

Desert Palace, Inc. d/b/a Caesar's Tahoe and International Alliance of Theatrical, Stage Employees and Moving Picture Operators, Local 363, AFL-CIO. Case 32-CA-4929

31 July 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 27 October 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

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

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me at South Lake Tahoe, California, on June 14 and 15, 1983, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 32. The complaint was filed on January 27, 1983 and is based on a charge filed by International Alliance of Theatrical, Stage Employees and Moving Picture Operators of the United States and Canada, Local Union 363, AFL-CIO (the Union) on October 13, 1982.¹ The complaint alleges that Desert Palace, Inc., d/b/a Caesar's Tahoe (Respondent) has engaged in certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

Issues

The complaint alleges three types of violations of the Act. It asserts that Respondent violated Section 8(a)(1) and (5) of the Act on July 28 or 29 by "disparaging and discrediting" the Union and that it repeated its conduct by a letter distributed on September 27.² Both of these

¹ Unless otherwise indicated all references to dates are 1981.

² While "disparaging and discrediting" a union might well violate Sec. 8(a)(1) it is doubtful that it would violate Sec. 8(a)(5) unless coupled with conduct actually undermining a union's representative status, i.e., direct dealing or similar conduct. The case on which the General Counsel relies, *Columbia Building Materials*, 239 NLRB 1342 (1979), appears to stand for the pleaded proposition, but the cases cited therein, at 1346, do not. In view of my decision here, it is unnecessary to decide the question.

incidents, according to the complaint, "impliedly encouraged employees" to decertify and undermine the Union as the collective-bargaining representative of the affected employees. Second, the complaint alleges that on September 6 Respondent transferred stagehand Robert Van Heusen from its showroom to its lounge because he had engaged in protected activity, in particular, the filing of grievance. Finally, the complaint alleges that Respondent violated Section 8(a)(1) by its treatment of employee Shane Williams on September 30 by allegedly directing him to cease discussing union matters of soliciting union membership during working hours and that such a directive was a disparate application of a no-solicitation rule. In dealing with each of these incidents, the relative credibility of witnesses is determinative.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits, and I find, that it is a Nevada corporation operating the Caesar's Tahoe Hotel and Casino in Stateline, Nevada; that during the past 12 months its gross revenues exceeded \$500,000 and during the same period it purchased and received goods valued in excess of \$5,000 which originated outside Nevada. Accordingly, it admits, and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Participants

In conjunction with the operation of its hotel and casino Respondent offers evening entertainment through two stage facilities. They are operated by its entertainment department. The larger of the two, known as the Cascade Showroom, generally features name acts. The smaller, Club Lookout, is a lounge. The entertainers appearing in the lounge usually are less well known. Admission to the showroom is by paid ticket; admission to the lounge is free. Responsibility for the entertainment department lies with one of Respondent's vice presidents, Richard D. Williams. He also has collective-bargaining responsibilities. During the time period involving these transactions, some of the managerial jobs were being changed. On August 6, Richard Langelius became director of entertainment and technical services. Sometime in April Respondent's stage manager had left. Between that time and August 6 Paul Hutchinson performed the stage manager's duties. On August 6 he was promoted to stage manager. He has been described during the interim period as a "superlead" person. His payroll designation was "supervisory technician." In effect he was the acting stage manager.

On July 20, 1981, following an election, the Board certified the Union as the exclusive collective-bargaining representative of a stagehand unit.³

The union official responsible for negotiating a contract with Respondent was Business Representative Johnny South. Assisting him was Las Vegas attorney, Dennis Sabbath, as well as two or three bargaining unit members. Among the employees who participated in the negotiations were alleged discriminatee Robert Van Heusen and Randy Redinger, who later became the shop steward.

South testified that prior to July 1982 the parties conducted some six negotiation sessions and that in July four more were held, resulting in an agreement on July 15. He further testified that at the request of Respondent's negotiators the Union agreed that the contract could be signed on August 1. South testified that the reasons which Respondent's negotiators gave him for the delay was to avoid double payment of insurance premiums (or the negotiated cash equivalent) during July as the existing health plan could readily be terminated at the end of that month. Furthermore, he said, Respondent's negotiators told him it would give Hutchinson time to familiarize himself with the agreement so that the transition would be smooth. South admits he did not make any effort to demand that the contract be signed on July 15 providing for commencement on August 1. Instead, he accepted Respondent's representations that the contract would be signed on that date. Indeed, Vice President Williams signed it on August 1 as promised.

The contract was almost immediately thereafter ratified. According to technician Robert Van Heusen, 12 employees attended the ratification meeting which was conducted on Respondent's premises. He says that the contract was "unanimously" ratified, but then stated that the vote was eight to none in favor. Apparently four individuals did not vote. There are approximately 18 employees in the bargaining unit.

