

Peppermill Casino, Inc., d/b/a Peppermill Hotel Casino and Rainbow Casino and Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO. Cases 32-CA-16144, 32-CA-16214, and 32-RC-4285

July 29, 1998

DECISION, ORDER, AND DIRECTION

BY MEMBERS FOX, HURTGEN, AND BRAME

On May 5, 1998, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent 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,¹ and conclusions and to adopt the recommended Order² as modified.³

ORDER

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

1. Substitute the following for paragraph 2(b).

¹ In finding that the Respondent's director of maintenance, Carl Ahaus, violated Sec. 8(a)(3) by issuing a negative evaluation to employee Reggie Martin, the judge noted a number of inconsistencies in Ahaus' testimony concerning his stated basis for the poor evaluation. In addition to those cited by the judge, we note the following: According to Ahaus, Martin's alleged reluctance to talk to Ahaus on the job was the basis for prescribing improvement by Martin in the evaluation elements of "supervisory relationship," "ability to communicate," and "attitude." Although Ahaus testified that the reluctance to talk commenced in April or May 1997, he later testified that it became a frequent occurrence only after the close of the evaluation period. Thus, as with other postevaluation matters to which Ahaus testified and which the judge addressed, this reason does not withstand scrutiny as the actual basis for the negative evaluation.

² In recommending the direction of a new election, the judge noted a "likelihood" that the unlawful conduct directed at employees Martin and Omura had been disseminated to other voters in the election. Contrary to the judge, we do not presume that evidence of objectionable conduct of the type involved in this case was disseminated. See *Sears Roebuck de Puerto Rico*, 284 NLRB 258, 259 fn. 13 (1987). As the judge notes, the outcome of the election, a tie, could have been influenced by a change in either Martin's or Omura's vote alone.

³ We have modified the administrative law judge's recommended Order to reflect the date on which the first unfair labor practice occurred. *Excel Container*, 325 NLRB No. 14 (Nov. 7, 1997).

The judge inadvertently omitted from his notice the expunction remedy.

"(b) Within 14 days after service by the Region, post at its Wendover, Nevada facility copies of the attached notice marked 'Appendix.'⁵ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and 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. 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, the 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 March 12, 1997."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 32-RC-4285 is severed from Cases 32-CA-16144 and 32-CA-16314, and that it is remanded to the Regional Director for Region 32 for action consistent with the Direction below.

[Direction of second election omitted from publication.]

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities, the union activities of other employees, or how employees intend to vote in a representation election.

WE WILL NOT create the impression that the union activity of our employees is under surveillance.

WE WILL NOT threaten employees with discharge if they engage in union organizing activity.

WE WILL NOT offer benefits to employees in the form of better jobs or increased pay for voting against union representation.

WE WILL NOT issue negative annual personnel evaluations to any employee because he has engaged in the protected activity of organizing on behalf of a labor organization such as Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO.

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

WE WILL, within 14 days from the date of this Order, remove from our files the unlawfully promulgated annual personnel appraisal of Reggie Martin dated June 19, 1997, and within 3 days thereafter notify him in writing that this has been done and that the personnel appraisal will not be used against him in any way.

PEPPERMILL CASINO, INC., D/B/A
PEPPERMILL HOTEL CASINO AND RAINBOW CASINO

Sharon Chabon, Esq., for the General Counsel.
James T. Winkler, Esq. (Hicks & Walt), of Las Vegas, Nevada, for the Respondent.
Timothy Sears, of Alameda, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Reno, Nevada, on October 23, 1997,¹ based on a consolidated complaint issued by the Regional Director for Region 32 of the National Labor Relations Board. It is based on unfair labor practice charges filed on June 11 and July 10 by Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO (the Union). The complaint alleges that Peppermill Casino, Inc., d/b/a Peppermill Hotel Casino and Rainbow Casino (Respondent) has committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act. In addition, the Regional Director has ordered a hearing on two objections to the outcome of a representation election, Case 32-RC-4285, and has consolidated them with the unfair labor practice complaint. They track two of the allegations of the complaint.

