

**President Riverboat Casinos of Missouri, Inc. and  
Hotel Employees, Restaurant Employees Local  
74, AFL-CIO.** Case 14-CA-23814<sup>1</sup>

September 7, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On August 23, 1996, Administrative Law Judge Michael O. Miller 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, and conclusions, as modified below.<sup>2</sup>

We agree with the judge's finding that Beverage Manager Faust's statement to an employee about wages during the election campaign violated Section 8(a)(1) of the Act.

1. The judge found that Faust said, in response to an employee's question whether wages would go down if the union were voted in, that this was "a possibility." The judge found this statement to be an implied threat because it communicated to employees, with no reference to the bargaining process, that wages might be reduced as a result of a vote for unionization.<sup>3</sup> We affirm the judge's finding of a violation because we agree that Faust's response to the employee's question reasonably would lead those who heard the exchange to conclude that the Respondent was indicating that it might retaliate against the employees by cutting wages should the employees vote for the Union.

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969), held that an employer may lawfully communicate to his employees "carefully phrased" predictions based on "objective facts" as to

"demonstrably probable consequences beyond his control" that he believes unionization will have on his company. However, the Court said, if there is "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," the statement is a threat of retaliation which violates Section 8(a)(1). In determining how employees might reasonably construe such communications, the Court emphasized that "the economic dependence of employees on the employer" must be factored into the analysis.

Here, Faust's response failed to include any reference to the collective-bargaining process or to any economic necessities or other objective facts as a basis for its prediction that wages might be reduced. Thus, we find that employees could reasonably have understood the import of the response to be that the employer might decide on its own initiative to reduce their wages simply as a result of the only event cited in the exchange: a vote by the employees for union representation.<sup>4</sup> The mere fact that Faust's remark was phrased as a "possibility" rather than a certainty does not remove the coercive impact,<sup>5</sup> nor was the impact diminished by the fact that it was in response to an anxious employee's question as to whether the employees would suffer adverse consequences if the union won the election. What is determinative here, as it was in *Gissel*, is that Faust's statement was not "carefully phrased on the basis of objective fact" to convey the employer's reasonable belief as to a likely economic consequence of unionization that was beyond the employer's control, but rather left open the possibility that Respondent might cut wages in retaliation for the employees' selection of the union. Thus, the statement clearly had the tendency to interfere with the employees' right to freely select or reject union representation without threat of reprisal, express or implied.

We find it immaterial that the response may have been "off-the-cuff" rather than fully thought out. In evaluating whether statements of this kind violate Section 8(a)(1), the Board has long applied an objective standard to determine whether the remark would reasonably tend to interfere with the free exercise of employee rights, without regard to the motivation behind the remark. *American Freightways Co.*, 124 NLRB 146, 147 (1959). See

<sup>1</sup> On October 15, 1996, the Board issued an Order Granting Motion by counsel for the General Counsel to sever Case 14-RC-11554 from Case 14-CA-23814 and to remand the former case to the Regional Director for Region 14 for further appropriate action. Consequently, we shall modify the judge's recommended Order by deleting from it any reference to Case 14-RC-11554.

<sup>2</sup> Consistent with *Excel Container, Inc.*, 325 NLRB 17 (1997), we have also revised the triggering date of the Respondent's notice-mailing obligation to the date of the first unfair labor practice.

<sup>3</sup> The judge further found that at a later date Beverage Manager Adolph, Faust's replacement, replied to a similar inquiry with the statement that, "there was no contract negotiated and your wages could go up or could go down, there was no way of knowing." The judge found that this also was unlawful because it contained only an ambiguous reference to the fact that negotiations had not yet begun. As explained *infra*, we do not find Adolph's statement to constitute an effective repudiation of Faust's unlawful statement. However, in light of our finding that Faust's statement violated Sec. 8(a)(1), and because a finding of a violation by Adolph would be cumulative and would not affect the remedy, we find it unnecessary to pass on the judge's finding that Adolph's remarks constituted an additional, independent violation of the Act.

<sup>4</sup> As the judge noted, Faust admitted at the hearing that although he was trained to explain that wages and benefits could go up or down, depending on the course of the negotiations, he had failed to do so in this instance.

<sup>5</sup> It is no less unlawful for an employer to convey to his employees that it *might* retaliate against them if they exercise their right to be represented by a union than it is to tell employees that it *will* retaliate against them. In either case, the statement is a threat and the effect is to interfere with the employees' free exercise of Sec. 7 rights. Indeed, in *Gissel* itself, the statements found to have violated the Act were to the effect that the union would probably strike and that a strike "could lead to the closing of the plant." *NLRB v. Gissel*, *supra*, 395 U.S. at 588. (Emphasis added.)

also *Medeco Security Locks v. NLRB*, 142 F.3d 733, 747 (4th Cir. 1998) (noting Federal court approval of this standard). We also reject any assertion that no violation should be found because a different manager, Adolph, referred to the collective-bargaining process in her response to a similar inquiry more than a week later. In order to effectively negate a prior unlawful statement, a subsequent clarification must, *inter alia*, be timely and unambiguous, must specifically disavow the prior coercive statement, and must be accompanied by assurances against future interference with employees' Section 7 rights. *Teksid Aluminum Foundry*, 311 NLRB 711 fn. 2 (1993), citing *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Adolph's statement met none of these requirements.