B. *Disparaging and Discrediting the Union*

1. The July 29 meeting

While there is some dispute over how it came to be called, Vice President Williams and Director of Human Resources Dennis Shipley conducted a meeting among unit employees in the early hours of July 29. The two management officials contend that they were invited to the meeting by Acting Stage Manager Hutchinson who, in their view, was still an employee. The General Counsel asserts that Hutchinson had already become a statutory supervisor and that the meeting was management generated. I do not deem it necessary to resolve the dispute.⁴

³ The unit found appropriate was: All full-time stage and/or entertainment department personnel, including sound personnel, light personnel, spotlight operators, stage carpenters, stage electricians, scenic artists, riggers, property personnel, wardrobe personnel, set personnel, and projectionist employed by the employer at its Stateline, Nevada facility; excluding all other employees, professional employees, guards, and supervisors as defined in the Act.

⁴ Shipley testified that Hutchinson had reported that four employees claimed to have had a misunderstanding of the newly negotiated contract. Shipley suggested that Hutchinson refer each of them to him. All

Most of the bargaining unit appear to have attended the meeting. While there is some dispute with respect to the manner and attitude presented by Williams and Shipley, there is agreement with respect to the overall presentation. After waiting a few minutes, Williams stood up and thanked the group for inviting Shipley and himself. He introduced Shipley who, although he had participated in the bargaining process, was a relatively new face at the hotel. Shipley then explained his role as director of human resources. He told the group that he wore two hats, one of which was to engage in collective bargaining and the other was to administer the contract and to make certain employees were treated fairly. He told the employees that the purpose of his presentation was to explain the new contract and its implications to employees who would be affected. He said in his role as a negotiator the company had taken a "tough line" but that the contract which had resulted was "a good one" and Respondent intended to honor it.

At this point the testimony begins to diverge. According to employee Van Heusen, Vice President Williams then "cut in" saying, "I'd like to say that this is a very easy agreement for us to live with. We can sign this tomorrow, have no problem with it, and it represents a 30 percent savings to our operating procedure." Van Heusen recalls Williams referred to the relatively strong bargaining position of the Hotel as opposed to the weak position of the Union. Stage technician Erick Sorenson testified that when Shipley had been introduced he advised that he and Williams were there to answer questions regarding the contract and to explain it. He remembers Shipley saying that "a hard line" had been taken by the Hotel and "it was a good contract for the employer and against the employees." Stage technician Redinger testified Williams told the meeting he "thought that the contract was very good to the Hotel, that it meant a 30 percent savings that they could see right off the top."

Both Williams and Shipley specifically deny those versions. They each testified they said nothing regarding any savings to the company nor did either of them assert that the contract was "for the employer and against the employees."

Shipley says after he explained his job, he went through a list of contract items explaining how the contract had changed existing practices. He says the topics he touched on were the same ones which had been raised by the three employees with whom he had had conferences. He remembers talking at some length about overtime, vacation, and seniority. He says he then asked for questions.

Employee Ledesma asked about the unit's work jurisdiction. Although the General Counsel's witnesses are not consistent with respect to who said what in that par-

four made separate appointments; three were kept. Later, according to Shipley, Hutchinson reported that misunderstandings were continuing. Shipley expressed puzzlement to Hutchinson regarding the Union's perceived failure to communicate with its membership. Hutchinson thereupon suggested that perhaps a meeting with employees would be a good idea. Shipley told him he could set up a meeting if he wished. Hutchinson did so. The meeting which was not mandatory was announced via a posting. Individuals who were not scheduled to work that evening were called by Hutchinson's secretary.

ticular conversation, I infer that employees were operating under the belief that their work jurisdiction involved anything dealing with performance platforms having sound and light features governed by cues. At least one management official, apparently Williams, is quoted by Van Heusen as saying that such a view was incorrect, that the stagehands' jurisdiction only covered events to which tickets were sold through the box office. Clearly Van Heusen's version is incorrect as the stagehands always worked in the lounge which was not covered by the box office. A question was asked with respect to whether the stagehands would continue to be involved in building boxing rings or to decorate for conventions and private or semi-private meetings such as horse shows or festivals. The answers are not clear, but the employees became dismayed and angry. Whatever the discussion was and whatever the jurisdiction may actually be,⁵ Re-dinger became annoyed with the flow of the discussion and walked out of the meeting. He viewed the meeting to be an insult to his and the Union's integrity as negotiators.

The concern raised by the jurisdiction issue prompted someone to loudly assert: "Well, we'll get more money won't we?" At that point Shipley reentered the conversation and said, "Not necessarily." He then went to a flip chart located in the room.⁶ On the chart Shipley drew two columns. On one side he listed the contract terms and on the other side he listed the terms which were then governing the stage employees.⁷ Among the things Shipley noted was the fact that the contract did not provide for certain benefits which they had previously enjoyed such as sick leave, holiday pay, and a free meal. The wage scale and the overtime formula had also been modified. He also observed that instead of a health insurance plan, the contract called for an 85-cent-per-hour addition for those employees who had worked for 2000 hours, money which was to provide for the employees' purchase of their own health insurance.