The issues

The Union's election petition was filed on April 17. According to the complaint, prior to that filing, Respondent interrogated an employee about his union activity and the union activity of others, created the impression of surveillance of employees' union activities, and threatened an em-

ployee with discharge for engaging in union activity. Pursuant to a stipulated election agreement approved on May 8, a representation election was held on May 30. It resulted in a tie vote.² According to the complaint, shortly before the election, Respondent interrogated two employees regarding how they intended to vote and impliedly promised improved benefits if the employees voted against union representation. Finally, the complaint asserts that 2 weeks after the election, Respondent issued an unsatisfactory work appraisal to an employee because he had supported the Union.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue, and to file briefs. All parties have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent admits it is a Nevada corporation which operates a hotel, several restaurants, and two gaming casinos in Wendover, Nevada. It further admits that its annual gross volume of business exceeds \$500,000 and that it annually purchases and receives goods and/or services from outside Nevada valued in excess of \$5000. Based on those facts, it admits it is an employer within the meaning of Section 2(2), (3), and (6) of the Act. Likewise it admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATIONS

A. Background

Respondent's businesses are located in Wendover, Nevada, a small and remote community located in the desert of the Great Basin on the Nevada-Utah border. It is accessible by Interstate 80, the highway between Reno, 400 miles to the west (on the western side of Nevada), and Salt Lake City, 125 miles to the east. The town has no room for growth because the land surrounding it is publicly owned. It is 2-1/2 miles long and 1/2 mile wide. It is home to five casinos, four small mining companies, and a few small motels. Most of the housing is owned by the casinos and are rental units for their employees.

Four individuals own Respondent, including Albert Seeno of Pittsburg, California. They do not appear to be active in operating the businesses. Daily operations are conducted by the two general managers of each of the properties. They are Gary Lewis of the Rainbow and Jim Conrad of the Peppermill. The two hotels/casinos are located on opposite sides of Wendover Boulevard, and about a 5-minute walk from one another. They share a common personnel manager, Heidi Lewis, and the same director of maintenance, Carl Ahaus.

Ahaus hired Reggie Martin as a general maintenance worker for the Rainbow in February 1995. Martin was expe-

¹ All dates are 1997 unless otherwise indicated.

² The voting unit covered all full-time and regular part-time maintenance department employees, including engineering and landscape workers. The tally of ballots showed that there were 26 eligible employees. The vote was 12 for and 12 against union representation.

rienced in the field and had worked with and for Ahaus at several casinos in Reno. They had known each other for about 10 years and had a friendly relationship which predates Ahaus' becoming a supervisor in the industry.

Martin In previous jobs, Martin had been a member of Operating Engineers, Local 39 in Reno, which represented stationary engineers, such as he. In January, Martin contacted that Local to try to obtain representation from them. He was provided with authorization cards and managed to sign up some of his fellow maintenance department colleagues. Shortly after he began, however, Local 39 decided Wendover was too far away and told him it would not proceed. That Local did advise the Charging Party of Martin's interest and several weeks later George Stavros, a business agent and organizer from the Union's Salt Lake City office, contacted Martin to see if he still wanted union representation. Martin said he did and on April 5 Stavros came to Wendover and met with Martin and some others. He provided them with authorization cards and the organizing began. Two other employees, Bill Bess and Harley House, actually took over the main organizing from Martin.

B. *Petition Conduct*

On March 12, at about 8 a.m., as Martin was finishing his graveyard shift at the Rainbow, Ahaus sent word via another employee that he wanted to see Martin at the Peppermill. Martin walked over there. He describes what transpired during a half-hour conversation:

Well, when I got there, he [Ahaus] asked me what I knew about the union and I told him that I didn't know anything. He said that they got a call from the Wendover Times Newspaper that the Peppermill maintenance people were trying to organize and they wanted to know if there was any truth to it. He then told me that . . . he was asking me because we were friends and he knew that if I knew anything I would be up front with him and let him know. I told him I hadn't heard anything. He said that it was pointing to Bill . . . Bill Bess and Harley House as going around passing the cards and getting them signed.

