Santa Fe Hotel, Inc. d/b/a Santa Fe Hotel and Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 28–CA–12817, 28–CA–12845, 28–CA–12980, and 28–CA–13081

July 12, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On October 17, 1996, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief. The Union also filed an answering brief. The Respondent filed an answering brief to the cross-exceptions and separate reply briefs to the answering briefs filed by the General Counsel and the Union. The General Counsel filed a reply brief to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. In adopting the judge's conclusion that the Respondent unlawfully enforced its no-distribution/no-solicitation rule against the employees' off-duty handbilling, we note the absence of any record evidence of a rule banning employees' off-duty access to the facility. Accordingly, we find it unnecessary to rely on the judge's discussion of the Board's application of the principles of *Tri-County Medical Center*, 222 NLRB 1089 (1976), to *Trump Plaza Hotel & Casino*, 310 NLRB 1162 (1993), and *Sears Roebuck & Co.*, 300 NLRB 804 (1990).

Furthermore, we agree with the judge that, as in *U. S. Steel Corp*., 223 NLRB 1246, 1247–1248 (1976), the occurrence of nonproduction work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity. Here, the main function of the Respondent's hotel-casino is to lodge people and permit them to gamble. The "work activity" which the Respondent asserts occurs at the handbilled entrances outside its hotel-casino—including security, maintenance, and gardening—is incidental to this main function. To hold that this is a work area (where handbilling cannot occur) would, as recognized in *U.S. Steel*, "effectively destroy the right of employees to distribute literature."[2] Id. at 1248.

2. We note that the judge's reference to the Respondent's invocation of the Nevada trespass statute as part of its unlawful actions on February 14, 1995, referred only to Respondent's use of the police to evict employee handbillers from nonworking areas. There were, however, two discrete acts: (1) the Respondent's use of the police as part of its efforts to oust employee handbillers from its property; and (2) police issuance of criminal trespass citations against the handbillers. We agree with the judge that the first act was unlawful. We further agree with the judge that the second had at least a reasonable basis in Nevada State law and, in fact, particularly since the alleged trespass occurred on the Respondent's private property. Accordingly, it was not until after the General Counsel issued a complaint, alleging that the employee conduct subject to the citations constituted protected concerted activity, that the Respondent's pursuit of these criminal citations became unlawful. See *Loehmann's Plaza*, 305 NLRB 663, 669–670 (1991).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Santa Fe Hotel, Inc. d/b/a Santa Fe Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Scott Brian Feldman and *Nathan W. Albright, Esqs.,* for the General Counsel.

Norman W. Kirshman, Esq. (Kirshman, Harris & Cooper), of Las Vegas, Nevada, for the Respondent.

Michael T. Anderson, Esq. (McCracken, Stemerman, Bowen & Holsberry), of Las Vegas, Nevada, and *Adam N. Stern, Esq. (Levy, Goldman & Levy),* of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Based on the original and first amended unfair labor practice charge in Case 28–CA–12817, which were filed by Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees

[1] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd., 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Member Hurtgen agrees with the judge that, under the circumstances of this case, the entrances outside the hotel-casino were "nonwork" areas at which the Respondent unlawfully denied off-duty employees the right to engage in handbilling. Member Hurtgen finds that the types of activities performed at those entrances (security, maintenance, valet parking, and groundskeeping) were insufficient to require a contrary result. In this regard, he notes that there was no evidence that the handbilling was likely to interfere with public access. Finally, Member Hurtgen notes that Respondent had a rule prohibiting on-duty employees from distributing materials in work areas during breaks. However, as discussed, the areas involved here is not a work area. Respondent's rule does not cover off-duty employees at all.

and Restaurant Employees International Union, AFL–CIO (the Union) on November 4 and December 19, 1994, respectively, the Acting Regional Director for Region 28 of the National Labor Relations Board (the Board) on December 12, 1994, issued a consolidated complaint, alleging that Santa Fe Hotel, Inc. d/b/a Santa Fe Hotel and Casino (the Respondent)[1] engaged in acts and conduct violative of Section 8(a)(1) of the National Labor Relations Act (the Act).[2] Based on the original and first amended unfair labor practice charge in Case 28–CA–12980 filed by the Union on February 16 and March 13, 1995, respectively, the Regional Director for Region 28 of the Board, on March 14, 1995, issued a complaint, alleging that Respondent had engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act. Based on the unfair labor practice charge in Case 28–CA–13081 filed by the Union on April 26, 1995, the above Regional Director, on May 18, 1995, issued a complaint, alleging that Respondent had engaged in acts and conduct violative of Section 8(a)(1) of the Act. Respondent timely filed answers to the above-described complaints, denying the commission of any of the alleged unfair labor practices. The above-described complaints were consolidated for hearing, and a trial of the allegations of those matters was held before me on January 29–31 and February 6–8 and 22, 1996, in Las Vegas, Nevada. At that trial, all parties were afforded the opportunity to examine and to cross-examine all witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for the General Counsel, by counsel for Respondent, and by counsel for the Charging Party, and each brief has been carefully considered. Accordingly, based on the entire record here,[3] including the posthearing briefs and my observations of the testimonial demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a State of Nevada corporation and maintains an office and place of business in Las Vegas, Nevada, where it is engaged in the hotel and gaming industry. In the course and conduct of its business operations, Respondent annually derives gross revenues in excess of $500,000 and purchases goods and materials, valued in excess of $50,000, directly from suppliers, who are located outside the State of Nevada. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

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

III. ISSUES

The General Counsel alleges that, on September 3, 1994, Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by denying its off-duty employees access to its property in order to distribute union leaflets to patrons of its hotel and gaming casino. The General Counsel further alleges that, on February 14, 1995, Respondent engaged in acts and conduct, violative of Section 8(a)(1) of the Act, by invoking the State of Nevada trespass statute and summoning representatives of the Las Vegas metropolitan police department in order to evict from its property its off-duty employees, who were, at the time, engaged in distributing union literature to patrons of the hotel and gaming casino, and to stop that protected concerted activity and by causing each of those off-duty employees to receive a citation for violating the Nevada trespass statute and that on February 15, 1995, Respondent engaged in conduct violative of Section 8(a)(1) and (3) of the Act, by issuing warning notices to its employees, who, while off duty the previous night, engaged in the aforementioned handbilling activities on its property. Finally, the General Counsel alleges that Respondent engaged in conduct violative of Section 8(a)(1) of the Act by, after the issuance of the complaint in Case 28–CA–12980 on March 14, 1995, failing and refusing to petition the Las Vegas city attorney to hold in abeyance further prosecution of criminal trespass proceedings against any of Respondent's employees, who were issued criminal trespass citations on February 14, 1995, and by actively seeking to persuade the Las Vegas city attorney to continue prosecution of the criminal trespass citations. Respondent denies the commission of any of the alleged unfair labor practices, contending that, on September 3, 1994, and February 14, 1995, it was properly enforcing its valid no-solicitation/no-distribution rule against off-duty employees, who were distributing leaflets to patrons in work areas of Respondent's facility and that, with regard to its counsel's attempt to persuade the Las Vegas city attorney to continue to prosecute the above-described criminal trespass citations, the doctrine of Federal preemption does not apply to criminal proceedings.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The record establishes that Respondent, a State of Nevada corporation, operates a facility, consisting of a six-story hotel, restaurants, an ice rink, a bowling alley, a gaming casino, and parking areas, located in the northwestern area of the city of Las Vegas, Nevada, and between 10 and 15 miles from the Las Vegas "strip"; that the facility is a 38-acre triangular shaped area, bordered on its three sides by the intersection of Highway 98 and Rancho Road and by Mountain Road; and that there are no other gaming casinos in the area of Respondent's facility, which is open to the public 24 hours a day. As of February 1995 there were two entrances to Respondent's facility, each off of Rancho Drive, a four-lane highway: one driveway, the main entrance, is divided into three incoming and three outgoing traffic lanes and

[1] At the hearing counsel for Respondent's motion to amend the formal papers to reflect its correct name was granted.