This news did not sit well with many of the employees and, already disturbed over the work jurisdiction issue, they began a hot discussion back and forth. Van Heusen remembers an employee asking if "the contract" can be "decertified" during its term. He recalls Shipley answering "No, you cannot decertify a contract in the term—if it is in existence. You have to wait until it's—to expire or before." Van Heusen said an employee then asked,

⁵ The contract is not in evidence.

⁶ The room in which the meeting was held was known as the "Band Room" where bands often rehearsed. It was also used as a training and meeting room. The flip chart was a standard piece of furniture.

⁷ Work in the stage department often involved the utilization of part-time and temporary employees. After the Union was certified, the Union and management, according to Shipley, had reached an interim accommodation with respect to the treatment of the part-timers as well as with respect to several other employment related matters. As a result of this accommodation, the part-time employees had been granted health insurance benefits to the same extent as if they had been full-time employees. When the contract was actually reached, the contract terms were to be applied. This resulted in changing many of the benefits reached during the earlier accommodation. Thus, the material which Shipley placed on the flip chart representing "current practices" was for the most part a reference to the accommodation which Respondent and the Union had earlier reached. It did not necessarily reflect company policy with respect to employees generally.

"How can we get back to what we have?" At that point, according to Van Heusen, Shipley explained the decertification process, advising that the employees had to have "30 percent or one-third of the bargaining unit, 33-percent or one-third of the bargaining unit to write down—to sign a petition to decertify the contract or the union and have it brought down to the NLRB . . . before the contract goes into effect." He also concedes either Shipley or Williams said management could not be involved in the decertification procedure, that such an effort was the employees' own business.

Stage Technician Sorenson testified that at one point during the meeting Williams had said he hoped the stagehands would have decertified or voted the Union out long before they had gone to negotiations. Sorenson also said Williams told them, "The only way to get rid of the contract now [is] not to ratify it." He agrees Shipley was asked how the employees could get out of the contract and Shipley responded by explaining the decertification procedure. Sorenson was also led to say at one point Williams referred to a desire to have a "union free environment."

Both Shipley and Williams deny ever using the phrase "union free environment." Moreover they both denied either of them said anything to the effect that they hoped that the employees would have decertified the Union by now. Furthermore, they testified that they were well aware that the contract had previously been ratified.

All witnesses agree that shortly thereafter Shipley and Williams left the meeting. The employees remained and discussed the situation among themselves. At that point employee Jesse Tango, who had left the meeting, returned. Earlier he had said that he knew all about the decertification procedure as he had looked into it. Indeed, some days before he had discussed the topic with Shipley.⁸ According to Shipley he had simply referred Tango to the NLRB's Oakland office. Tango himself was never called as a witness. Upon his return to the meeting, Tango produced a decertification showing of interest sheet which already had at least one signature on it, that of employee Earl Sullins. The sheet was circulated among the group and later that day was submitted to the Board's Oakland office together with a decertification petition.

On August 1, as promised, Williams signed the collective-bargaining agreement. On August 31 a hearing was conducted on Tango's decertification petition. Although the decision is not in this record, the Regional Director apparently found merit to the petition and ordered an election, later scheduled for October 22. Approximately a week before the election, the Union filed the instant charge and it was indefinitely postponed. Later, on February 24, 1983, well after the issuance of the instant complaint, the Regional Director conditionally dismissed Tango's petition.

To the extent that there is a credibility dispute between the employees and the two management officials who attended the July 29 meeting, I tend to credit the

⁸ Tango was not one of the four who had been referred to Shipley by Hutchinson.

management officials. A number of the quotations attributed to them by the employees simply do not ring true. First, at the time the meeting was conducted, both Shipley and Williams were well aware that the contract had been ratified. They had told the Union that they intended to sign the contract on August 1 and later did so. It seems unlikely in that circumstance, that the employee representatives would risk antagonizing the bargaining unit by telling them that the contract was a good one for the employer and "against" the employees.

On July 29, even if Shipley had a hint that a decertification petition was being considered, there is no proof that he actually knew one would be filed. The mere fact that Tango had told Shipley he intended to do so would not have been sufficient for Williams to assume that it would occur. That being the case, it seems unlikely that Williams would risk antagonizing the entire crew by telling it that the contract was "against" the employees. Such a statement would have had the necessary result of totally demoralizing the crew and would have risked poor productivity for the term of the agreement. Unless Williams actually knew that Tango had succeeded in obtaining enough signatures and could get to Oakland from Stateline in time to beat the contract-bar rule, it seems quite improbable that such a statement would be made.