On March 31, Ahaus called Martin about 5 p.m. while he was in the Rainbow's maintenance shop. Martin's recollection:

Well, he started talking about some work things and I don't recall what all he was saying, but it led up to him asking me how the union was going and [I] told him again I hadn't heard anything. I didn't know. And he said, "Oh, really?" And he then told me that he walked by the Peppermill breakroom and he saw Bill . . . Bill Bess and Barry Anderson and some other people sitting together and talking and when he walked up they stopped talking real quick.

On April 8, the Union sent a letter to Respondent Conrad asserting that it had attained majority status and offered to prove it through a third party, suggesting an April 24 date. Respondent does not appear to have replied. The letter did trigger an internal response within Respondent's corporation. Legal counsel was obtained and on April 14 Personnel Manager Heidi Lewis received telephonic instructions concerning

the appropriate things to say. Also that day, counsel faxed her a letter containing "do's and don'ts" which she carefully reviewed.

Nearly simultaneously with Heidi Lewis' phone conversation with counsel, Ahaus spoke to Martin again, eventually taking him to her office. Martin's testimony:

Q. BY MS. CHABON: All right. Now, directing your attention to the middle of April, do you recall having a conversation with Ahaus at that time?

A. Yes, I do.

Q. And where did this conversation take place?

A. In his office.

Q. And where is his office located?

A. At the Peppermill.

Q. Was anyone else present?

A. It was Carl and Mark Christenson.

Q. How did this conversation come about?

A. I was going over to pick up some parts, drop off or locate some, and I had to go to his office.

Q. And then so you went to his office and what happened?

A. I went to his office and he asked me to come . . . he said, "Come on in."

Q. Okay. Now, I'd like, again, for you to tell us what was said in the conversation, what you can recall Mr. Ahaus saying and what you responded.

A. Well, he asked me again . . . he wanted to know more about this union business. I told him that I didn't know anything. I didn't . . . I don't know anything. Hadn't heard nothing. He said that they received some papers about the union and that they had a meeting with their attorneys in Reno over the union and he said that it was . . . it looks like more and more Bill and Harley were the main people. I don't recall what else.

Q. Can you recall if anything else was said in the conversation?

A. He told me—he mentioned Albert Seeno—he said that Albert Seeno said that he should fire all the maintenance people.

Q. Who's Albert Seeno?

A. He . . . I think he's one of the owners.³

Q. BY MS. CHABON: Okay. Can you recall if anything else was discussed in this conversation with Mr. Ahaus?

A. I don't remember exactly what all we.

Q. Did he talk to you at all about the cards?

A. He did ask me about signing cards, if anybody came and asked me or anybody to sign cards and I told him no. He said that he had heard . . . he understand that there was some people going around getting cards signed or that had signed cards.

Q. And what did you tell him?

A. I told him I hadn't . . . no one asked me.

Q. So when you finished this conversation in Ahaus' office, then what happened?

³There is no evidence in this record that Albert Seeno ever said any such thing. Ahaus says he heard it secondhand from a person who works for one of Seeno's construction companies.

A. Well, we were going to leave . . . I was leaving and he was going to leave. He said he had to go take care of something. As we were leaving, he asked me to come with him and we went to Heidi Lewis' office.

Q. And who's Heidi Lewis?

A. Personnel director and he said that I was . . . he told her that I was another person that wasn't asked to sign cards and she said, "Well, we'll find out more as this goes along."

Personnel Director Lewis also testified about the entire matter. Her shock at Ahaus' timing is apparent:

JUDGE KENNEDY: The question originally was, before you started talking about why you needed it and all that, was I guess the time frame between the telephone call, the fax, and then Mr. Martin; what was the sequence?

THE WITNESS [HEIDI LEWIS]: The telephone call came first. I had hung up the phone and it had not been a minute when . . . my door was shut . . . Carl Ahaus knocked on the door. I should say there was a knock on the door, he opened the door, and Carl was there with Reggie. I was shocked because I had just been told by [counsel] that we could not have the employees in the office and talking to them and Carl had reiterated to me that Reggie didn't know anything about the union and that he hadn't signed a card, and my response was just to get the situation stopped; that we didn't have a lot of information about the union but we would get more information in the following weeks and that I didn't need to talk to Reggie.