[2] During the hearing, on February 8, 1996, the parties reached an informal settlement agreement, approved by me, pertaining to the allegations of the consolidated complaint. However, the allegations of par. 5(c) of the consolidated complaint were specifically excluded from the settlement and were the subject of litigation.

[3] After the close of the hearing, counsel for Respondent filed a motion, seeking that I reopen the record and receive two additional exhibits, the first consisting of certain bus schedules relating to a courtesy bus service provided by Respondent to its patrons and the second being an affidavit of the courtesy bus operation supervisor. In his motion, counsel states the proffered evidence is relevant to the issue as to whether the area surrounding the front doors is a work area. Counsel concedes that the bus schedule information does not constitute newly discovered evidence but states that the proffered evidence was obtained by him from the Union pursuant to a subpoena and was not offered during the hearing due to inadvertence. Counsel for the General Counsel objects on relevancy grounds and counsel for the Charging Party argues that the material has little probative value. Having considered the submission and the arguments for and against, I have decided to reopen the record to the extent of receiving the proffered courtesy bus schedules, R. Exhs. 38(a) through (d) and 39(a) through (g).

leads to the valet park and horseshoe-shaped front doorway area of the hotel and casino[4] and the other driveway leads into the parking area of the facility. The record further establishes that, following an election held on September 30 and October 1, 1993, the Union was certified by the Board as the collective-bargaining representative of certain of Respondent's full-time and regular part-time employees on August 28, 1995. Thereafter, attacking the validity of the Board's unit determination in the representation proceeding and the Board's failure to consider, as untimely raised, certain alleged objectionable conduct, Respondent failed and refused to bargain with the Union and, in a decision reported at 319 NLRB No. 116 (1995) (not reported in bound volume), the Board concluded that the conduct was violative of Section 8(a)(1) and (5) of the Act.[5] Several of the alleged unfair labor practices here involve efforts by certain off-duty employees of Respondent to handbill at the front doors and an exterior side doorway of the hotel and casino and Respondent's enforcement of a no-solicitation/no-distribution rule, which it maintained in effect during 1994 and 1995. The no-solicitation/no-distribution rule, which is published in Respondent's employee handbook, reads as follows:

> Employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during working time. Employees who are not on working time (e.g., those on lunch hour or breaks) may not solicit employees who are on working time for any cause or distribute literature or printed material of any kind in working areas at any time. Non-employees are likewise prohibited from distributing material or soliciting employees on Company premises at any time.

With regard to the handbilling incident preceding the first of Respondent's alleged unfair labor practices, there is no dispute that, on September 3, 1994, Respondent's security officers prevented three off-duty employees from distributing union literature to patrons outside an entrance doorway. Thus, as viewed from the valet park area, located to the left of the front doorway of the hotel and casino, around a corner of the building, and several feet down the public sidewalk, which surrounds the exterior of the facility, is another exterior doorway, consisting of double doors and utilized by Respondent's patrons to enter and exit the casino and sometimes by workers bringing heavy equipment into the facility's ballroom for shows, known as the "old bingo" entrance.[6] Mario Vidales, who is employed by Respondent as a food server, testified that, on the above date, along with two other employees, "before my shift" at approximately 1:30 p.m., he was outside, standing beside the old bingo entrance next to a trash receptacle and engaging in "handing leaflets to the customers as they were coming in and leaving the hotel" through that doorway. The handbill, which they distributed, General Counsel's Exhibit 10, read as follows:

SANTA FE HOTEL
AND CASINO
Customer Advisory

We are employees of the
Santa Fe Hotel and Casino.
During your stay at the Santa
Fe Hotel and Casino let
management know you
support our struggle to gain a
fair CONTRACT.
Culinary Union Local 226

According to Vidales, after handbilling for "about three or five minutes," two security guards, one of whom had the last name of Webster, came outside and approached them.

> Webster told me that I have to leave, that I . . . was not allowed to do that in the premises. And I say, I do have the right to do it as an employee. He says, "No, you can do it in the [employee dining room] or out in the street," and he pointed to Rancho [Road].

Thereupon, Webster warned the three employees that, if they did not leave, he would call the police and have them arrested for violating the Nevada trespass law, and the employees walked out to the public sidewalk, which runs along Rancho Road. Respondent's security guard, Kennedy Webster, essentially corroborated Vidales' account of the incident, stating that, on September 3, after observing Vidales, who was off duty, standing outside by the exterior doorway next to the facility's ballroom[7] and "soliciting pamphlets out to guests and employees coming in and out of that door," along with another security guard, he approached Vidales and told him he could not solicit on Respondent's property and would have to do so on the public sidewalk on Rancho Road. Thereupon, he and the other security guard accompanied Vidales to a parked van, in which a woman was sitting, and it was driven away.[8] According to Webster, he acted to prevent Vidales engaging in what he termed, soliciting, as Respondent's facility is private property and employees may not solicit except in their dining room or locker room.

Although Vidales, who stated that no sign was posted by the old bingo entrance prohibiting the distribution of literature, denied that the outside area surrounding the old bingo entrance doors was a work area of the facility, Webster defined the area as a work area as security guards perform a "clock run" there every hour and check the fire extinguisher, gardeners work on plants and flowers nearby, and the hotel's engineers bring equipment through the doorway and utilize it for their zone checks. Webster added that the only nonworking areas of the entire facility are the

[4] From the driveway, the roadway winds around a fountain to the front door area, which is covered by a facade and is columned. The six double doors, which open into the front lobby of the hotel and casino, are set back a few feet from the roadway.

[5] That decision and Respondent's representation case contentions are currently on appeal before the United States Court of Appeals for the District of Columbia Circuit.

[6] Just inside the entrance is the room in which Respondent had held bingo games for customers.

[7] Webster stated that there was always a heavy flow of customer traffic through this doorway "as long as they had bingo going."

[8] Asked why he escorted Vidales from Respondent's property when off-duty employees are invited and encouraged to frequent the facility's casino and bar, Webster replied that Vidales was handing out the pamphlets in a working area and had been told a month before that such was prohibited.

With regard to this prior incident, according to Webster, about a month before the alleged unfair labor practice, he had observed Vidales while the latter had been engaged in soliciting at another exterior entrance to the facility, an entrance at which employees clocked in and out of work, and spoken to him about his conduct. More specifically, Webster testified, Vidales had been standing in a "breezeway," which is open to the public, and distributing union literature to employees as they entered and exited through that entrance.

employee dining room and the employee locker room and that the no-solicitation rule extends to the parking lots, which are private property and working areas of the facility.[9] Further, while acknowledging that off-duty employees are encouraged to patronize the casino to gamble and to drink, Webster was not sure if it was against the no-solicitation policy for those employees to speak to guests about the Union while at a bar and averred that, if he heard this, "I would simply tell [the employee] just stop it, cut it out."