The statement would be credible if Williams could be shown to have known that the decertification petition would successfully be filed. However, the General Counsel's proof on the point is simply nonexistent. All he has shown is that Tango approached Shipley regarding a decertification, that Shipley referred him to the NLRB office, that Tango solicited employees in a timely way, albeit at a meeting which was called at company premises and that Tango (who already had one signature) succeeded in obtaining the requisite number. He has not shown that Shipley deliberately encouraged Tango to initiate those procedures. While one might suspect that Respondent's officials fostered Tango's interest here, suspicion is not proof. Neither party called Tango and I am without the benefit of his testimony on the point.⁹

In addition to the improbability of the foregoing statement, I note that the testimony of Van Heusen and Sorenson is to some extent inconsistent. Moreover, although Sorenson on direct seemed to have good recall, he conceded that the recall was the result of having recently reviewed some notes. On matters outside the notes his memory was quite poor. With respect to his recalling the "union free environment" remark, the General Counsel led him. Strangely, he was not corroborated in this regard. That phrase is a well-publicized and well-known code in vogue these days. If it had been used it seems

likely that more than one employee would have remembered it and that the one employee who did claim to remember it would not have needed a leading question to recall it.

Finally, there is the salient fact that Respondent, on August 1 as promised, signed the collective-bargaining agreement. Had it been involved in manipulating employees into seeking decertification, it seems likely that it would have found some excuse to delay the signing. Instead, it kept the promise it made to the Union. While it is possible that Respondent knew or could have known that the petition had actually been filed in Oakland, for a telephone call on either July 29 or 30 might have revealed that fact, there is no actual proof that it did know. If it had known of the filing, what is it most likely to have done? It seems to me that the higher probability is that Respondent would not have signed the agreement. It would take a very sophisticated and knowledgeable labor-relations person to know that signing the contract in that circumstance would be an effective way of covering otherwise illegal activity. There is simply no proof that Respondent was that sophisticated or that Machiavellian.

Furthermore, Sorenson's testimony that Williams told the employees that the "only way to get rid of the contract now was not to ratify it" is improbable in the circumstances. Both Williams and Shipley well knew that the contract had already been ratified. They would have known that urging nonratification would be an ineffective act. Thus, it is unlikely that management would have made such a statement. Indeed, assuming that the contract was favorable to Respondent, as it appears that it was, why would Respondent's representatives urge that it be avoided? Doing so would have risked causing a labor dispute where there had been none before. At the very least it would have resulted in both the Company and the Union swimming in unknown waters. Such a labor dispute might even have resulted in a contract that was not as favorable. Risking such uncertainty does not seem likely.

Accordingly, I conclude that the General Counsel has not shown by a preponderance of credible evidence that the July 29 meeting, as conducted by Shipley and Williams, was designed to disparage and discredit the Union. More likely the purpose of the meeting was, as asserted by Shipley and Williams, to try to settle questions regarding the changes in pay rates and personnel practices which the contract would cause. Indeed, the General Counsel does not contend that anything Williams and Shipley said was inaccurate.¹⁰ Thus, the General Counsel concedes that Shipley and Williams were accurately describing the contents of the contract and accurately describing the effects the change would have on the employees' wages, hours, and terms and conditions of employment. In that circumstance, I am unable to see how such conduct could have "impliedly encouraged employ-

⁹ I find instructive the Board's decision in *Montgomery Ward*, 187 NLRB 956, 960 (1971), with respect to the quantum of proof required in proving sponsorship of a decertification petition. In that case the General Counsel, despite proving that the decertification petitioner had engaged in some suspicious contact with management was found to have failed to have proven improper assistance, even though the decertification petitioner had probably obtained an employee list from the personnel department. Although one might have concluded that giving such a list to the petitioner constituted illegal sponsorship, the Board adopted the trial examiner's refusal to do so. The trial examiner would rely on circumstantial evidence; both he and the Board required direct evidence. Similarly, see *American Express Reservations*, 209 NLRB 1105, 1120 (1974).

¹⁰ Although the contract did not include certain benefits which the employees had previously enjoyed, it is not clear whether Sec. 8(d) would require them to be maintained despite their absence. It may be that Shipley's analysis was not correct. However, that question is not before me and I need not decide it.

ees to engage in a drive to decertify and to undermine the union" as asserted in paragraph 14 of the complaint.

2. The September 27 letter

A nearly identical incident, also alleged to have violated Section 8(a)(5) of the Act, occurred on September 27 when Respondent issued a letter to its employees which, like the comparison drawn on the flip chart on July 29, compared the contract with the conditions in effect prior to the contract. This letter was distributed to the employees after the Regional Director had issued his decision and direction of election. Again, the General Counsel makes no contention that it is in any way inaccurate. Indeed the testimony is that the comparison was nearly identical to that which Shipley had earlier written on the flip chart.