Q. BY MR. WINKLER: Okay. Did you have a conversation with Carl after that incident?

A. I had told him I had just got off the phone with you and that this was something we could not do. We could not ask questions. We didn't want to get information from our employees and that we shouldn't do this.

Q. Okay. Now, was Reggie Martin still standing there when you were telling Mr. Carl.

A. No.

Q. Okay. Tell me when you talked to Carl about it?

A. He dismissed Reggie or they were having a conversation, Carl came directly back and I just said, "We can not do this. You know, I just had this conversation with [counsel], and this is one of the things we cannot do and you cannot do it again." I was surprised that he was even . . . you know, Reggie had even been down in my office.

There is no evidence that Lewis ever asked Martin whether he had been asked to sign cards or not. Instead, the evidence is that Martin had deliberately avoided revealing his union activity to his friend, Ahaus, by denying that he had even been solicited to sign a card. Ahaus became suspicious, not of Martin whom he trusted, but of the truth behind the Union's claim of majority. It was for that reason that he took Martin to Lewis' office. Recently schooled in the do's and don'ts, she cut the inquiry off. In fact, it does not appear that Respondent had any concerns other than to allow the organizing process to go forward in a lawful manner. It was preparing to engage in a lawful Section 8(c) free speech cam-

paign of persuasion; not one of coercion. Ahaus does not appear to have ever gotten that message.

The Union's election petition was filed on April 17, 2 or 3 days after Ahaus took Martin to see Lewis.

C. Postpetition Conduct

Two or three days before the election, Ahaus took Martin aside again. He called Martin to the Over-the-Rainbow Restaurant at the Rainbow. Both Martin and Ahaus gave strikingly similar testimony. I will quote Martin's testimony as it fully describes the conversation:

REGGIE MARTIN: He asked me to sit down. I sat down and he said people were talking and it's looking . . . it's pointing toward me. It's looking like I was the one who started the union.

Q. BY MS. CHABON: Can you recall anything else?

A. He said that . . . he asked me, "Why did I call them?" And I said, "You have to" . . . I asked him, could he prove that? He said he couldn't prove it for sure but it's . . . it looks like me.

Q. Did he say anything else that you can recall?

A. He said he thought we were . . . he said he thought we were friends.

Q. What did you respond to that?

A. I asked him was our friendship coming into this now? He said, "No," and he was asking me . . . then he asked me to vote no.

Q. Well, how did he phrase that, if you can recall?

A. He said, "So I'm asking you to vote no."

Q. Can you remember if he said anything else?

A. I asked him why the union was so . . . why he thought the union was so bad and he said, "Because we just don't want it."

Q. Can you recall anything else being said?

A. I told him I was going to vote the way I decided and he asked me to just think about [it].

Q. All right. Now, can you recall anything else that Mr. Ahaus said to you in this conversation?

A. I can't remember anything else.

Q. Do you recall if he mentioned getting new jobs?

A. Yeah, he did mention it.

Q. What did he say that you can recall?

A. He said he had gotten me jobs in the past that I would have never got on my own.

Q. And after he said that what did he say?

A. He then said . . . I don't remember what he said.

Q. Is that when he asked you to vote no?

A. Well, yeah, he asked me to vote no and I told

. . . .

Q. After he told you

. . . .

A. After he said that, he said, "So I'm asking you to vote no," and I said, "I'm voting whatever way I decide."

Q. All right. And how long did that conversation last?

A. No more than half an hour.

The day before the election Ahaus spoke to Fred Omura who works in the maintenance department as a housepainter. At least part of the reason for the conversation was to dis-

cuss Omura's performance. He had been hired in March and was coming up for a 90-day review.

