

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTER BETWEEN:)	
)	
WHEELING ISLAND GAMING, INC.,)	
)	Case No. 6-RC-12664
Employer)	
)	
and)	
)	
UNITED FOOD AND COMMERCIAL)	
WORKERS, INTERNATIONAL)	
LOCAL 23)	
)	
Petitioner)	

REQUEST FOR REVIEW

On February 27, 2009 RC petition 6-RC-12664 was filed on behalf of the 56 poker dealers employed by Wheeling Island Gaming, Inc., at its casino located in Wheeling, West Virginia. The Petitioner established a proper showing of interest among the dealers and a hearing was scheduled for March 12, 2009 before Hearing Officer Julie Stern, Esquire, in the Federal Courthouse in Wheeling. The sole issue before the Court was whether the petitioned-for unit constituted an appropriate unit under the Act. Both parties submitted briefs by March 27, 2009. By Decision dated April 6, 2009, the Acting Regional Director held that the petitioned-for unit of poker dealers did not constitute an appropriate unit.

Section 102.67 (c) of the National Labor Relations Board's Rules and Regulations provides that:

- (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
 - (2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
 - (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
 - (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(Section 102.67 (c) of the National Labor Relations Board's Rules and Regulations)

Here, the Acting Regional Director's Decision warrants review in that it constitutes a departure from officially reported board precedent, and that departure has negatively impacted the Board's long-standing policy of selecting the smallest appropriate unit encompassing the petitioned-for employee classification. *Overnite Transportation Co.*, 331 NLRB, 662, 663 (2000) More specifically, the Acting Regional Director's Decision gave an inordinate amount of weight to minor similarities between the poker dealers and the pit dealers while downplaying the importance of weightier distinctions between the two groups. To wit, the Decision attaches significance to the fact that both poker dealers and pit dealers are merely facilitators of gambling games. Similarly, the fact that the licensing and pre-employment procedures are the same for each group loomed large in the Acting Regional Director's analysis. The Decision also gave weight to other insignificant factors such as similarities in starting times, apparel and name tags, while discounting the gravity of more significant factors such as separate immediate supervision, method of receipt of tips, functional integration and lack of interchange between the two groups.

The following analysis of the appropriate factors dictates a finding that the petitioned-for unit is appropriate and, therefore, that the Acting Regional Director's Decision must be overruled.

DEGREE OF FUNCTIONAL INTEGRATION

In *United Operations, Inc.*, 338 NLRB 123 (2002) the Board reversed the Regional Director's December 12, 2000 determination that the smallest appropriate unit sought by the petitioner must include *all* field service employees and dismissed the petition. The Board found instead that the HVAC constituted a functionally distinct group with common interests distinguishable from the employer's other field service employees. In arriving at its Decision, the Board gave weight to the fact that no other field service employees had the requisite skills to perform HVAC work. (*Id.* at 123)

This is analogous to the matter *sub judice* in that poker dealers, and poker dealers only, have the necessary skills and training to deal poker. Similarly, pit dealers have no ability or training to deal poker games.

The Board, in *United Operations, Inc.*, noted that like the poker dealers and the pit dealers in the present matter, that there was no significant contact between HVAC technicians and other field service employees. (*Id.* at 125) Furthermore, in addition to being isolated from the other unit, the pit dealers, like the HVAC techs, have regular, work-related contact with one another.

Another similarity between the poker dealers and the HVAC techs lies in the limited evidence of interchange between these groups and their co-workers. In *United Operations*, the Board found that there was no evidence of temporary or permanent transfers between the HVAC techs and the other field service employees. Similarly, here there is absolutely no evidence of record indicating that poker dealers and pit dealers have transferred from one department to another.

CONTACT AMONG EMPLOYEES

As discussed above, the Board in *United Operations, Inc.*, (*Supra*) attached great significance to the fact that the HVAC employees and the rest of the field service employees had limited contact with one another.

Here, it is undisputed that the poker dealers are in a portion of the casino that is remote from the pit game area. It is also undisputed that the poker room is just that – a room, enclosed by walls, separated from the rest of the facility, and designated as the “Poker Room” on its exterior walls. The poker dealers and the pit dealers have separate time clocks in separate portions of the building that they are *required* to use, thereby limiting contact between the two groups in that regard. (T., p. 135) There is a break room located close to the poker room and another break room located close to the pit games area. However, the Union’s witness, Kara Lewis, candidly testified that the poker dealer smoking break room is utilized by some pit

dealers, as there is no smoking permitted in the upstairs break room. However, the Respondent failed to provide any evidence as to how many pit dealers use the downstairs break room. Furthermore, given the short duration of employee breaks, common sense dictates that employees in each department likely use the break room closest to their work area.

