

**Resorts International Hotel Casino and Hotel Employees and Restaurant Employees International Union Local 54, AFL-CIO. Case 4-CA-19690**

July 21, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND  
RAUDABAUGH

On February 24, 1992, Administrative Law Judge James L. Rose issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed limited cross-exceptions and a supporting brief, and the General Counsel and Charging Party filed answering briefs.

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 briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Resorts International Hotel Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> In view of our agreement with the judge that the Respondent has not established a need for confidentiality, we find it unnecessary to reach the issue of what the Respondent's obligation would have been had it established the confidentiality claim.

*Monica L. McGhie-Lee, Esq.*, for the General Counsel.

*Howard R. Flaxman, Esq. (Blank, Rome, Comisky & McCauler)*, of Philadelphia, Pennsylvania, for the Respondent.

*James Katz and Robert F. O'Brien, Esqs. (Tomar, Simonoff, Adourian & O'Brien)*, of Haddonfield, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on November 18, 1991, on the General Counsel's complaint which alleged that Resorts International Hotel Casino (the Respondent) failed to furnish certain information requested by the Hotel Employees and Restaurant Employees International Union, Local Union No. 54, AFL-CIO (the Union or Charging Party) in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

All parties were represented by counsel and given the opportunity to call, examine and cross-examine witnesses, and

following the hearing, to submit briefs. On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is alleged, admitted, and I find that the Respondent's business meets the Board's jurisdictional standards and it is an employer engaged in interstate commerce within the meaning Section 2(2), (6), and (7) of the Act.

It is further alleged, admitted, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Respondent operates a gambling casino and hotel in Atlantic City, some of whose employees, including cocktail servers, are represented by the Union. The Respondent and the Union are parties to a collective-bargaining agreement effective September 15, 1989, through September 14, 1994, covering those employees.<sup>1</sup>

On March 9, 1991,<sup>2</sup> two customers of the Respondent complained about the job performance of cocktail server Lori Cosenza Maiman. So far as is important here, as a result of these complaints, Maiman was suspended; she filed a written grievance, which was denied, and she was discharged. Thereafter the discharge was converted to suspension without backpay, and later she received partial backpay.

A similar incident happened on March 25 when a patron complained about cocktail server Karen Mulkey. She was suspended, and she filed a grievance which was denied. The Union requested arbitration, then the matter was settled.

As to both grievances, Joseph "Ace" Orzechowski, the Union's business agent, requested that the Respondent furnish the names, addresses, and phone numbers of the complaining customers.

The denials of these requests were communicated to Orzechowski by letters dated March 29 and April 25, in which the material language is identical

We provided you with the guest's statement . . . however, we did not disclose the name and phone number of the guest. This has been a practice at Merv Griffin's Resorts since opening. If you proceed arbitration, you will have an opportunity at that hearing to cross-examine the guest. . . .

. . . should you have any specific questions I will be more than willing to contact the guest(s). At the same time, if the guest(s) authorizes release of his (their) name(s), I will then have no further objection.

Orzechowski did not respond to either of these letters, so far as the Respondent's suggestion that the guests would be contacted, if he wanted, to see if they would authorize release of their names. And, as noted, both grievances were settled before arbitration.

<sup>1</sup> The 12 Atlantic City casinos bargain together with the Union, but they each have separate collective-bargaining agreements.

<sup>2</sup> All dates are in 1991 unless otherwise indicated.

## III. ANALYSIS AND CONCLUDING FINDINGS

On these facts the General Counsel and the Union contend that the Respondent was required to furnish the Union information necessary for servicing the collective-bargaining agreement—the names, addresses, and phone numbers of the complaining patrons.

The Respondent argues that it has an overriding interest in protecting the confidentiality of its customers; that it in fact offered to ask the customers if they would allow their name to be given the Union; and whatever right the Union might have in securing the names of complaining patrons in a situation such as these, that right was waived in negotiations.