Omura testified:

Well, first I went into his office and I liked his hot rod [pictured in an office photograph] and I asked him about and he run it down about what kind of cubic inches it had and everything and that lasted about three minutes. And then he says something that—or he—about he's qualified to give out raises and stuff and I watched for a minute and he says, "I'm qualified to give it to them," and then he says, "and I talked to Jim Conrad and he usually okays it." And then he says, "Yeah, I usually . . . I've never given less than fifty cents and no more than \$2.75," and then he hesitated a minute and he says, "Oh, I mean now at \$3.75," and then he picked up a piece of paper and he says, "Oh, I see you're coming up for your annual [sic] raise," and I says, "Yes, it's in pretty soon." And he says, "Well," . . . he says, "I hope you join our team, you know." And I says, "Well, regardless I'm voting for . . . just for the union," and that kind of shot the conversation out so he says, "Oh, well, we're all through."

Ahaus' testimony is not much different. He testified:

THE WITNESS [AHAUS]: Okay. What was said was that I would appreciate, you know, him [Omura] giving me a no vote for the upcoming election and that the scuttlebutt was all about him being a professional painter and his pay wasn't up to a professional painter's type of pay rate. And his background, I told him, was basically that he was a laundry person and we put him into the housing division, which is basically . . . all they do is paint . . . they do a lot of painting and Fred does a very good job at it. And I told him, I said that his 90-day eval was coming up and that, you know, on the past . . . in the evaluation we do pay raises, pay adjustments that range anywhere from fifty cents an hour to \$2.50 an hour. I mean I have given \$2.50 an hour pay raises and I have given fifty cent and I've given anywhere in between. And I told . . . I asked Fred if he would give us a no vote and he said something that, no, he's going to vote probably yes and that was the end of the conversation. I stopped.

As noted previously, the May 30 election ended in a 12 to 12 tie.

D. Martin's Evaluation

On June 19, about 2-1/2 weeks after the election, Ahaus gave Martin his annual evaluation, due in June. Both Martin's 1995 and 1997 appraisal are in evidence. The parties have agreed that that no 1996 appraisal could be found in Martin's personnel file if an evaluation was made, but that during that in June of that year he did receive a pay increase a \$1 per hour pay increase.

The complaint asserts that the evaluation given Martin by Ahaus on June 19 is a negative one and that the comments made were as a result of his having been involved in the organizing drive. Respondent counters that the evaluation is not negative at all.

The areas of the form with which the General Counsel is concerned deal with the employee's relationship with his supervisor, his communications capabilities, and his attitude. In the 1995 appraisal, Ahaus had no comment about those areas, checking the "exceeds job requirement" boxes. Five of the ten listed evaluation factors were at that level, while four were at the "meets requirement" level. One factor was listed as "not observed." Martin had no area which was marked as "needs improvement."

In the 1997 evaluation, the form had changed. Although 10 factors were still to be appraised, instead of three choices, there were now only two: "needs improvement" and "meets requirement." Of the nine factors which were reviewed, five were listed as "meets requirement." Three were listed as "needs improvement." These were supervisory relationship, ability to communicate, and attitude. Ahaus' written explanation appears in the comments portion:

Reggie is a good asset to this Company. He has been with us since we purchased the Rainbow in 1995.

Reggie, though, needs to work on three items, 8, 9, and 10. He is reluctant to talk to management, i.e. (Maint. Director), about problems that he may have; only with a lot of proding [sic] does he sometimes open up; his attitude has changed drastically toward the Company and Management within Recent Weeks.

Whenever Reggie has a problem he needs to let management know whatever it may be so that it could be resolved in a timely manner. Improvement needs to be shown within the next 30 days.

During his examination, Ahaus explained that it was important for the night shift people such as Martin to inform management of any problems he had encountered during his shift so that it could be further pursued if necessary. He spoke in hypothetical terms and I was not persuaded that any specific incident was cited to support the conclusions reached in the evaluation. He also testified about two postevaluation matters, said to support the accuracy of the evaluation. These dealt with a supposed refusal to communicate after Martin was evaluated and a decision to wear earrings requiring his ears to be pierced. Earrings were considered a dress code violation, but he had never been accused of violating that policy in the past. Moreover, there is some reason to think that the evaluation itself led Martin to stop talking altogether. In any event, I am not persuaded that Martin's postevaluation attitude cited by Ahaus has any bearing on his preevaluation conduct.