The letter, signed by Shipley, is on its face typical preelection propaganda. It contains no threats or promises and cannot be seen as coercive in any way. Indeed, no witness testified that any of Respondent's officials ever promised that the Company would return to the precontract practices if they chose to decertify the Union. One might assume it, but given the fact that such practices were the result of negotiations between the Union and management in the first place, one might also assume that Respondent might return to the practices in effect before the Union ever came on the scene, whatever they may have been. Truthful comparisons unaccompanied by any threats or promises of benefits are protected by the free speech provision of Section 8(c). See for example *Thrift Drug Co.*, 217 NLRB 1094 (1975) (Member Jenkins dissenting), and *Snap-Out Binding & Folding*, 166 NLRB 316, 328 (1967).

C. Van Heusen's Transfer to the Lounge

Robert Van Heusen had been hired by Respondent in 1980 and had earlier worked in the entertainment department. He later worked for a time in the electronics department but returned to entertainment in June 1982. In July 1981 he had served as the Union's observer during the NLRB election. He also attended two negotiation sessions including one in July 1982. He attended the July 29 meeting previously discussed and says he corrected Shipley who had told the employees that the new contract did not provide for health insurance or vacation. He spoke up in disagreement pointing out that the contract did provide for an 85-cent hourly addition and for vacation.

Van Heusen testified that he took 2 days of his vacation during the third week of August, a long weekend. When he returned, he learned that he had been scheduled to work only 29 hours for the next week. He had previously averaged 40 hours and could not understand why he was not also scheduled for 40 hours on this particular week. In late August, described as about a week before the Linda Rondstadt Show, which began on August 6, he, together with Shop Steward Redinger, spoke to Stage Manager Paul Hutchinson about the reduced hours. He told Hutchinson that he was normally scheduled for 40 hours, but had only received 29 and

could not understand why persons with less seniority than he were scheduled for the full 40 hours. He says he told Hutchinson that he believed it was a violation of seniority clause of the contract and he asked Hutchinson "to get back to me about it."

Redinger, however, does not fully confirm Van Heusen. Redinger says Van Heusen told Hutchinson he was "curious" why his hours had been reduced as other members on the crew were "still picking up their 40 hours and maybe an hour or two overtime." He says Van Heusen's main gripe was that he was more senior than they and he thus knew the theater better than anyone else. He denies that Van Heusen or he claimed any contractual right. He does report Hutchinson told Van Heusen that he would schedule the hours as he saw fit.

According to Van Heusen, on September 6 Hutchinson called him to his office. Also present in the office was Richard Langelius. Langelius was Respondent's director of entertainment and technical services. He reported to Vice President Williams and was Hutchinson's immediate superior.

Van Heusen testified that during the meeting Hutchinson told him he had reviewed Van Heusen's "question of the other day" and disagreed with Van Heusen's belief that he should have been scheduled for 40 hours. At that point Van Heusen asserted that by being scheduled for less than 40 hours he had actually been "laid off." He says Langelius cut in saying, "You are laid off, and only on layoff, when we tell you you are laid off." Van Heusen replied, "to me 29 hours is a layoff" and told Langelius that he would grieve it. Langelius replied, "That is your right." The meeting then ended.

Shortly thereafter, with Redinger's assistance, Van Heusen drafted General Counsel's Exhibit 3, a grievance form. About 6 p.m. he handed it to Hutchinson who simply said, "Oh," and walked away. Copies were also provided to the Union. The grievance asserts that three paragraphs of section 9 of the contract had been violated. These are the only sections of the contract dealing with seniority, but apparently do not create any clearcut scheduling rights. The form itself alleges: "Supervisor not honoring seniority clause of contract. I have plus 2000 hours within department and have least hours scheduled within in my department every other week."

On September 4 Hutchinson had posted a work schedule for the week of September 6, the week of the Linda Ronstadt Show. It provided that Van Heusen would be the sound lead for the Ronstadt Show as well as bringing the show in on Monday and taking the show out on Saturday, September 11. Also on September 4, Bruce Melendez, the technician who normally worked in the lounge, resigned leaving a vacancy which needed to be filled.

Langelius testified that on September 5 he had a meeting with Ronstadt's technical staff to determine the staging needs of that performer. He testified that as a result of the meeting and also aware of the vacancy in the lounge, he and Hutchinson decided to revise the entire schedule for the week of September 6. Accordingly, a new schedule (R. Exh. 4) was drawn and posted the

evening of September 6. The revised schedule contained a large number of changes. The only changes with which the General Counsel is concerned are those involving Van Heusen. In the original schedule he had been assigned as sound lead in the showroom during the entire run of the Ronstadt show, including "load-in" on September 6 and "load-out" on September 11. As the new schedule did not go into effect until September 7, he actually did participate in the work required for setting up the show as well as performing as the lead sound technician during opening night. However, under the revised schedule he was moved to the lounge as the technician responsible for both light and sound.

