

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

LYTTON RANCHERIA OF CALIFORNIA
d/b/a CASINO SAN PABLO

Case Nos. 32-CA-025585
32-CA-025665
32-CA-064020
32-CA-086359

and

UNITE HERE LOCAL 2850.

**CHARGING PARTY UNITE HERE LOCAL 2850'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, UNITE HERE Local 2850 ("Local 2850" or "the Union") submits the following exceptions to the Decision of the Administrative Law Judge [JD(SF)-11-13] ("ALJD") issued on March 5, 2013 in the above-captioned case.

Exception #1

The Charging Party excepts to the ALJ's failure to make an explicit finding that Respondent denied employees access to their Union representative, in violation of Sections 8(a)(5) and (1) of the Act, by barring Union representative Jessica Medina from its property indefinitely (ALJD at 14). In support of this exception, the Union relies upon the testimony of Max Alper (Tr. 313-314) and Jessica Medina (Tr. 389-391).

Basis for Exception #1: The record is clear that Medina did not engage in any conduct that warranted her expulsion from Respondent's property. By barring her indefinitely, Respondent denied employees access to their Union representative and failed to bargain in good faith with the Union. However, despite the ALJ's factual findings in support of such a conclusion, he failed to make an explicit finding that the Respondent's conduct violated Sections 8(a)(5) and (1) of the Act as alleged in Paragraph 10 of the Complaint in Case 32-CA-086359.

Each party to a collective bargaining agent has both the right to select its representatives and the duty to deal with the chosen representatives of the other party. *NLRB v. Indiana & Michigan Elec. Co.*, 599 F.2d 185, 190 (7th Cir. 1979); *General Electric Co. v. NLRB*, 412 F.2d 512, 516-17 (2d Cir. 1969); *Claremont Resort and Spa*, 344 NLRB 832, 835 (2005); *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980). An employer may not refuse to deal with a union's chosen representative in the absence of conduct that is violent,

threatening, or unjustifiably disruptive. For instance, in *King Soopers, Inc.*, the Board found that the employer could refuse to deal with a union representative who had been discharged for, inter alia, throwing a meat hook at a coworker, throwing knives and other company equipment and threatening his supervisor. 338 NLRB 269 (2002). Likewise, in *Fitzimmons Mfg. Co.*, supra, the Board found that management could refuse to bargain with a local union representative who physically assaulted a management representative without provocation. Conversely, in *Claremont Resort and Spa*, the NLRB found no such special circumstances where the union's chosen representative pushed past a security guard to enter a supervisor's office from which she was barred, and used profanity toward the supervisor. 344 NLRB at 834.

Here, Mr. Medina was one of the Union's chosen representatives. Her conduct has never approached that required to relieve the Employer of its obligation to deal with her. Respondent barred Medina after she and another Union representative attempted to engage Respondent's human resources director in a conversation at the end of a scheduled grievance meeting on December 7, 2011 (Tr. 313-314; GC 53). The meeting took place in Respondent's training center which is located on Respondent's property but in a building set apart from the Casino. At the end of the meeting, Medina and Max Alper, the other Union representative present, attempted to engage Respondent's human resources director, Chris Mavroudis, in a discussion about why Respondent had been replacing full-time employees with part-timers. Mavroudis did not respond, but instead stated that the meeting was over.

A moment later James Grant, Respondent's director of security, walked over and told Mavroudis to go to the back of the room; Mavroudis complied. Alper then raised the same issue with Grant, and a brief discussion ensued, which included Medina joining in. Grant

then ended the discussion by saying that they needed to leave. After Grant made this request, Alper and Medina packed up their belongings and walked out of the building. (Tr. 308-310, 389-390) There were no allegations that Medina was threatening or aggressive. The only specific allegations were that she raised her voice when speaking to Grant, and that she had to be told several times to leave. In *Claremont Resort and Spa*, where the union's chosen representative pushed past a security guard to enter a supervisor's office from which she was barred, and used profanity toward the supervisor, the Board did not permit the employer to refuse to deal with the representative. 344 NLRB at 834. The conduct alleged here does even not rise to that level of *Claremont Resort and Spa*, much less approach that discussed in the cases cited above.

If Respondent ever did have a legitimate reason to bar Medina or any other Union representative, it still had an obligation to notify and bargain with the Union over the change in access rights. As the ALJ recognized, the law is well-settled that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining. *American Commercial Lines*, 291 NLRB 1066, 1072 (1988). In addition, a union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. *Turtle Bay Resorts*, 353 NLRB 1242 (2009).

Exception #2

The Charging Party excepts to the ALJ's failure to make an explicit finding that Respondent denied employees access to their Union representative, in violation of Sections 8(a)(1) and 8(a)(5) of the Act, by denying Union representative Max Alper access to the area where employee schedules are posted (ALJD at 14). In support of this exception, the Union relies upon the testimony of Max Alper (Tr. 276-278).

Basis for Exception #2: The ALJ made a factual finding that, on March 10, 2011, Respondent's representatives refused Max Alper's request to be escorted to the area where the employee schedules were posted. (ALJD at 7:19-24). Prior to this incident, Union representatives had regularly had access to the areas where schedules were posted. (Tr. 252-260) However, the ALJ failed to make an explicit finding that such conduct by Respondent violated Sections 8(a)(5) and (1) of the Act as alleged in Paragraph 12(c)(2) of the Consolidated Complaint.

Exception #3

The Charging Party excepts to the ALJ's failure to make an explicit finding that Respondent denied employees access to their Union representative, in violation of Sections 8(a)(1) and 8(a)(5) of the Act, by denying Union representative Max Alper access to the employee break room and to other areas outside of the employee cafeteria (ALJD at 14). In support of this exception, the Union relies upon the testimony of Max Alper (Tr. 278-279).

Basis for Exception #3: The ALJ made a factual finding that, on March 21, 2011, Respondent's representatives refused Max Alper's request for an escort to take him from the employee cafeteria to one of the employee break rooms. (ALJD at 7:25-29). The record evidence also shows that the past practice between the parties was to permit Union representatives access to employee break rooms and other back-of-the house areas. (Tr. 240, 257, 718). However, the ALJ failed to make an explicit finding that such conduct by Respondent violated Sections 8(a)(5) and (1) of the Act as alleged in Paragraph 12(c)(3) of the Consolidated Complaint.

Dated: April 2, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CHARGING PARTY UNITE HERE LOCAL 2850'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was filed using the National Labor Relations Board's on-line E-filing system on the Agency's website and copies of the aforementioned were thereafter served upon the following parties via email on this 2nd day of April, 2013:

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