In addition, Ahaus added that Martin had stopped attending the monthly safety meetings. Assuming that was true, he agrees that the safety meeting attendance issue was not raised during the evaluation, either orally or placed on the evaluation form. As a result, I conclude that this issue was not a valid consideration for whatever conclusions he reached.

In fact, Ahaus agrees that the matters which he did cite coincided with the Union's campaign. He said: "After about April or May . . . it's when he started to be real reluctant to talk to us, he would . . . if . . . for example, if I was walking down one side of the casino and he'd seen me, he'd make sure he'd walk clean around the place so he would avoid to get into any contact with me."

It is apparent to me that given the fact that Martin deliberately misled Ahaus about the extent of his union activity, and the fact that Ahaus did not know about it until late in the game, caused Ahaus to treat Martin differently than he would have had Martin been honest with him in the first place. Yet Ahaus' continued pursuit of information from Martin about the union organizing put Martin even further off. He did not want to be confronted about it, even by a longtime friend. He thought Ahaus was taking advantage of the friendship to find out information which Martin wished to keep confidential. He could not understand Ahaus' attitude since Ahaus was a former union member. Martin just didn't know what Ahaus was up to. He tried to avoid Ahaus so he wouldn't have to continue to withhold information. Ahaus, unfortunately, couldn't perceive that it was he, not Martin, who was causing the problem.

III. ANALYSIS

As Respondent has said in its brief, there are really no credibility issues here. As best I can tell, each witness testified honestly and to the best of his or her recollection. The only real issue is whether the incidents in issue were coercive of the employees' Section 7 right to organize a union. The General Counsel asserts that Martin and Omura's testimony clearly demonstrates the coercive nature of the conduct; Respondent contends otherwise, looking to the long-standing friendship between Martin and Ahaus. It also asserts that Ahaus' remarks to Omura were lawful in the context of a 90-day evaluation.

While I recognize that Ahaus and Martin had (and probably still have) a long-term friendly relationship, it is clear that Ahaus' inquiries were coercive. In the very first incident, March 12, Ahaus went well beyond simply asking a former fellow union member if he knew about any current organizing. He told Martin that an inquiry had come from the local newspaper and that it looked like two other employees were behind it, Bess and House who were passing authorization cards. That reference suggested immediately to Martin that Ahaus, despite his union background, was making it his business to identify the union activists. Such an effort went beyond an innocent comment between friends. Indeed, Ahaus' reference to the union activities of Bess and House clearly created the impression that their union activities were under surveillance. Martin correctly recognized that Ahaus was attempting to solicit corroborating information from him as well as to determine what Martin's personal intentions were. This inquiry clearly violated Section 8(a)(1) in both manners alleged in the complaint. It was a coercive interrogation and it was the creation of the impression of surveillance of the union activities of other employees.

On March 31 a replay occurred. Again it began with Ahaus asking Martin if he had heard anything more about union organizing, followed by a repeat of his statement that it looked as if Bess and House were behind it. The circumstances here are no different than they were on March 12. The analysis must be the same—two violations of Section 8(a)(1).

And, on April 14, Ahaus issued a threat to Martin, although in fairness, he may not have understood what he was doing. Certainly he had not yet been advised of the do's and don'ts which were only moments away, but he may not have recognized it as a threat at all. He told Martin that Respond-

ent's owner, Albert Seeno, had said he would fire any employee who organized a union. Yet, as he admitted, he had no firsthand knowledge of what Seeno's policies were in that regard. He took the word of one of Seeno's construction company employees (whom he had apparently only overheard), whose knowledge would be uncertain at best. Despite that infirmity, Ahaus repeated what he had heard to Martin without clarifying the nature of his source. Martin, expectedly, took Ahaus at his word. The threat, therefore, is not Seeno's, but Martin's. Essentially, Ahaus made a threat of his own using Seeno's name to do it. Therefore, the General Counsel has proved the allegation that Respondent, acting through Ahaus, threatened to discharge employees who organized a union.