The handbilling incident, which precipitated Respondent's next alleged unfair labor practices, occurred on February 14, 1995. On this date, according to Kevin Kline, an organizer for the Union, the Union had planned a rally, which was to commence on the public sidewalk outside Respondent's facility. Handbilling was going to be an element of the rally; however, according to Kline, as the purpose of such was to communicate a message directly to Respondent's customers, requesting them to inform Respondent's management "that they didn't support the Company position of not negotiating with the employees,"[10] rather than distributing leaflets in front of the main entrance driveway, the Union's plan entailed groups of three off-duty Santa Fe employees walking to the front main entrance of Respondent's facility, spacing themselves 10 feet apart from each other at the entrance doors, and handing leaflets to hotel and casino customers as they entered the building. At approximately 5:45 p.m. on February 14, between 60 and 100 people gathered on the Rancho Road sidewalk by the main entrance driveway into Respondent's facility. More than half were off-duty employees and, according to Kline, having observed Las Vegas metropolitan police cars at the front entrance,[11] he was aware that Respondent would not permit the handbilling on its private property and told the off-duty employees, who would be doing the handbilling that hotel security guards would immediately confront them and read the Nevada trespass law to them, that they should say they had a right to be there and they weren't going to leave, that the security guards would then ask for assistance from the police officers, who would also ask them to leave Respondent's property, and that, after each again refused to leave, he or she would be issued a trespass citation. Several employees volunteered to perform the handbilling, and Kline's plan was to have a new group of three commence handbilling at the entrance doors immediately after the prior group of three had been issued citations. Kathleen Thomas, who was a slot floor person employee for Respondent at that time and who had completed her work shift for the day and attended the rally, testified that she was one of the off-duty employees who engaged in the handbilling that, along with two others, Marty Tabarez and Wendy Jobe, she "walked . . . from the sidewalk to the front entrance and proceeded to leaflet a few customers . . ." by the front doors for approximately 5 minutes. According to Thomas, she had distributed no more than 10 handbills, copies of General Counsel's Exhibit 10, when Respondent's "security came over to us and read us the trespassing act and told us that we had to leave and we said we believed we were within our rights to be there." After refusing the security guards' request three times, "Metro police officers came over to us and asked us to step aside and issued us a citation." Kevin Kline testified that he observed each of Respondent's off-duty employees, who engaged in handbilling by the front doors of Respondent's hotel and casino on February 14, distribute leaflets, receive a police citation, and leave Respondent's private property, and the record discloses that, in fact, 12 employees, Thomas, Tabarez, Jobe, Israel Hernandez, Emeteria Puga, Raul Olivas, Juan Villela, Miguel Reyes, Anita Rodriquez, Daniel Sanchez, Charlene Slaba, and Deanna Ferguson each received a criminal trespass citation that evening for remaining on Respondent's property after being warned not to trespass by a security guard. Besides the criminal trespass citations, the next day, February 15, 1995, each of the above 12 employees received a written disciplinary warning notice from Respondent for having violated its existing no-solicitation/no-distribution rule by "distributing literature in a working area on [the previous evening]."

Kevin Kline testified that the Union decided to have employees handbill at the front doorway to Respondent's facility rather than on the public sidewalk at the Rancho Road entrance to the main driveway inasmuch as the former "really is the only area you can actually hand a leaflet to the customers because of the fact . . . they're coming in on Rancho right off of Highway 98 . . . and . . . they're moving at a pretty good clip" as they turn right. He added that the Union rejected alternative means of communicating its message to customers as the facility's location makes handbilling "the only way to get a message to the customers. . . . During cross-examination, Kline elaborated, saying the Union had specifically rejected other means of communicating with Respondent's potential customers such as paid advertising ("just out of reach financially") and leafletting nearby shopping centers and housing developments ("It's logistically difficult to do because you have to cover such a large area").[12] Moreover, while

[9] Apparently offered as corroboration that the parking areas of Respondent's facility are working areas, Facilities Manager Edward Beres testified that gardeners police the parking lots once a day; a street sweeper, which is used to clean the parking area, is operated in the parking areas, engineers make sweeps of the areas; and hotel security regularly patrols the parking lots.

Contrary to the assertion of Webster that all areas, except the employee dining room and the employee locker rooms, of Respondent's facility are working areas, when asked to define the working areas, the slot machine manager, Doreen Gallagher, limited these to "the casino floor or the different restaurants, the outlets there, the bowling, the skating rink."

[10] Kline conceded that a purpose of the handbilling was to test the employees' right to do so but denied that a purpose of the handbilling was to place pressure on Respondent to withdraw its objections to the conduct of the representation election and voluntarily recognize the Union as the employees' bargaining representative. On this point, the witness was impeached by what he stated in a pretrial affidavit. Relying on Kline's pretrial affidavit testimony, counsel for Respondent, in his posthearing brief, asserts that a purpose of the handbilling on February 14 was, in fact, to pressure Respondent into withdrawing its election objections and voluntarily recognize the Union. However, inasmuch as the usage of his pretrial affidavit was for purposes of impeachment, whatever Kline stated in his pretrial affidavit on this point is not evidence and shall only be considered by me as bearing on Kline's credibility.

[11] Kline testified that the rally had been publicized "by word of mouth."

[12] Kline testified that, between the date of the representation election and February 1995, the Union had issued between 10 and 15 press releases to a local newspaper, The Review Journal and union officials had given approximately five interviews to radio and television news representatives. Further, the record is replete with newspaper articles, publicizing the labor dispute between the Union and Respondent.

The parties stipulated that, since October 1, 1993, the Union has incurred in excess of $25,000 in costs related to boycott activity aimed at customers of Respondent's facility and that figure includes the cost of mailers and flyers.

the Union was aware of a large population base in the area of Respondent's facility and was sure that customers "come from that area," it would be only guesswork as to who were Respondent's patrons; while the people coming into the facility "are the customers." Finally, Kline stated, "We made a conscious decision to gain access to the front doors" as "we could see that the way to communicate with the customers at the Santa Fe would be at the front doors and since employees have a right to do it."

Just as with the area surrounding the old bingo entrance, Respondent argues that the front entrance area of its facility is a work area. In this regard, Chantelle Waugh testified that Respondent's valet parking service is located at the front entrance, where valet parking attendants remove and deliver cars and help hotel guests with their luggage. Also, according to Waugh, hotel bellman deliver luggage to and remove luggage from the front entrance area, gardeners and maintenance engineers are responsible for maintaining the fountain and green area, around which the entrance roadway winds, and housekeepers and porters, who respectively clean the doors and remove trash, work in the front entrance area on a regular basis. Further, security guards patrol this area, and the courtesy bus stops there. Edward Beres, Respondent's facilities manager testified but was unable to estimate the percentage of their workdays gardeners and hotel engineers may work in the front entrance area.

As an aspect of their case, counsel for the General Counsel argue that, as off-duty employees are encouraged and invited by Respondent to be on its private property for other reasons and as off-duty employees have been allowed to participate in solicitations and distributions in other public areas of Respondent's facility, on September 3, 1994, and February 14, 1995, Respondent's no-solicitation/no-distribution policy was disparately enforced against off-duty employees, who were on Respondent's private property, engaging in protected concerted activities. In this regard, there is no dispute that off-duty employees are invited and encouraged by Respondent to utilize the gambling casino and the facility's food and bar services and attend shows and other attractions, which are open to the public. Further, the record reveals that Respondent has held holiday fairs and craft fairs on a yearly basis, four art shows a year, and book fairs in areas of the facility, including ballrooms and the main lobby,[13] which are not set aside for the exclusive use of employees; that the public is invited to attend these events; and that, as are other vendors, off-duty employees are invited to participate and set up booths to sell products to the general public.