The parties agree that the basic legal principle here is well settled. The Union is entitled to whatever information is necessary for it to perform its duty as the bargaining representative of employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Howard University*, 290 NLRB 1006 (1988); *Washington Gas Light Co.*, 273 NLRB 116 (1977).

Though the initial test is whether the information sought is relevant, the employer nevertheless need not produce information which is confidential or privileged. Thus the claim of confidentiality must be balanced against the union's need for the information. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979). But on this the employer has the burden of proof.

The Respondent seems to agree that the information sought here is of the type which it would generally be required to produce; however, it claims there is an overriding interest protecting the confidentiality of its guests.

The Respondent offered evidence and argument that running a gambling casino is highly competitive, where great care is taken to ensure superlative service and to protect the confidentiality of customers. The Respondent annually spends millions of dollars to attract customers and in fact has about 2.5 million patron visits each year. Of these, according to John P. Belisle, the vice president of marketing, about 24,000 are what he would refer to as high rollers or rated players—individuals who are willing to put \$1000 or more at risk. A huge majority of the patron visits are repeats; thus Belisle estimated that the Respondent annually has about 200,000 different customers. Much of his testimony dealt with high rollers and rated players who, because they put at risk substantial sums of money, expect to be treated well, lest they take their business elsewhere.

Therefore, to solicit a gratuity, which were the complaints here, was a serious violation of company policy. Further Belisle offered the opinion that releasing the names of customers “could have an impact, depending on the level of player”; and to protect the anonymity of the complaining guests was more important than the Union's right to their names. However, there is no evidence that the complainants were high rollers or rated players, or even that they were gamblers. Thus, the Respondent's argument has a certain appeal in the abstract; however, in this factual setting it is not persuasive.

As to the particular grievances here and the Respondent's refusal to furnish the names of the complaining guests, this situation is essentially identical to *Fairmont Hotel*, 304 NLRB 746 (1991). While the business of the Respondent might in some circumstances serve to distinguish this matter from *Fairmont Hotel*, none have been established.

In *Fairmont Hotel*, the Board found that the company failed to show it had promised the guest anonymity, or that

the guest had any reasonable expectation of privacy. Further the guest appeared at the arbitration hearing which rendered moot any claim of anonymity. And finally, even if the company had established its claim for confidentiality, it failed to show it met its bargaining obligation by offering some accommodation to the competing interests.

Here the Respondent offered no evidence that the complaining guests were assured of confidentiality or expected it. Absent such evidence it is just as reasonable to conclude that a customer who complains to management about an employee would assume that employee would be told who lodged the complaint. In any event, the burden is on the Respondent to prove its claim of confidentiality and it failed to do so.

As in *Fairmont*, the Union was told that the complaining guests would be present at the arbitration hearing, and no doubt would have been but for settlement of the grievances. Had they appeared it would have been at the insistence of the Respondent who, under the collective-bargaining agreement, had the burden of proving just cause for the discharge in question. Such necessarily would have violated the professed necessity for protecting the guests' confidentiality, simply to support the Respondent's discharge decision. But Belisle testified that to release the name of a customer would be more damaging to the Respondent than the act for which Maiman and Mulkey were discharged.

There is an inherent inconsistency in the Respondent's argument. Indeed, the Respondent seeks to pick and choose the point when protecting the confidentiality of a complaining guest is paramount and when it is not. I conclude that such a position is contrary to the claim that the identity of the complaining guests must be confidential. Therefore, by failing to furnish their names, addresses, and phone numbers on request, the Respondent breached its bargaining obligation.

I further conclude that the Respondent's two additional defenses are insufficient to alter this result. First, it is argued that an offer was made in the letters of March 29 and April 25 to contact the guests and, if they agreed, to release their names. The Union did not respond to this suggestion. Thus, the question is whether such was a reasonable offer by the Respondent to accommodate the competing interests here.