On May 27, 3 days before the election, Ahaus took Martin aside. He began by asking Martin why he had called the Union, saying that it was Martin after all, not so much Bess and House. He went on and asked Martin to vote no as a personal favor to him. Ahaus reminded Martin that he had been instrumental in getting Martin this job, some jobs in Reno, and had gone to bat for Martin when Martin had suffered some racial discrimination there.

The question, which Ahaus asked, why had Martin gone to the Union, clearly qualifies as another coercive interrogation. This is principally because in context it is a continuation of the previous interrogations. The General Counsel asserts that it also carries with it an implied promise of rectifying whatever problems had caused Martin to go to the Union in the first place. On balance, while other interpretations might be placed on that question, I think the General Counsel is correct. Ahaus immediately followed up his question by observing all the good things their relationship had brought Martin. If the question had been purely rhetorical, Ahaus would not have connected it to past benefits. Such a connection clearly directed Martin to future benefits if he voted the correct way. It was vague, to be sure, but clearly its purpose was not innocent. Ahaus was subtly attempting to buy Martin's vote. That effort violated Section 8(a)(1).

Ahaus used a similar tactic when approaching Omura. It is true that Omura was apparently up for a 90-day review. Moreover, such reviews commonly involve a wage increase, a small reward for passing a probationary period. Thus, a raise is a normal part of such a discussion. Still, it is improper to tie that raise to how the employee intends to vote in an NLRB representation election.

Unlike his conversation with Martin, Ahaus' approach to Omura was not subtle. He first told Omura that it was he who authorized the raises, that Manager Conrad usually rubberstamped his recommendations. Then he observed that the 90-day pay raises ranged from 50 cents to \$2.50 per hour. He then asked Omura to vote against the Union. Clearly Ahaus was seeking to coerce Omura's vote: if Omura voted for the Union there was a good chance that he could get a \$2.50 raise; if against, the raise would only be 50 cents. Moreover, by pursuing Omura's vote with money, Ahaus, whether he intended to do so or not, was necessarily engaging in an unlawful interrogation. The answer Omura gave, telling Ahaus how he intended to vote, was the natural consequence of the entire conversation. It was never innocent, but was always intended to coerce a favorable vote. Therefore, I find that Ahaus violated Section 8(a)(1) in two ways during his preelection conversation with Omura: It was

an interrogation regarding how Omura intended to vote and was also an attempt to buy his vote.

Finally, with respect to Martin's June 19 annual appraisal, the evidence is pretty conclusive. By May 27, Ahaus had learned that Martin was the one who had first contacted the Union. Moreover, he had come to realize that Martin had not been candid with him about what was going on. Ahaus viewed that as, if not a betrayal of their friendship, a deception which hurt. Furthermore, he didn't understand that he had been subjecting Martin to acts of coercion which had forced Martin to withdraw from one-on-one conversations with him. Ahaus characterized that withdrawal as affecting the supervisory relationship, a failure to communicate, and a poor attitude toward work. All of that became incorporated into the evaluation.

Respondent argues that the evaluation itself is not negative, but I disagree. It certainly was not as positive as the one he received in 1995. Furthermore, the fact that it began by describing Martin as a "good asset" is not persuasive. It ended with the imposition of a 30-day deadline for Martin to improve his supposed shortcomings. One does not impose corrective deadlines on individuals who are perceived as "good assets." I recognize that employees may be recognized as "good" even though negative remarks are validly included in the evaluation. This one, however, is not an honestly conceived evaluation. It has been severely tainted by Ahaus' dismay over Martin's union organizing. Ahaus' treatment of Martin is therefore unlawful as a violation of Section 8(a)(3) of the Act for it affected his hire and tenure of employment as described by that statute. Ahaus' duty was to provide an objective, honest assessment of Martin's work. He did not, and what he did provide was based on Martin's having been a union activist. Respondent's contrary argument is not persuasive and does not rebut the General Counsel's prima facie case. This type of personnel treatment violates the Act.