Accordingly, the *only* evidence of record of contact between the two groups is found in the fact that some pit dealers who are smokers use the downstairs break room.¹ This incidental contact is not significant in that the number of such smokers and the frequency of their use of the smoking break room have not been established. Therefore, this factor supports a finding that poker dealers constitute an appropriate unit

COMMON SUPERVISION

In *Overnight Transportation Company*, 331 NLRB 662, 663 (2000) (Supra) the Board noted that although there was some evidence of cross-supervision of the two prospective units, there was also evidence of separate immediate supervision. Accordingly, the Board held that the evidence regarding supervision was insufficient to support the employer's contention that the larger unit was the smallest appropriate unit.

Here, the record clearly illustrates that poker dealers and pit dealers have separate immediate supervision. The Respondent's witness, Michael Tusken, the Employer's Director of Table Games, reluctantly agreed that the poker managers as stipulated to by the parties (T., p. 11) perform the day-to-day supervision of the poker dealers. More specifically, Tusken, speaking to the poker room supervision hierarchy, testified that Peter Lau is the poker manager. Tusken admitted that Lau's license says "poker manager." Lau does not have the ability to supervise table games. (T., p. 41) Donna Lapia is licensed only as a poker supervisor and she cannot supervise table games. She is strictly poker side. (*Id.*) Doug Price, Jason Hudson, Matthew

¹ The Acting Regional Director's Decision is correct in noting at page 6 that all dealers have access to a locker room area, however, there is no evidence of record indicating how many employees, if any, utilize the locker room area. (T., p. 25)

Gladish, and Denise Huff are all strictly poker supervisors. Jodi Bataglia has a dual license, meaning she can supervise both pit and poker. (T., p. 42)

According to Tusken, the shift managers oversee the poker room as well as the table games. (*Id.*) However, Tusken admitted that shift managers *only* go to the poker room when the poker manager is not there and a question or a dispute arises between customer and customer or customer and dealer. (T., p. 38) Tusken's testimony in this regard was corroborated by that of poker dealer Kara Lewis, the Union's witness. (T., pp. 120-121) Lewis testified that the shift manager is rarely seen in the poker room. Lewis testified that "you may see him stop in the poker room and talk to the floor supervisor for a couple of minutes a day, but that the shift manager does not actually come in the room and oversee poker dealers." (*Id.*)

It is also noteworthy that poker supervisors must be licensed specifically as poker supervisors. It is undisputed that the poker supervisors' licenses designate them as such. (T., p. 41)

Clearly distinguishable to the matter *sub judice* the Board in *ACL Corporation 273* NLRB 87 (1984), in finding the larger group favored by the employer to be appropriate, stated that:

The hotel's management is highly centralized. The Employer introduced numerous memoranda from General Manager Utnik to various department heads, assistant department heads, and assistant area managers, which demonstrate Utnik's close involvement in minor details of the hotel's day-to-day operation. (*Id.* at 88)

The Employer offered no such evidence in the present matter. The undisputed evidence of record demonstrates that the day-to-day supervision of poker dealers is distinct and separate from that of the pit dealers. However, the Employer made a half-hearted effort to belie that fact via Tusken's testimony regarding periodic meetings attended by both poker and pit dealers. (T., p. 24) Tusken testified that three such meetings have occurred since he has been in charge of the table gaming operation. (T., p. 24) Tusken acknowledged, however, that the subject of the meetings was to discuss the Employer's marketing plans and plans related to short term goals.

(T., p. 25) There was absolutely no mention of any discussion of upper management's involvement in the day-to-day operation of the poker room. It is also significant that Kara Lewis credibly testified that she remembers being at only one such meeting during her ten-year tenure at Wheeling Island. (T., p. 122)

The overwhelming weight of the evidence dictates a finding that the poker dealers have distinct and separate supervision from all other employees, including pit dealers. Accordingly, this factor supports the Petitioner's contention that poker dealers constitute an appropriate unit.