I conclude not. First, in order to have a defense of accommodation, the Respondent must first prove its claim of confidentiality. Only then is there triggered the balancing of the the Union's needs against the confidentiality concerns.<sup>3</sup> Secondly, this offer does not really balance the competing interests but is simply a suggestion to check with the guest to see if they wanted to be anonymous—something the Respondent should have done in the first instance.

Joanne Gitto, the Respondent's director of employee labor relations, testified that prior to receiving the first written demand from Orzechowski, she had a brief meeting with him at which time she offered to call the guests and ask them any questions he posed, or to arrange for a conference call. She testified he declined this offer. Orzechowski specifically denied any such offer being made by Gitto.

This apparent conflict in testimony is on a somewhat tangential issue and need not be resolved. Gitto's offer, if there was one, relates to the Respondent's defense that it offered to accommodate the competing interests, which would have

<sup>3</sup> *Fairmont Hotel*, supra at fn. 3.

been viable only if the Respondent had first established the need for confidentiality. Secondly, Gitto's stated offer is not substantively different from that in her letters—which Orzechowski did not answer. Thus, to credit her would not add much. To credit him would not subtract much.

I conclude that the Respondent in fact offered to contact the guests. But this is no defense because the Respondent did not establish the need for confidentiality or that the guest reasonably expected that their names not be released to the employee about whom they complained.

The Respondent further argues that the Union waived its right to the names of complaining guests in such circumstances as these during contract negotiations. Specifically, in 1989 negotiations with the employer the Union made a proposal which included: "In addition, the names and addresses of any customers, who make written complaints on an employee shall be furnished to the union upon request if they are relied upon by the employer, as a basis for a discharge or suspension of employees." The employers' initial response was "The proposal is unacceptable." But in subsequent colloquy recorded between the chief negotiators, the employers stated: "Will take a bye on this issue now." And nothing more was done during negotiations.

On these facts the Respondent contends the Union waived its statutory right to have the names of complaining customers. I disagree. While it is possible for a union to waive its statutory rights in negotiations, such a conclusion is not favored and therefore must be established by clear and convincing evidence. For the Respondent to approve its defense here, the evidence must establish a "clear and unmistakable waiver by the Union of its statutory right to request information from the Respondent." *Clinchfield Coal Co.*, 275 NLRB 1384, 1385 (1985).

In effect, the Respondent argues that a union waives statutory rights if it makes a proposal relating to them which it does not pursue. Such a rule would clearly inhibit negotiation and compromise and therefore cannot be clear and unmistakable proof of waiver. To establish waiver it must be shown that the union actually intended to give up a statutory right. For instance, the union abandoned statutory right in return for some benefit. There is no such evidence here. The evidence relied on by the Respondent falls short of clear and convincing proof that the Union waived its statutory right to the name of individuals whose complaints the Respondent relied on to discipline employees.

On the foregoing findings, conclusions, and the entire record in this matter, I conclude that by failing on request to furnish the Union with the names, addresses, and phone numbers of complaining guests in connection with grievances of employees, the Respondent violated Section 8(a)(5) and (1) of the Act and I issue the following recommended<sup>4</sup>

#### ORDER

The Respondent, Resorts International Hotel Casino, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

<sup>4</sup>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.

#### 1. Cease and desist from

(a) Refusing or failing to bargain in good faith with the Union by withholding from it requested information relevant to the processing of grievances or the administration of their collective-bargaining agreement.

(b) 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) On request, furnish the Union with the names and addresses of the complaining guests in connection with the 1991 grievances of Lori Maiman and Karen Mulkey.

(b) Post at its Atlantic City, New Jersey facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>5</sup>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."

#### 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 fail or refuse to bargain in good faith with Hotel Employees and Restaurant Employees International Union Local 54, AFL-CIO, by withholding from it requested information material to the processing of grievances or the administration of our collective-bargaining agreement.

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

WE WILL, on request, furnish the Union with the names, addresses, and telephone numbers of the complaining guests in connection with the March 1991 grievances of Lori Cosenza Maiman and Karen Mulkey.

RESORTS INTERNATIONAL HOTEL CASINO