The third alleged unfair labor practice here concerns Respondent's counsel's efforts to convince the Las Vegas city attorney to continue prosecution of the above-mentioned criminal trespass citations[14] and his failure to seek a stay of those proceedings. In this regard, Bernard Little, the chief of the criminal division in the Las Vegas city attorney's office, testified that, subsequent to the issuing of the citations to Respondent's employees, as he had been involved in a prior preemption dispute concerning another hotel/casino at which trespass citations had been issued during a labor dispute and as the instant citations potentially involved a similar preemption dispute, he became involved in these matters.[15] In fact, the complaint in Case 28–CA–12980 was issued by the Regional Director for Region 28 on March 14, 1995, and, on April 7, 1995, he wrote letters to the clerk of the Las Vegas, Nevada Justice Court and to the administrator of the Las Vegas, Nevada Municipal Court, advising each that, in his view, "state court jurisdiction is preempted until such time as the NLRB hods the handbilling to be unprotected under the Act" and requesting that "any action against those receiving citations from the Las Vegas Metropolitan Police Department should be held in abeyance pending a decision on the merits by the NLRB." A week later, in a letter dated April 13, 1995, counsel for Respondent wrote to the Clark County district attorney, setting forth Respondent's legal position that the Regional Director cited no viable precedent that the State of Nevada's criminal trespass proceedings had been preempted by the issuance of the above complaint and that the Regional Director "should not be permitted, based upon an ex parte investigation, to interfere with the orderly process of the Nevada law enforcement and its courts in the adjudication of trespass citations, simply by sending a letter, citing his administrative decision to issue a complaint." Subsequently, an associate of counsel for Respondent telephoned Little to inquire as to the city attorney's intention, and, according to Little, "I believe I advised him that I had decided to hold off on prosecuting those cases until after a scheduled hearing before the [Board]."[16] Respondent's counsel's associate replied that he wanted Little to consider some legal precedent, which would allow the city attorney to proceed with the prosecutions notwithstanding the Board's processes, and Little agreed to consider them. Thereafter, on May 24, Little received a letter from Respondent's counsel in which he stated that "the position asserted by [the Regional Director] in his letter of April 7, 1995, is not supported by statute or judicial precedent" and that "I am hard pressed to understand why [the Regional Director's] naked assertion should deprive a Nevada property owner of access to Nevada laws and law enforcement assistance." Notwithstanding Respondent's counsel's arguments to the contrary, the city attorney decided not to change his position to stay prosecution of the pending trespass citations pending the Board's decision as to the allegations in the above complaint.[17]

B. Legal Analysis

I turn first to consideration of the unfair labor practice allegations pertaining to the events of September 3, 1994, and February 14, 1995. Inasmuch as the facts, with regard to both incidents, are essentially uncontroverted,[18] as to what occurred on September 3, I find that, at approximately 1:30 p.m, food server employee Mario Vidales and two other employees positioned themselves outside and next to the old bingo entrance to Respondent's

[13] The parties stipulated that the following employees perform duties in the front lobby area, which is located inside the front entrance doors and to which the public and off-duty employees have free access: the bell staff, engineers, housekeeping, and reception and registration employees, who are located behind a barrier, which is adjacent to the lobby.

[14] Each criminal trespass citation includes a potential penalty of 6 months in jail and a $1000 fine.

[15] According to Little, under the State of Nevada criminal trespass statute, a criminal trespass occurs when individuals "remain on the property after warning that they were trespassing." He added that no "cause" need be proven; that "any private property owner can just at their own inclination trespass somebody off their own . . . property;" and that catagories of individuals include invited guests or employees.

[16] Little stated that he reached his decision in April after receipt of the Regional Director's letter.

[17] Little testified that, if Respondent had requested to withdraw the trespass citations, "I would have honored that request."

[18] Mario Vidales and Kennedy Webster differed as to aspects of their respective testimonies regarding the September 3 incident. As between the two, I found Vidales to have been a more trustworthy witness and shall rely on his version of the events.

facility and began distributing copies of General Counsel's Exhibit 10 to Respondent's patrons as they entered and exited the hotel and casino through said doorway; that the three employees were off duty at the time; that, after approximately 5 minutes, two of Respondent's security guards, including Kennedy Webster, opened the doors and walked outside; that, obviously enforcing Respondent's published no-solicitation/no-distribution policy, Webster informed Vidales and the other employees that they had to leave as they were not allowed to engage in such conduct on Respondent's premises; that, after Vidales said he possessed a legal right as an employee to do so, Webster said such could only be done in the employee dining room or in the street and pointed to Rancho Road; that Webster then warned the three employees that, if they did not leave Respondent's property, he would call the police and have them arrested for violating the Nevada trespass law; and that, thereupon, the employees left Respondent's premises, walking out to Rancho Road. As to the February 14 incident, I find that, acting pursuant to the Union's plan to enlist Respondent's patrons in the Union's efforts to induce Respondent to recognize and bargain with the Union as the bargaining representative of a unit of its employees and to accomplish this and, at the same time, testing the employees' legal right to handbill on Respondent's private property, by distributing leaflets to customers at the main entrance doors of the hotel and casino, 12 off-duty employees of Respondent, in groups of three, walked from the public sidewalk on Rancho Road to the main entrance doorway of Respondent's facility, spaced themselves 10 feet apart, and commenced handing copies of General Counsel's Exhibit 10 to patrons; that, after a few minutes, security guards approached each group of handbillers and demanded that they stop and depart from Respondent's property or become subject to the Nevada trespass law; that, after the employees refused the security guards' demands, the latter read the trespass act to the employees; that, after each employee again refused to cease what he asserted was his or her legal right to distribute handbills to patrons at the front doors, security guards beckoned to Las Vegas metropolitan police officers, who had been waiting on Respondent's property since prior to the start of the handbilling; and that, after each employee again refused to cease handbilling and leave Respondent's premises, he or she was issued a trespass citation by the police officers and then ceased handbilling. Further, I find that, the next day, February 15, each of the 12 employees was issued a written disciplinary warning notice by Respondent for having violated Respondent's no-solicitation/no-distribution policy by distributing literature in a working area of the facility the previous evening.

Several significant points are worthy of emphasis at this point in my analysis. First, the individuals, who engaged in the handbilling involved in the September 3, 1994 and February 14, 1995 incidents, were Respondent's own employees. In this regard, while counsel for Respondent paints the February 14, 1995 incident as precipitated by the Union and asserts that "the utilization by the Union of off-duty . . . employees as handbillers cannot under those circumstances elevate [what occurred] . . . from activity undertaken by the Union for its own questionable purposes . . . " the unmistakable and conceded fact is that the handbilling that evening was undertaken by 12 employees of Respondent, and the Board rejects any contention that the participation of nonemployee union organizers in an event, in which employees engage, somehow vitiates the Section 7 rights of the participating employees. *Be-Lo Stores*, 318 NLRB 1, 10 fn. 25 (1995). Moreover, I reject counsel for Respondent's assertion that the employees were acting as "instruments" for the Union, noting that the mere fact that the employees' and the Union's interests may have coincided does not somehow remove the acts of the former from the protection of the Act. Next, there is no dispute that Respondent's employees, who engaged in the handbilling on both of the above dates, were off duty at the time. Further, Respondent's rule, which Mario Vidales is alleged to have violated on September 3, 1994, and which the 12 above employees allegedly violated on February 14, 1995, was Respondent's effective no-solicitation/no-distribution policy, and the employees apparently violated that provision of the rule, prohibiting off-duty employees from "distribut[ing] literature or printed material of any kind in working areas at any time."[19] Finally, there is no record evidence that Respondent ever maintained a published employment rule, prohibiting off-duty employees from remaining at or returning to its facility. Rather, there is no dispute that off-duty employees were encouraged and invited to utilize the gaming casino, to frequent the facility's restaurants and bars, and to view the various shows.