On September 7, to explain these changes, Hutchinson and Langelius conducted a staff meeting. Van Heusen was present and signed an attendance sheet but, due to some work requirements, was unable to stay very long. There is also undenied testimony that Director of Human Resources Shipley telephoned Union Business Representative Johnny South that afternoon to invite him to the meeting. South did not attend, but the record is not clear whether South had sufficient opportunity either to adjust his schedule or to travel to Stateline from his office in Reno.

In any event Langelius and Hutchinson, who only a month before had taken on their new duties, advised the staff that there would be some policy changes with respect to how assignments were made. In the past, according to Langelius, the lounge technicians had pretty much been limited to lounge work and showroom technicians generally assigned to the showroom. With the departure of Melendez, as well as with their own perception of the showroom's needs, assignments were to be handled somewhat differently. According to Langelius, the lounge technician job was to be rotated among those individuals who had both sound and light expertise. Furthermore, rather than rotating the showroom leads as had been the practice before, the leads were to be made permanent. A lead technician, under the collective-bargaining contract, receives a premium over his basic pay rate. Van Heusen does not appear to have been present during this explanation, but there can be no doubt that it was made.

Van Heusen, on learning he had been reassigned from the Ronstadt Show to the lounge, was insulted. He viewed the lounge job as a "training ground." In actuality there is some doubt whether that is so. He was also miffed because he was unable to work the Ronstadt Show and believed he was being denied an opportunity to claim the Ronstadt Show as part of his overall work experience. It is clear, however, that the skills required of the sound and light technicians are essentially the same in both the lounge and the showroom. The technician's pay rates are identical. Indeed, in some respects working in the lounge may be deemed more preferable to working the showroom, as there is approximately one 15-minute break period per hour between 45-minute performance sets. That break might, on occasion, involve repair or maintenance work. When a technician works in the showroom, however, he gets a 15-minute coffeebreak only after 4 hours; he also gets a half-hour mealbreak after 6 hours.

According to Langelius, Van Heusen's revised schedule for the week of September 6 gave him more guaranteed hours than Van Heusen had had when he was assigned to the showroom for that week. Langelius' observation, while accurate, does not clearly describe the situation. September 6 on the original schedule had some open hours to allow for the completion of the "load-in" for the Ronstadt Show. Similarly, the schedule for Saturday, September 11, contained open hours for the "load-out." Of the 4 remaining days, 2 provided for 7-1/2 hours' work and 2 provided for 4-1/2 hours' work, a total of 24 guaranteed hours. However, Van Heusen was clearly scheduled to work on load-in and load-out for some period of time. Under the revised schedule it appears the "guaranteed hours" included the work he had already performed on Monday. The remaining number of hours that week involved 3 days' work in the lounge, a total of 20 hours. In a sense, Langelius was comparing apples and oranges, for when he included Monday work actually performed on the revised schedule as part of the hours guaranteed Van Heusen, those hours had already been worked. Nonetheless, there are only 4 hours difference for the work scheduled between Tuesday and Friday. It is true that the revised schedule did not provide for load-out work. However, the record does not show how many hours, if any, his replacement, David Lines, worked that Friday. Indeed Lines and technician Gilhooley split the sound lead job between them Tuesday through Friday. Lines was scheduled for only 15 hours and Gilhooley for 12. As noted earlier, there is no record evidence regarding how many hours Lines actually worked on Saturday as sound lead, although he was scheduled to begin at 8 p.m. and undoubtedly covered the last show.

The payroll records show that in the week following the Ronstadt Show, Van Heusen returned to duties in the showroom working 39 hours there; in the second week he worked 34 hours there. He agrees that other senior employees, like himself, were later required to work the lounge. For the week in question, September 6, he actually worked a total of 39-1/2 hours, virtually a full schedule. He received 1 day's pay as lead, apparently for September 6 when he actually was the lead (a payroll error allocating that time to another day does affect that observation).

It is fair to assume that Van Heusen, as a result of the schedule change, lost some showroom hours at lead pay. The question which is presented, however, is whether or not that loss was the result of discrimination against him by Respondent for his having filed the grievance. Frankly, I am unimpressed with the General Counsel's proof here. Put quite simply all he has shown is that Van Heusen, shortly after his vacation, complained that he had not been scheduled for a full 40-hour week on one occasion. He confronted his immediate supervisor, who appears to have been somewhat surprised at the complaint, but who readily scheduled him for full-time work. Initially, therefore, Hutchinson cannot be seen to have had any negative reaction to Van Heusen's complaint.