BENEFIT PACKAGES

The Acting Regional Director's Decision attached great significance to the fact that poker dealers and pit dealers receive the same benefit package. However, the benefit package applies to *all* non-union employees at the facility. Accordingly, the fact that poker and pit dealers enjoy the same benefits is meaningless. Receipt of the same benefits is emblematic of their current status as non-union employees rather than a factor negating the distinctive nature of one group from the other.

INTERCHANGE OF EMPLOYEES

In *NLRB v. Paper Manufacturers Company* 786 F.2d 163, 167 (3d 1986) the Board, in finding that a smaller unit of employees was appropriate, gave significant weight to the fact that with the possible exception of two maintenance employees, there was no interchange of employees between the groups. (*Id* at 168)

In the present matter, there is absolutely no dispute that only those licensed to perform as poker dealers may deal poker and only those licensed to deal pit games can work in that capacity. Lewis testified that the only interchange between poker and pit dealers has been where a dealer was terminated from one department, obtained new certification in a different game, and was hired back to work in the other department. (T., p. 119) Employees are *never* scheduled one day to the poker room and one day to the pit, according to Lewis. (*Id.*)

It is also undisputed that all employees can become certified and licensed to deal games they are not presently dealing by either getting the appropriate training or by being able to demonstrate proficiency and experience in dealing the other game. However, the Respondent's witness, Anitra Salkovick, was unable to name a single employee currently working at Wheeling Island who was licensed as both a poker dealer and as a pit dealer. (T., p. 98) Accordingly, there is absolutely no interchange between poker dealers and pit dealers. Therefore, the interchangeability factor supports the Petitioner's position that poker dealers are an appropriate unit.

THE NATURE OF EMPLOYEE SKILLS AND FUNCTIONS

The record clearly illustrates that the *only* similarity between the two groups of employees lies in the fact that they are all dealers in gambling games. It is submitted that any resemblance between the two groups ends there. It is undisputed that the two groups of employees receive separate training and licenses that enable them to deal distinctly different games. The dealers in both departments must be familiar with the arcane terms of art peculiar to their particular game. They must be aware of the betting structures in each game, and these betting structures vary wildly between games. For instance, a craps dealer would have no idea of how to deal Texas hold 'em, just as a poker dealer would be befuddled by the betting structure of roulette. Poker dealers do not handle money while pit dealers do. Poker games generate income for the casino in a different manner than do pit games. Clearly, the skill sets possessed by the two groups are separate and not interchangeable. Accordingly, this factor weighs in favor of a finding that the poker dealers are an appropriate unit.

WORK SITUS

It is undisputed, as discussed above, that the poker dealers are in a remote area of the casino, separate and apart from the pit dealers, in an enclosed room. While it is true that both groups of employees are housed in the same building, the physical distance between the work areas of the two groups of employees makes contact with one another unlikely on a daily basis.

GENERAL WORKING CONDITIONS

All of the factors discussed above are probative of the fact that the poker dealers and the pit dealers work under distinctly distinguishable conditions. They work in separate areas of the building; have different supervision and deal different types of games. However, the most significant difference between the two groups revolves around the issue of receipt of tips. Poker dealers are entitled to keep 100 % of a tip given to them by a customer, while pit dealers must share their tips with coworkers. Accordingly, poker dealers have the ability to increase their income by providing excellent customer service, and thereby increase their chance of receiving a generous tip, while pit dealers, in addition to providing tip worthy service must also hope that all of their fellow pit dealers are providing the same great customer service in order to maximize the likelihood of receipt of generous tips. Clearly, this is an important issue for the poker dealers as they seek to be represented in their own unit.

In summation, the majority of the community of interest factors dictates a finding that poker dealers constitute an appropriate unit under the Act. There is no common supervision between the two groups, little contact between the two groups, different skills and training, different methods of receiving tips and of generation of income for the Employer and no interchange between employees of the two groups. The cumulative weight of the evidence weighs heavily in favor of a finding that the poker dealers constitute an appropriate bargaining unit under the Act. Therefore, it is respectfully requested that the Acting Regional Director's Decision be reviewed, and ultimately, overruled.

Respectfully submitted,

By _____
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CERTIFICATE OF SERVICE

I, Thomas A. Cook, Jr., Esquire, certify that on this date a true and correct copy of the attached Request for Review has been emailed and faxed, respectively, to the following parties:

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