As to whether Respondent unlawfully denied its off-duty employees the opportunity to handbill on its property on September 3, 1994, and February 14, 1995, the paramount consideration is whether Respondent enforced its no-distribution rule in working areas of its facility. In placing the instant alleged unfair labor practices in the proper legal context, I initially note that, as the handbilling on both of the above dates was engaged in by Respondent's own employees and not by nonemployees, such as agents of the Union, the dictates of the Supreme Court in *Lechmere v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), do not apply. Rather, the guiding legal principle, regarding what occurred on the above dates, is, as enunciated by the Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and affirmed in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978),[20] that an employer may not prohibit

[19] While security guard Webster believed that the conduct, in which Mario Vidales and the other employees engaged on September 3, 1994, constituted soliciting, given the wording of the warning notices which were issued to the 12 employees, based on the February 14, 1995 incident, the inference is warranted that, had Vidales and the two other employees received similar discipline, such would have been for distributing literature, the conduct in which they, in fact, engaged.

While there is no complaint allegation regarding the facial validity of Respondent's no-solicitation/no-distribution rule, counsel for the General Counsel argues that Respondent's rule is vague inasmuch as the no-distribution rule does not specifically ban the distribution of literature to customers. I disagree. Thus, the portion of the entire rule, pertaining to off-duty employee solicitations and distributions, is contained in one sentence and is written in the disjunctive rather than the conjunctive, and, while the ban on soliciting is limited to employees who are on working time, the ban on distributing literature in working areas is without limitation as to the object of the distribution and clearly includes patrons.

Finally, Respondent's rule prohibits nonemployees from distributing literature on its property at any time.

[20] In *Nashville Plastic Products*, 313 NLRB 462 (1993), the Board rejected an argument that "*Lechmere* applies to off-duty employees. Lechmere itself emphasized the critical distinction between employees and nonemployees as established in *NLRB v. Babcock & Wilcox*, and, a fortiori, the rule enunciated in *Lechmere* does not apply to employees. By virtue of the continuing employment relationship, an off-duty employee, even if not scheduled to work on the day he seeks access to the premises, remains an employee of the employer. Unlike the nonemployee union organizer whose status as a trespasser invokes the employer's property right to restrict access, an off-duty employee is a

its employees from distributing union literature in nonworking areas of its property during nonworking time absent a showing that such a ban is required to maintain the operation of the business. In accord with Board case law subsequent to *Republic Aviation Corp*., I find merit in the General Counsel's contentions that Respondent violated Section 8(a)(1) of the Act, on September 3, 1994, by denying off-duty employees the opportunity to distribute leaflets to customers outside the old bingo entrance to its gambling casino and, on February 14, 1995, by invoking the Nevada trespass statute and denying off-duty employees the opportunity to distribute leaflets to customers at the main entrance doors to its casino and hotel and that Respondent violated Section 8(a)(1) and (3) of the Act by issuing disciplinary notices to employees who engaged in the aforementioned handbilling on February 14; however, I do not adhere to the legal analysis, which is postulated by counsel for the General Counsel.

Thus, counsel for the General Counsel assert that, inasmuch as prohibitions on the right of access of off-duty employees to Respondent's facility in order to engage in protected concerted activity is involved in these proceedings, the analytical approach, set forth by the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and its progeny, constitutes the applicable legal analysis to be utilized here. However, such a legal analysis does not appear to be applicable to the instant matters; for, while, to be sure, off-duty employees of Respondent were involved in both incidents, there is no contention that Respondent maintained any type of rule, denying such employees access to its property. Rather, all parties agree that Respondent invited off-duty employees to gamble, to partake of its entertainment events, and to eat and to drink at its public bars and restaurants; the rule, which was enforced by Respondent's security personnel on both of the above dates, was Respondent's rule, prohibiting distribution of literature in working areas of its facility; and the *Tri-County Medical Center* analytical approach is applicable only to instances where an employer allegedly violates Section 8(a)(1) of the Act by "publish[ing] or disseminat[ing] to its employees any no-access rule concerning off-duty employees." Id. at 1089. In these circumstances, in my view, the analysis, which should have been undertaken by counsel for the General Counsel and which I shall apply here, is that which is traditionally utilized by the Board in cases involving alleged unlawful enforcement of valid no-distribution rules—has the rule been enforced in nonworking areas of the employer's facility; has the rule been disparately enforced against employees who are engaged in protected concerted activities; and has the employer presented evidence that the ban on Section 7 rights is necessary for the operation of its business or for the maintenance of discipline or security. *Reno Hilton*, 319 NLRB 1154 (1995); *Lucile Salter Packard Children's Hospital*, 318 NLRB 433 (1995); *Dunes Hotel*, 284 NLRB 871, 876–878 (1987); and *United Aircraft Corp.*, 139 NLRB 39 (1962).[21]

In the instant matters, as there is no record evidence or contention that Respondent's enforcement of its no-distribution rule on either September 3, 1994, or February 14, 1995, was necessary for the operation of its business or the maintenance of security or discipline, the focus of my analysis concerns whether, in each instance, Respondent enforced its rule in a working area of its facility. In this regard, I note that, for purposes of determining whether a retail store's enforcement of a no-solicitation/no-distribution rule is violative of the Act, the seminal Board decision for determining what portions of such a facility constitute working areas is *Marshall Field & Co*., 98 NLRB 88 (1952). In that case, which involved an off-duty employee no-solicitation rule, the Board concluded that, as such could have a direct and detrimental impact on sales, the retail store lawfully banned off-duty employee union solicitations in areas of the store in which sales are being made and, as such conduct may affect the passage and safety of customers, in aisles, corridors, escalators, and elevators which interconnect selling areas. However, the Board further concluded that, as off-duty union solicitations have only a "slight" effect on public use of such facilities and no foreseeably adverse effect on sales activities, prohibitions against such employee acts and conduct in the retail store's public waiting rooms and restrooms were unlawful. The Board also concluded that an outright prohibition against all union solicitations in a store's public restaurant was unlawful and that, as the area was open to the public for pedestrian use, a ban on solicitations in the private street on the employer's premises was unlawful. Finally, the Board rejected the retail store's contention, one similar to that which was put forth by Respondent's security guard, Webster, that it could properly prohibit union solicitations in all areas of its facility, stating that "while all of Respondent's store area is, in a sense, of course, 'inextricably interwoven' with the Respondent's business, it is an entirely incorrect assumption to conclude that the impact produced by union solicitation in any portion of the store would be the same." Id. at 92–94. Subsequent to *Marshall Field & Co.*, in *McBride's of Naylor Road*, 229 NLRB 795 (1977), the Board emphasized that, as well as regarding solicitations in retail stores, it will not allow "restrictions on . . . distribution to be extended beyond that portion of the store which is used for selling purposes."

While there is no Board precedent on the precise legal issue involved here, the significance of these holdings of the Board to my analysis as to whether Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act is that the Board has long concluded that gambling casino and hotel facilities, such as operated by Respondent, are analogous to retail stores for purposes of considering the validity of enforcement of no-solicitation/no-distribution rules in asserted working areas. *Dunes Hotel*, 284 NLRB 871, 875 (1987); and *Barney's Club*, 227 NLRB 414 (1976). From this, it is clear that the working areas of a gaming establishment, such as operated by Respondent, encompass the gambling areas of the casino and adjacent aisles and corridors, areas which the Board equates to the selling area of a retail store, but exclude the public bars and restaurants. *Harolds Club*, 267 NLRB 1167 (1983); and *Barney's Club*, supra at 417. Further, just as in a retail store where there are other areas, including the public rest rooms, in which distributions of literature have no affect on the business of the store and may be undertaken, there are areas of a gambling establishment in which

'stranger' neither to the property or to the employees working there." Id. at 463. (Citation ommitted.)