A few days later, having satisfied himself that his actions were defensible under the Company's practice,

Hutchinson told Van Heusen that he did not believe Van Heusen's complaint had merit. Van Heusen then argued with him, claiming that a denial of hours was the same as a layoff and should be so considered. He says Langelius disagreed, but told him he had the right to file a grievance if he wished.¹¹ Later that day the grievance was filed. Hutchinson's immediate reaction to the filing was simply to accept the grievance; as described by Van Heusen it almost appears as if Hutchinson expected it and was not even surprised.

It is true that Hutchinson, who no longer works for Respondent, was not called by Respondent to testify with regard to why he revised the schedule, though Langelius was. However, despite the General Counsel's urging, I cannot conclude that an adverse inference should be drawn from that failure. Both Langelius and Hutchinson were involved in the decision. In that circumstance the Board has held that an adverse inference need not be drawn. *O'Dovero Construction*, 264 NLRB 751 (1981) (Member Jenkins dissenting). In any event, Langelius' explanation is both credible and comports with objective facts. Obviously Respondent needed to cover the lounge in order to replace the technician who had resigned. Certainly an employee who had both sound and light skills, such as Van Heusen, would be selected. Others might have been selected as well. But Van Heusen's transfer was not permanent; he was simply the first individual to be placed on the lounge rotation. Others who had the same skills were later placed on that rotation. Moreover, while the explanation is not as clear as it might be, Langelius' meeting with the Ronstadt production personnel and determining that the needs were different than had been originally scheduled certainly seems credible. Finally, I do not see that Van Heusen's loss of the Ronstadt Show has anything to do with his hire or tenure. His subsequent inability to claim experience working the Ronstadt Show does not seem to me to be cognizable as something which Section 8(a)(3) can remedy.

Thus, although one might have the suspicion that Hutchinson revised the schedule to demonstrate to Van Heusen that grieving could have an adverse impact on his employment, there is no real reason to think that it was Hutchinson's actual purpose. Certainly Hutchinson made no such admission and his responses to Van Heusen's complaint were perfectly calm and rational. Moreover, two things occurred simultaneously which appear to have justified the scheduled revision, the resignation in the lounge and the Ronstadt personnel modification. Indeed, the latter resulted in a great deal of rescheduling; the changes to Van Heusen's schedule were simply part of a greater reshuffling. In that circumstance, I find that the General Counsel has failed to prove by a preponderance of evidence that Van Heusen was transferred from the showroom to the lounge for discriminatory reasons.¹²

¹¹ Langelius' response to one question can be interpreted as a denial that he was present during that conversation. If so, it was Hutchinson who told Van Heusen he had the right to file a grievance.

¹² Shortly after the hearing began, counsel for the General Counsel moved to amend the 8(a)(3) portion of the complaint dealing with Van Heusen to allege that he had also been discriminatorily denied the "lead

D. The Shane Williams Incident

The complaint alleges that on September 30 Hutchinson ordered Williams not to discuss union matters nor solicit union membership during working hours, except during lunch and break periods. It further alleges that the order Hutchinson gave amounted to selective and disparate enforcement of a no-solicitation rule covering nonunion related matters.

The incident actually occurred on October 5 about 2-1/2 weeks before the scheduled election. Furthermore, the General Counsel has failed to prove the existence of any rule whatsoever with respect to on-the-job solicitation. The only evidence adduced with respect to such conduct was that some employees occasionally bought and sold sporting goods, Girl Scout cookies, automobiles, etc., to other employees. The evidence is scant that such activity occurred while employees were actually performing job duties. Furthermore, to the extent that there is evidence that job duties were being performed and perhaps interrupted by such activity, there is no evidence whatsoever that management was aware of it. It is fair to presume, however, that management had a common sense rule requiring employees not to interrupt or disrupt the work of either themselves or others in order to engage in nonjob-related matters.

Williams testified that on October 5 he and two other stagehands, Derick McClure and Earl Sullins were working overtime. Williams testified that Sullins wondered aloud how the overtime pay would be calculated. Williams says he told Sullins that overtime began after 10 hours' work in a day. Sullins then left work and telephoned Human Resources Director Shipley to verify what Williams had said. According to Williams, Sullins returned saying that Shipley had confirmed Williams' understanding. He was angry because he wanted overtime after 8 hours.

A short time later, about 5 p.m., Williams says he was called to the office shared by Stage Manager Hutchinson and Director of Entertainment and Technical Services Langelius. Both Hutchinson and Langelius were present.

sound" job in the showroom after filing his grievance. At the hearing I asked the General Counsel's representative if he had given Respondent's counsel any notice of the proposed amendment. He conceded he had not, but asked for a continuance if I deemed it prejudicial. Clearly a continuance would have been appropriate due to the extensive investigation the amendment would have required. As the hearing occurred in a city requiring distant travel for both Respondent's counsel (who is officed in Massachusetts) and for the Government personnel, I denied the motion, principally on grounds of practicality. In his brief the General Counsel has renewed his motion.