IV. THE REMEDY

Having found Respondent to have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall require Respondent to expunge the personnel evaluation given Martin on June 19, 1997, and shall require Respondent to post a notice to employees announcing the remedial steps it has undertaken.

Recommendations Regarding the Election in Case 32-RC-4285

The Charging Party asserts that the unfair labor practices which occurred during the pendency of the election were sufficient to set aside the election and order a rerun. See, generally, *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). Respondent disagrees, contending that the unfair labor practices were de minimis and were insufficient to have affected the election's outcome.

First, I again observe that this election was very close and resulted in a tie vote in a relatively small bargaining unit. There were approximately 26 eligible voters, 24 of whom cast ballots. That resulted in a tally of 12 for and 12 against union representation. Thus, even though the coercive conduct

which occurred during the election campaign was not of epic proportions, it would not have taken much to have affected the outcome. Second, I am not persuaded that the individuals who were the victims of the unfair labor practices actually voted the way they said they would. The mere fact that both Martin and Omura told Ahaus that they would not be dissuaded from voting for the Union does not mean that they did. The ballot is secret and no one can truly know how any person voted. It is a common phenomenon for individual voters to say one thing to their friends and coworkers and do another at the voting booth. Therefore, there is some likelihood that Ahaus improperly influenced the Omura and Martin votes shortly before the election. Furthermore, there is also a great deal of likelihood that what happened to them shortly before the election became known to other voters and influenced them.

Accordingly, I conclude, based on the rule set forth in *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962), that the election should be set aside. In that case, the Board held that unfair labor practices occurring during the course of a representation election campaign is a fortiori conduct which interferes with the exercise of free and untrammelled choice in an election. See also *Diamond Walnut Growers*, 316 NLRB 36 (1995). Accordingly, I recommend that the Board set the election aside and direct that a second election be conducted after an appropriate remedial period as set forth in the unfair labor practice portion of this case.

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

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 March 12 and 31, April 14, and May 27, 1997, Respondent, acting through its supervisor and agent, Carl Ahaus, interrogated employees about their union activities, the union activities of other employees, and how they intended to vote in a representation election, thereby violating Section 8(a)(1) of the Act.
4. On March 12 and 31 and April 14, 1997, Respondent, acting through its supervisor and agent, Carl Ahaus, created the impression that he was surveilling the union activities of its employees, thereby violating Section 8(a)(1) of the Act.
5. On April 14, 1997, Respondent, through Ahaus, threatened that employees would be discharged if they engaged in union organizing activity, thereby violating Section 8(a)(1) of the Act.
6. On May 27, 1997, Respondent, through Ahaus, offered benefits to employees in the form of better jobs or increased pay if they voted against union representation, thereby violating Section 8(a)(1) of the Act.
7. On June 19, 1997, Respondent issued an annual personnel evaluation to its employee, Reggie Martin, which negatively affected his hire and tenure of employment, because he had engaged in the protected activity of organizing the employees for and on behalf of a labor organization, Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Peppermill Casino, Inc., d/b/a Peppermill Hotel Casino and Rainbow Casino, Wendover, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities, the union activities of other employees, or how they intend to vote in a representation election.

(b) Creating the impression that the union activity of its employees is under surveillance.

(c) Threatening employees with discharge if they engage in union organizing activity

(d) Offering benefits to employees in the form of better jobs or increased pay if they vote against union representation.

(e) Issuing negative annual personnel evaluations to employees because they engaged in the protected activity of organizing on behalf of a labor organization such as Operating Engineers Local Union No. 3, International Union of Operating Engineers, AFL-CIO.

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

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

⁴If 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.

(a) Within 14 days from the date of this Order, remove from its files the unlawfully promulgated annual personnel appraisal of Reggie Martin dated June 19, 1997, and within 3 days thereafter notify him that this has been done and that the personnel appraisal will not be used against him in any way.

(b) Within 14 days after service by the Region post at its businesses in Wendover, Nevada, copies of the attached notice marked "Appendix." ⁵ Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, 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 Respondent at any time since June 19, 1997.

(c) 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 Respondent has taken to comply.

⁵If 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."