have to split the tips with the security the way we are, we're just going to come dressed like security." Ingerling's testimony

about wearing the black shirt is simply so incredible that I believe that she sought to mislead me on what she thought was a material issue. Accordingly, I discredit her and conclude that the Respondent did not violate Section 8(a)(1) as alleged in paragraph 5(h).

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

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

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

Paragraph 5(m) alleges that Robertson threatened employees should they discuss the discharge of Ingerling. Tonks testified that about 45 minutes after Ingerling was discharged, Robertson "said I just want to let you know that anyone caught talking about the situation with Betty will be suspended or fired." Robertson testified that he was working just three days a week and was not present the day Ingerling was terminated. He further testified that he did not discuss the fact of Ingerling's discharge with "the security staff on duty" or any of the slot staff

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

Don Herndon is the Director of Security. On October 29, he suspended Carol Marthaler and Barbara McCoy (discussed below) and at that time, according to Marthaler, "he told us that if we came, when we came back, we were not to say one word to anybody about our suspension, because if we did we would be fired, and it was going to be kept confidential and nobody was to know." Herndon testified to the events leading to the suspension of Marthaler and McCoy, however, he was not asked to affirm or deny the statement attributed to him by Marthaler. I therefore conclude that he did in fact tell them not to discuss their suspensions and if they did, they would be discharged. An employee's suspension is clearly a term or condition

of employment which employees have the protected right to discuss. Thus Herndon's admonition was clearly a threat in violation of Section 8(a)(1) as alleged in paragraph 5(n).

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

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

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

The Respondent contends that Herndon saw the handbillers block the entrance door and told them they could not. He further testified that they did not seem agreeable and he therefore called the police. Ingerling and Thompson deny that they blocked entrance to the casino or were stationed anywhere other than the sidewalk. On this I credit Ingerling and Thompson and I discredit Herndon. I conclude that Herndon called the police to have the handbillers removed from in front of the casino, but which was public property. The police would not do so and the handbilling continued another three days without incident. The threat to have the police remove them from the public sidewalk, followed by attempting to do so was violative of Section 8(a)(1) as alleged in paragraph 5(w) of the complaint. *Snyder's of Hanover, Inc.*, 334 NLRB No. 21 (2001).

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

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

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

5. The Removal of Union Literature.

It is alleged that on December 8, Dennis Warrick and Leslie Blevins removed union literature from the Respondent's lunchroom in violation of Section 8(a)(1). The parties are in general agreement concerning the facts of this allegation. On December 8, Lowell Moses was terminated (apparently for cause and his termination is not in issue here). When Moses was being escorted from the premises, he placed an item of union literature on Hostetler's desk. Warrick then learned that there were items of union literature in the employees' lunchroom. He retrieved these and Blevins gave them to Sisneros who in turn, sent them to his attorney.

The General Counsel argues that removing this literature was violative of Section 8(a)(1) because doing so tended to interfere with employees' right to distribute union literature in non-work areas on non-working time. I agree. *Venture Industries, Inc.,* 330 NLRB No. 159 (2000).

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

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

6. The Discharge of Betty Ingerling.

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

Thus Blevins testified, in answer to the reasons Ingerling was discharged, "Betty had several situations that she was involved in and discussing tips on the floor was one." Blevins

further testified that McCoy and Marthaler were suspended rather than discharged because "we hadn't called them in on a tip issue."

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

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

7. The Suspensions of Carol Marthaler and Barbara McCoy.

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

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

8. The Suspension of Tina Tonks.

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

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

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

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

IV. REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The Respondent, Double Eagle Hotel & Casino, its officers, agents, successors and assigns shall:

1. Cease and desist from:

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

   b. Maintaining a rule prohibiting employees from discussing with non-employees or among themselves wages, hours and other terms and conditions of employment.

   c. Maintaining a rule prohibiting employees from being on its property unless working their scheduled shift.

   d. Maintaining a rule prohibiting employees from providing information about the Respondent to the media without the Respondent's prior approval.

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

   f. Removing union literature from the employees' lunchroom.

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

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

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

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

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

a. Offer Betty Ingerling, Carol Marthaler and Barbara McCoy reinstatement and backpay in accordance with the Remedy Section above and rescind the discharge and suspensions given them and notify them this has been done and the disciplines will not be used against them in any way.

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

c. Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all former employees employed by the Respondent at any closed facility since the date of this Order.

d. Within 21 days after service of this Order, inform the Region, in writing, what steps the Respondent has taken to comply therewith.

e. The allegations of unfair labor practices not found above are dismissed.

Dated San Francisco, California

[5] If this Order is enforced by a Judgment of the 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."

James L. Rose
Administrative Law Judge

JD– –95
Grand Rapids, MI

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Section 7 of the Act gives employees these rights.

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

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

WE WILL NOT maintain a rule prohibiting employees from discussing with non-employees or among themselves wages, hours and other terms and conditions of employment.

WE WILL NOT maintain a rule prohibiting employees from being on our property unless working their scheduled shift.

WE WILL NOT maintain a rule prohibiting employees from providing information about us to the media without our prior approval.

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

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

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

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

WE WILL offer Betty Ingerling reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position of employment and make whole for any loss of wages or other benefits they may have suffered.

WE WILL rescind the suspensions given to Carol Marthaler and Barbara McCoy and will not use such suspension in any way against them and we will make them whole for any loss of wages they may have suffered as a result of the suspensions.

DOUBLE EAGLE HOTEL & CASINO

JD– –95

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17TH St.-7th Floor, North Tower

Denver, CO 80202-5433

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER 303-844-3554.