There is reason, however, to think that there is no charge pending on the issue. First, the original charge contained language broad enough to have covered the conduct now sought to be included, but the Regional Director did not include it in his complaint. Second, the Regional Director, on February 7, 1983, approved the Union's withdrawal of the "8(a)(3) portion" of the charge. (Respondent's motion to receive the approval letter, attached to its brief, is granted.) The General Counsel contends that the letter mistakenly overstates the extent of the withdrawal; indeed, Van Heusen's lounge transfer has not been challenged on "no charge" grounds. Even so, as the director did not proceed on the "lead sound" claim, it is likely that the Union was asked to withdraw that portion of its charge and did so. As it has never been reinstated no charge dealing with the "lead sound" issue is pending before the Board as required by Sec. 10(b) of the Act. My denial of the motion to amend, therefore, stands.

Williams remembers Hutchinson saying something to the effect that it had been brought to his attention that a couple of stagehands had heard Williams talking about the Union and the contract. Langelius then interjected, telling him, "Shane, maybe you're not used to not talking about the Union or the contract at other hotels, but you don't do it here." Hutchinson then finished saying, "We don't want to hear any more complaints or talk of you talking about the Union from any of our stage employees on our crew." Williams then said, "Okay" and walked out of the office. Williams denies that either of them asserted that he had interrupted the work of himself or others. He conceded that Langelius did tell him he was free to discuss the Union on his breaktime or his lunchtime. He insisted, however, that they did not say anything about disrupting work.

Langelius' version is quite different. He testified that there had been two earlier complaints about Williams which Hutchinson had brought to his attention, both dealing with the solicitation of union membership. He had earlier told Hutchinson to ignore them. A third complaint had come to Hutchinson from Earl Sullins to the effect that Williams was disrupting Sullins' work by trying to solicit union membership. Accordingly, they called Williams to the office and Hutchinson told Williams about the complaints. Langelius told Williams to stop disrupting the work of others by trying to solicit union membership but that he could do it on breaks, lunch or before or after work. Langelius also testified that he later confirmed Sullins' complaint by speaking to Sullins separately. He reports Sullins as claiming Williams had been "badgering" him.

Langelius testified that during the meeting Williams agreed he had solicited membership saying that it was common when he had worked at the MGM Grand in Reno and he was unaware that he had caused any problems or had disrupted anyone's work. Langelius says he told Williams he was not working at the MGM and that at Caesar's Tahoe work hours were for work. Langelius denies that he ever told Williams, "We don't talk about the Union here."

Langelius says no record was kept of the incident and, from Respondent's standpoint, no discipline has been levied against Williams.

For his part, Williams denies ever soliciting membership at all. He says the only discussion he remembers is the one described above relating to the overtime question. Furthermore, he says he did not have in his possession any union membership cards or any other union cards. Union Business Representative Johnny South testified the only person who had papers of any type was shop steward Randy Redinger, who solicited dues-check-off authorization forms. South says the only person who possessed union-membership authorization cards was himself.

With respect to the relative credibility of Williams and Langelius, I am not inclined to disbelieve either one of them. The difficulty with the two versions is one of perspective, not one of probity. My view is that something got lost in the transmission of Sullins' complaint. Quite clearly Williams believed that the discussion of union

matters on the job was permitted. Indeed, Langelius in his testimony, does not contend otherwise. However, Langelius and Hutchinson, operating on second-hand information, determined that Williams probably was disrupting the work of Sullins by soliciting cards even though Williams was not doing so. Thus the credible evidence is that Williams did not disrupt Sullins' work, but Sullins thought he was. Acting on that misinformation, Hutchinson and Langelius told him to stop it. Because Williams had not been doing so, he did not understand the trust of their admonition. He understood them to be denying him the right to even talk about the Union while working. He was, however, in error. However, Williams' concession that they told him he was free to engage in union conduct on breaks and free time tends to give credence to Langelius' version, for it partially corroborates him.

Thus, I conclude that they all erred in determining what was actually happening. Hutchinson and Langelius erred in concluding that Williams was soliciting cards. Yet, Langelius did apply a proper admonition to Williams. He told Williams that he could not disrupt the work of others while soliciting membership. The difficulty with that was that it was not an appropriate admonition for the conduct since Williams was not soliciting any sort of union cards.

In any event, it is clear that Respondent does not have any rule with respect to "no union-talk" and that Langelius was not attempting to impose such a rule on Williams. I conclude, therefore, that the General Counsel has failed to prove this allegation.

On the foregoing findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Desert Palace, Inc., d/b/a Caesar's Tahoe, Stateline, Nevada is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Alliance of Theatrical, Stage Employees and Moving Picture Operators, Local 363, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove by a preponderance of credible evidence that Respondent violated Section 8(a)(1), (3), or (5) of the National Labor Relations Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The complaint is dismissed in its entirety.¹⁴

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁴ Any outstanding motions inconsistent with this decision are denied.