[21] I recognize that counsel for the General Counsel's apparent confusion as to the proper legal analysis here is attributable to the Board's own inconsistent application of the *Tri-County Medical Center* guidelines. Thus, notwithstanding the Board's clear statement therein that its approach is for cases, involving employer rules denying access to off-duty employees, the Board, in later cases, such as *Trump Plaza Hotel & Casino,* 310 NLRB 1162 (1993), and *Sears Roebuck & Co.*, 300 NLRB 804 (1990), adopted administrative law judge decisions, which wrongly utilized the *Tri-County Medical Center* analytical approach in cases involving enforcement of facially valid no-solicitation/no-distribution rules.

off-duty employee distributions of literature clearly have no adverse effect on the main business of the facility—the operation of games of chance, and I do not believe that Respondent may legitimately interfere with such conduct in those areas. On this point, specifically analogous to the *Marshall Field & Co.* outside private street, which was open to the public for pedestrian use and as to which the Board could discern "no cogent reason for denying employees the right to solicit . . . for union membership," are the outside areas, including the pedestrian sidewalk outside the old bingo doorway and the front entrance door area, of Respondent's facility, as to which there is no record evidence that off-duty employee distributions of literature in these areas had any detrimental effect on Respondent's gaming operations or the passage of patrons through the affected entrance doorways. Moreover, while counsel for Respondent defines the old bingo doorway and front entrance doorway areas as working areas given that work tasks are performed at the former by security personnel, engineers, and guards and at the latter by valet parkers, bell persons, courtesy bus drivers, maintenance personnel, gardeners, engineers, and housekeeping employees, a similar contention was summarily rejected by the Board as one "that can be asserted by every company, thus effectively destroying the right of employees to distribute literature. Some work tasks . . . are performed at some time in almost every area of every company." *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976). In sum, neither the area outside the old bingo entrance to Respondent's gaming casino nor the area surrounding the main entrance doorway may be properly classified as a working area of Respondent's facility, and Respondent may not lawfully enforce its no-distribution rule so as to prohibit the distribution of union-related literature by off-duty employees at either location.

In arguing against the finding of unfair labor practices here, counsel for Respondent makes two other contentions. The first concerns the nature of General Counsel's Exhibit 10, which was distributed to customers by off-duty employees on September 3, 1994, and February 14, 1995. Counsel argues that the document "was an attempt by the Union to pressure Respondent to waive rights provided to employees by the Act"—to abandon the Board proceedings and have the question of representation decided by other means—and, in support, points to *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962), in which the Board held that "organizational rights . . . require . . . that employees have access to nonworking areas of the plant premises" for distribution of literature. Id. at 621. Contrary to counsel, in *Sacramento Union*, 291 NLRB 540 (1988), the Board concluded that a similar appeal by a union, which was distributed to an employer's advertisers, urging them to express support for the union's position to the employer, was protected by Section 7 of the Act, and, in *Eastex, Inc*., supra, the Supreme Court held that, notwithstanding that a newsletter did not address purely organizational matters, an employer could not lawfully prohibit employee distribution of it in nonworking areas during nonworking time and that its *Republic Aviation Corp*. decision should not be limited on the basis of the content of otherwise protected matter. Id. at 572. Moreover, counsel's characterization of General Counsel's Exhibit 10 is based on the pretrial affidavit of Kevin Kline, which is not evidence here. Accordingly, I find Respondent's arguments, in this regard, to be without merit. Next, counsel correctly argues that, prior to February 14, 1995, the Union considered and rejected other available means of conveying the message, which was contained in General Counsel's Exhibit 10. However, while counsel argues that the Union thereby failed to meet its burden of proof in such regard, the handbilling here was accomplished by off-duty employees and, in *United Aircraft Corp.*, supra, the Board noted that, "with respect to other avenues of communication . . . their availability to the Union has no relevance where an employee's right to distribute union literature is involved as distinguished from a nonemployee's right which depends on the lack of other effective means of reaching employees." Id. at 45. Likewise, in *Babcock & Wilcox Co.*, supra, the Supreme Court distinguished between employees and nonemployees in concluding that the latter must establish the unavailability of "the usual methods of imparting information" before being able to gain access to an employer's private property in order to approach his employees. Id. at 113.[22] Finally, in this regard, the fact that the off-duty employee distributions on both dates were to customers rather than to other employees appears to be a distinction without a difference and is an irrelevant consideration. Accordingly, I believe that Respondent improperly enforced its no-distribution rule against its off-duty employees on the above two dates and, based on the foregoing and the record as a whole, I find, as alleged, that Respondent violated Section 8(a)(1) of the Act on September 3, 1994, by denying its off-duty employees the right to distribute leaflets to customers outside the old bingo entrance doors to its casino, a nonworking area of Respondent's facility and on February 14, 1995, by refusing to allow its off-duty employees to distribute leaflets to customers outside the main entrance doors to its hotel and casino facility, a nonworking area of Respondent's facility, by invoking the State of Nevada trespass statute and summoning Las Vegas police officers to evict the employees from its property[23] and that Respondent violated Sec-

[22] In *Southern Services*, 300 NLRB 1154, 1155 fn. 13 (1990), the Board noted that its mode of analysis in *Jean Country*, 291 NLRB 11 (1988), does not apply in cases such as here involved. The meaning of the Board's language in *A-1 Schmidlin Plumbing Co.*, 312 NLRB 201 fn. 3 (1993), is, to say the least, confusing but does not, in my view, change the law in this area.

[23] Contrary to the complaint allegation in Case 28–CA–12980, I do not believe that Respondent violated Sec. 8(a)(1) of the Act by causing the off-duty handbillers on February 14, 1995, to be cited for violations of the Nevada trespass statute. Thus, in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Supreme Court held that a lawsuit, which has a reasonable basis in law and fact, cannot be found to be an unfair labor practice even if the employer's motive is to retaliate against employees for the exercising of their Sec. 7 rights. Subsequently, in *Johnson & Hardin Co*., 305 NLRB 690, 691 (1991), the Board concluded that the same considerations apply to the filing of a criminal trespass complaint by an employer. While strictly speaking, Respondent did not file criminal trespass complaints against its off-duty employees, who engaged in the handbilling on February, it caused the citations to be issued by summoning for Las Vegas police officers to be present that evening, invoking the Nevada trespass statute, and seeking the aid of the police in dealing with the "trespassing" off-duty employees. In determining whether a violation of Sec. 8(a)(1) of the Act has occurred in such circumstances, pursuant to *Johnson & Hardin*, the Board adopts a two-part analysis, initially inquiring as to whether the employer's action had a reasonable basis in law and fact and, if not, then, whether such had a retaliatory motive. Inasmuch as Bernard Little testified that a criminal trespass occurs immediately after a property owner requests that an individual leave his private property and that trespassers may include invited guests and employees, I believe that, notwithstanding that it acted in retaliation for its off-duty employees' exercising of their Sec. 7 rights, Respondent had a reasonable basis in law for causing the Las Vegas police officers to issue the criminal trespass citations and that, therefore, no violation of the Act may be found in such circumstances. Accordingly, I shall recommend dismissal of the applicable paragraph of the above complaint.

tion 8(a)(1) and (3) of the Act by issuing disciplinary warning notices to the off-duty employees who attempted to handbill on February 14. *Trump Plaza Hotel & Casino*, supra.[24]

I turn now to the allegations here that Respondent engaged in conduct, violative of Section 8(a)(1) of the Act by its counsel's failure to petition the Las Vegas city attorney to withdraw the aforementioned criminal trespass citations, which were issued to Respondent's off-duty employees who were handbilling on February 14, 1995, after issuance of the complaint in Case 28–CA–12980 and by its counsel's attempts to persuade the Las Vegas city attorney to continue prosecuting said citations. In these regards, there is no dispute here, and I find that, on issuing the above complaint, the Regional Director for Region 28 wrote letters to the administrator of the Las Vegas, Nevada Municipal Court and to the clerk of the Las Vegas Justice Court, advising each that, in his view, prosecution of the misdemeanor citations was preempted by the complaint in Case 28–CA–12980 and requesting that those matters be stayed pending resolution of the complaint allegations before the Board; that, thereafter, Respondent's counsel wrote to the Las Vegas city attorney, arguing against the assertion of preemption by the Regional Director and urging that the Las Vegas city attorney continue prosecution of the trespass citations; and that, subsequent to being informed that the Las Vegas city attorney had decided to stay prosecution of the misdemeanor citations until after conclusion of the Board proceedings, Respondent's counsel again wrote to the Las Vegas city attorney, arguing against the Regional Director's request and urging the Las Vegas city attorney to continue prosecuting the trespass citations. In support of the complaint allegation, counsel for the General Counsel rely on two decisions of the Board—*Loehmann's Plaza*, 305 NLRB 663 (1991), and *Johnson & Hardin Co.*, supra. In the former, the Board considered whether a strip shopping mall owner's continued pursuit of a lawsuit in state court, seeking injunctive relief against a union's picketing inside and at the entrances of its shopping mall, after a Regional Director's issuance of a complaint, alleging that the respondent's attempts to limit the picketing were violative of the Act, was itself violative of Section 8(a)(1) of the Act.

In answering affirmatively, the Board initially noted that, unlike in *Johnson & Hardin*, the Supreme Court's decision in *Bill Johnson's*, supra, was not controlling, for the Court there specifically stated, in a footnote, that it "was not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal law preemption." Id. at 737–738 fn. 5. The Court added that, at the Board's request, a United States District Court could enjoin enforcement of a state court injunction where the Board's "federal power preempts the field." Id. Accordingly, the Board set its task at determining at what point in a legal proceeding, seeking to enjoin peaceful union leafletting, Federal labor law preemption occurs and, after noting that *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), established that "when arguably protected activity is involved, preemption does not occur in the absence of Board involvement in the matter . . ." and "upon the Board's involvement, a lawsuit directed at arguably protected activity is preempted by Federal labor law" (*Loehmann's Plaza*, supra at 669), concluded that "when the General Counsel issue[s] a complaint alleging that the Respondent's lawsuit constitute[s] unlawful interference with protected activity, the requirements for establishing preemption [are] met." Id. at 670. Accordingly, the Board held that "the filing or active pursuit of a state court lawsuit seeking to enjoin protected peaceful picketing after the point of preemption—when a complaint issues concerning the same activity—tends to interfere with Section 7 rights, thereby violating Section 8(a)(1) of the Act" and that a respondent has the burden of establishing that it undertook affirmative action to stay the state court proceeding within 7 days of the issuance of the complaint. Id. at 671. Finally, counsel for the General Counsel points to *Johnson & Hardin Co.*, which involved criminal proceedings, as establishing that *Loehmann's Plaza* applies to both civil lawsuits and criminal complaints.

Contrary to counsel for the General Counsel and counsel for the Charging Party, counsel for Respondent disputes the allegation that counsel's above conduct is violative of Section 8(a)(1) of the Act. In this regard, counsel argues that, in accord with *Loehmann's Plaza*, subsequent Board decisions, including *Great Scot, Inc.*, 309 NLRB 548 (1992), and *Be-Lo Stores*, 318 NLRB at 12, involve state court injunctive proceedings, which are civil in nature and that *Loehmann's Plaza* has never been held applicable in criminal proceedings by the Board. Counsel for Respondent is, of course, correct on this point, and I note that *Johnson & Hardin Co.*, which is relied on by counsel for the General Counsel and by counsel for the Charging Party, is concerned with State court civil or criminal proceedings prior to the point of Federal labor law preemption and not with proceedings, such as are involved here. Nevertheless, while his point is compelling, I must disagree with counsel for Respondent. Thus, in *Johnson & Hardin Co.*, the Board specifically found that "a state criminal complaint, perhaps even more than a state-court civil lawsuit, invokes the State's compelling interest in maintaining domestic peace" and, like the filing of a civil lawsuit, is "an aspect of the right to petition the Government for redress of grievances." Id. at 691. Moreover, notwithstanding counsel for Respondent's assertion that a party registering a criminal complaint does not have the final say as to whether a criminal complaint will result in prosecution, Bernard Little testified that had counsel so requested, he would have dismissed the above criminal trespass citations. Therefore, in the instant circumstances, it would be specious to conclude that, as, rather than seeking civil injunctive relief, Respondent elected to invoke the State of Nevada criminal trespass statute and cause the Las Vegas police to issue criminal trespass citations to its off-duty employees on February 14, Federal labor law preemption may not occur, and this aspect of Respondent's defense must be found to be without merit.

Counsel next raises constitutional arguments in Respondent's defense. Initially, counsel asserts that the Regional Director's appropriate course of conduct here would have been to file a lawsuit to enjoin the city attorney from prosecuting the instant criminal trespass citations. Instead, counsel points out, the Regional Director elected to send an opinion letter to the city attorney, which letter accomplished the "shelving" of the criminal trespass prosecutions and now contends that Respondent engaged in conduct violative of the Act based on its counsel's reply letter, expressing disagreement with the Regional Director's opinion. Counsel argues that the contention is violative of

[24] While I believe that the method of analysis is incorrect, the facts and legal issues of the cited decision are similar to here and the holding is supportive of my decision here.

Inasmuch as I have concluded that Respondent's no-distribution rule was unlawfully enforced by it in nonworking areas, I need neither decide the issue of disparate enforcement or whether Respondent's conduct is unlawful pursuant to the Supreme Court's decision in *International Society. for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992).

Respondent's first amendment right to have access to the courts and to the civil authorities, which are concerned with the local administration of justice. Counsel failed to cite any support for this contention and, whether or not a first amendment right is involved here, counsel has missed the point. Under *Loehmann's Plaza*, once the Regional Director issued his complaint and irrespective of any further acts by the Region, it was Respondent's obligation, in order to avoid interfering with the Section 7 rights of its employees, within 7 days of the issuance of the complaint, to seek withdrawal of the criminal trespass citations or, at the very least, a stay in their prosecution and, given the testimony of Bernard Little, the Las Vegas city attorney would have honored such a request. Thus, Respondent's counsel's failure to act constitutes its unlawful conduct and not the content of counsel's April 13 reply letter to the letters which were sent by the Regional Director, which letters the Board views as a mere "courtesy." Id. at 671–672 fn. 56.[25] In these circumstances, counsel for Respondent's April 13 reply was irrelevant. Counsel next argues that, by sending his letters, which prompted the Las Vegas city attorney to stay prosecution of the criminal trespass citations, the Regional Director, in effect, deprived Respondent of its property without due process of law—a right guaranteed by the fifth amendment. In this regard, counsel asserts that the Regional Director's proper course of conduct was to have sought a court order, enjoining Respondent from using the trespass statute to protect its property right, thereby permitting Respondent to be immediately heard on the preemption issue. Once again, however, it must be pointed out that, pursuant to *Loehmann's Plaza*, the burden was on Respondent to have sought a withdrawal of the trespass citations within 7 days after the issuance of the complaint in Case 28–CA–12980 or, at least, a stay in the prosecution of them and not on the General Counsel to have sought such a result in court. That the Las Vegas city attorney acted on his own volition to stay prosecution of the citations must be viewed as a fortuitous circumstance and did not act to alleviate Respondent's burden initially to have sought such a result and to refrain from acting to achieve a different result. Viewed in this light, counsel is simply wrong to assert that Respondent was entitled, as a matter of due process under the Fifth Amendment to the Constitution, to a hearing in order to be heard on its arguments against Federal labor law preemption. Preemption occurred on the issuance of the above complaint, and Respondent's obligations flowed therefrom. Accordingly, by failing to seek withdrawal of the trespass citations and by actively seeking to change the Las Vegas city attorney's decision to stay prosecution of the citations, Respondent engaged in conduct violative of Section 8(a)(1) of the Act. *Be-Lo Stores,* supra, *Loehmann's Plaza*, supra.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On September 3, 1994, by enforcing its no-distribution rule so as to prohibit its off-duty employees from distributing union-related literature to customers outside of the old bingo entrance doorway of its facility, a nonworking area, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

4. On February 14, 1995, by enforcing its no-distribution rule so as to prohibit its off-duty employees from distributing union-related literature to customers outside of the front entrance doorway of its facility, a nonworking area, and by invoking the State of Nevada criminal trespass statute and summoning city of Las Vegas police officers in order to evict the off-duty employees from its facility, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

5. On February 15, 1995, by issuing written disciplinary warning notices to its employees, who, while off duty on February 14, 1995, had distributed handbills to patrons outside of the front entrance doorway of its facility, a nonworking area, for acting in violation of its no-distribution policy, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (3) of the Act.

6. After the issuance of the complaint in Case 28–CA–12980 on March 14, 1995, by failing to seek the withdrawal of the criminal trespass citations, which were issued to its employees, who, while off duty on February 14, 1995, had distributed handbills to patrons outside of the front entrance doorway of its facility, a nonworking area, and, after the Las Vegas city attorney had decided to stay prosecution of the criminal trespass citations, by attempting to convince the city attorney to change his decision, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

7. The unfair labor practices, which are described above, are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Unless specified above, Respondent engaged in no other unfair labor practices.

REMEDY

Having found that Respondent engaged in serious unfair labor practices, violative of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies and purposes of the Act. In particular, I shall recommend that Respondent be ordered to remove from its records all copies of, and references to, the unlawful warning notices, which were issued to the 12 employees, who, while off duty on February 14, 1995, had distributed General Counsel's Exhibit 10 to patrons outside of the front entrance doorway of its facility, and to notify them in writing that such has been done. Further, I shall recommend that Respondent be ordered to inform, in writing, the Las Vegas city attorney that it seeks the withdrawal of the criminal trespass citations, which were issued to the 12 off-duty employees, who were engaged in leafletting outside of the front entrance doorway of its facility on February 14, 1995, and to reimburse those employees for all legal and other expenses, plus interest,[26] which each incurred in connection with defending against the criminal trespass citation, which was issued to him or her, subsequent to the issuance of the complaint in Case 28–CA–12980 and until Respondent moves to seek withdrawal of the trespass citations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

[25] Whether the Regional Director's letters to the Las Vegas courts may be characterized as a "courtesy" is debatable; however, it is clear that such were sent after Respondent failed to seek withdrawal of the trespass citations.

[26] Interest should be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Santa Fe Hotel, Inc. d/b/a Santa Fe Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Enforcing its existing no-solicitation/no-distribution policy so as to prohibit its off-duty employees from distributing union-related literature to patrons in nonworking areas of its hotel and casino facility, including outside the old bingo entrance doors and outside the main entrance doors.

(b) Invoking the State of Nevada criminal trespass statute and summoning city of Las Vegas police officers to evict off-duty employees, who are distributing union-related literature to patrons in nonworking areas, from its hotel and casino facility.

(c) Issuing disciplinary warning notices, alleging violations of its existing no-solicitation/no-distribution policy, to its employees, who, while off duty, engaged in the distribution of union-related literature to patrons in nonworking areas of its hotel and casino facility.

(d) After issuance of a complaint alleging that the underlying conduct involved protected concerted activity and that its interference with such was violative of Section 8(a)(1) of the Act, failing to seek the withdrawal of criminal trespass citations, which were issued to its employees, who engaged in the protected concerted activity, at our behest and, after a decision had been reached to stay prosecution of the criminal trespass citations, seeking a reversal of that decision.

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

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

(a) Within 14 days from the date of this Order, remove from their personnel files the warning notices, which were issued on February 15, 1995, to employees Kathleen Thomas, Marty Tabarez, Wendy Jobe, Israel Hernandez, Emeteria Puga, Raul Olivas, Juan Villela, Miguel Reyes, Anita Rodriguez, Daniel Sanchez, Charlene Slaba, and Deanna Ferguson, and any references in the files to their unlawful warning notices and, within 3 days thereafter, notify each employee, in writing, that this has been done and that the warning notice will not be used against him or her.

(b) Within 14 days from the date of this Order, in writing, inform the Las Vegas city attorney that it seeks withdrawal of the criminal trespass citations, which were issued to its above-named employees on February 14, 1995.

(c) Reimburse the above-named employees for any and all legal and other expenses, with interest, which each incurred while defending himself and herself against the criminal trespass citation, which was issued to him or her on February 14, 1995, subsequent to the issuance of the complaint in Case 28–CA–12980 and until Respondent requests withdrawal of the criminal trespass citations.

(d) Within 14 days after service by the Region, post at its hotel and casino facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director of Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained by for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint in Case 28–CA–12980 be dismissed insofar as it alleges that Respondent unlawfully caused off-duty employees, who at the time were engaging in handbilling activities, to receive criminal trespass citations for violation of the State of Nevada criminal trespass statute.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT enforce our existing no-solicitation no-distribution policy so as to prohibit our off-duty employees from distributing union-related literature to our patrons in nonworking areas of our facility, including outside the old bingo entrance and outside the main entrance doors.

WE WILL NOT invoke the State of Naveda criminal trespass statute and summon city of Las Vegas police officers to evict our off-duty employees, who are distributing union-related literature to patrons in nonworking areas, from our facility.

WE WILL NOT issue disciplinary warning notices, alleging violations of our existing no-solicitation no-distribution policy, to our employees, who, while off duty, engage in the distribution of union-related literature to patrons in nonworking areas of our facility.

WE WILL NOT, after issuance of a complaint by the Regional Director of Region 28 of the National Labor Relations Board alleging that the underlying conduct involves protected concerted activity and that our interference with such is violative of the National Labor Relations Act, fail to seek the withdrawal of criminal trespass citations, which were issued to our employees, who engaged in the said protected concerted activities, at our behest, and WE WILL NOT, after a decision has been reached to stay prosection of said criminal trespass cita-

mended 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.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tions, seek a reversal of said decision by Las Vegas City Attorney.

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

WE WILL, within 14 days of the date of the Order of the National Labor Relations Board, remove from their personnel files the warning notices, which were issued on February 14, 1995, to our employees Kathleen Thomas, Marty Tabarez, Wendy Jobe, Israel Hernandez, Emeteria Puga, Raul Olivas, Juan Vilela, Miguel Reyes, Anita Rodriguez, Daniel Sanchez, Charlene Slaba, and Deanna Ferguson, and any references in said files to their unlawful warning notices and, within 3 days thereafter, notify each employee that this has been done and that the warning notices will not be used against him or her.

WE WILL, within 14 days of the Order of the National Labor Relations Board, in writing, inform the Las Vegas City Attorney that we seek withdrawal of the trespass citations, which were issued to our above-named employees on February 14, 1995.

WE WILL reimburse our above-named employees for any and all legal and other expenses, with interest, which each incurred while defending himself or herself against the criminal trespass citation, which was issued to him or to her on February 14, 1995, subsequent to the issuance of the complaint in Case 28-CA-12980 by the Regional Director of Region 28 of the National Labor Relations Board and until we request withdrawal of said criminal trespass citations.

SANTA FE HOTEL D/B/A SANTA FE HOTEL AND CASINO