2. Contrary to our dissenting colleague, we affirm the judge's conclusion that Respondent's executive sous chef, Thomas Athanus, unlawfully interrogated employees, including employee Roy Gladney, of whom he inquired, "What do you think of this union stuff?" In reaching this finding, the judge specifically relied on Athanus' admission that he engaged in such conversations with a number of other employees, and that these conversations were intended to elicit the subject employee's union predilections during the election campaign. Rather than innocent banter associated with a supervisor's expression of his views on unions, this questioning was, as the judge found, engaged in on the instructions of Athanus' superior, the food and beverage director, to ferret out and report on the union leanings of unit employees. The Board has repeatedly held that such calculated probing of union sympathies is a violation of Section 8(a)(1). *Yerger Trucking*, 307 NLRB 567, 569 (1992), citing *Hunter Douglas, Inc.*, 277 NLRB 1179, 1181 (1985), *enfd.* 804 F.2d 808 (3d Cir. 1986). Our colleague misconstrues the basis for the judge's decision which we are affirming. In any event, we note that questioning an employee about his union views shortly before an election in a relatively confined area, during the same time that the Respondent was placing unlawful restrictions on workplace discussions about the Union among unit employees, would have a reasonable tendency to interfere with Section 7 rights, particularly in the case of an employee, like Gladney, who had not openly identified himself as a union supporter.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, President Riverboat Casinos of Missouri, Inc., St. Louis, Missouri, its officers, successors, and assigns, shall take the action set forth in the recommended Order as modified.

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

"(b) Interfering with employees by suggesting the possibility of reduced wages and benefits if they voted for union representation."

2. Substitute the following for paragraph 2(a).

"(a) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the 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 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 October 4, 1995."

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

MEMBER HURTGEN, dissenting in part.

I do not agree with my colleagues in two respects. First, I cannot conclude that Respondent's executive sous chef, Thomas Athanus, unlawfully interrogated employee Roy Gladney. As recounted by the judge, Athanus and Gladney happened to meet in the washroom. Athanus volunteered his views of unions, and ultimately asked Gladney "What do you think of this union stuff?" Athanus did not probe Gladney for details about Gladney's activities or how he might vote in an election. He merely discussed, in general terms, the pros and cons of unions. In light of the locus of the conversation (not in a company office), the isolated nature of the question, and the absence of any threats or promises in the conversation, I do not find the coercion necessary to establish a violation of Section 8(a)(1). See *Sunnyvale Medical Center*, 277 NLRB 1217 (1985).

My colleagues say that Athanus was acting pursuant to the instruction of his superiors to ascertain employee sentiments, and that he had engaged in similar conduct vis-a-vis other employees. However, there is no showing that Gladney (the alleged victim of the interrogation) was aware of any of this. Thus, there is no showing of an 8(a)(1) violation in regard to Gladney.<sup>1</sup>

<sup>6</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."

<sup>1</sup> Compare *Yerger Trucking*, 307 NLRB 567, 569 (1992), where the question (Did you sign a union card?) would itself convey to the employee a coercive intent.

Second, I do not find that Beverage Manager Faust's statement about wages violated the Act. When an employee asked Faust whether wages would go down if the union were voted in, he replied that this was "a possibility." The response was, of course, a truthful one. It did not contain the threat that would have been present if he had simply answered the question in the affirmative. Faust's remark was a correct response to an employee question, rather than an unsolicited statement that unionism would result in lower wages. Although Faust did not mention the negotiation process, his successor (Adolph) did mention negotiations when she was asked a similar question several days later.<sup>2</sup> Faust's simple, truthful response to an employee question contained no overt threat and was not coercive.

My colleagues suggest that Faust's remark was unlawful under the teachings of *NLRB v. Gissel Packing*, 395 U.S. 575 (1969). They submit that Faust's truthful response was not a "carefully phrased" prediction based on "objective facts."

However, as I read Faust's remark, he predicted nothing. He did not state or imply that the Respondent would, or even might, *retaliate* against employees. He merely noted a "possibility" that wages ultimately could decrease. My colleagues stretch the principles of *Gissel* to find a threat in Faust's remark.<sup>3</sup> I would dismiss this allegation of the complaint.

## 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 interrogate employees concerning their union activity, membership, or desires.

WE WILL NOT interfere with employees by suggesting that wages and benefits might possibly be reduced if they voted for union representation.

<sup>2</sup> As I do not find Faust's remark unlawful, a fortiori, I do not find that Adolph's remarks violated the Act.

I am not asserting that Adolph cured an unlawful statement by Faust. Rather, I find that the Faust statement must be evaluated in light of the Adolph statement. In that context, the Adolph statement was not unlawful, and there was nothing to cure.

<sup>3</sup> The cases cited by the judge in support of his finding are distinguishable. In both *Medical Center of Ocean City*, 315 NLRB 1150, 1154 (1994); and *Parkview Acres Convalescent Center*, 255 NLRB 1164, 1180-1181 (1981), employer officials told employees, in one-on-one conversations, that employees could lose their benefits upon unionization. The employers were not responding to questions but sought out employees to convey their message. The employer messages also included direct threats of retaliation for union activity or other unlawful statements.

WE WILL NOT disparately prohibit employees from talking about the Unions while they are working.

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

PRESIDENT RIVERBOAT CASINOS OF MISSOURI,  
INC.

*Kathy J. Talbott-Schehl, Esq.*, for the General Counsel.

*Stephen D. Smith, Esq. (Thompson Coburn)*, for the Respondent-Employer.

*Greg A. Campbell, Esq. (Diekemper, Hammond, Shinnors, Turcotte & Larrew, PC)*, for the Charging Party and the Joint Intervenors.

## DECISION

### STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was heard in St. Louis, Missouri, on May 7 and 8, 1996, based upon charges filed by Hotel Employees, Restaurant Employees Local 74, AFL-CIO (Local 74) on October 16, 1995, as amended on November 20, 1995, and a complaint which was issued on November 20, 1995, by the Regional Director of Region 14 of the National Labor Relations Board. The complaint as amended on March 19, 1996, alleges that President Riverboat Casinos of Missouri, Inc. (Respondent or the Casino) interfered with, restrained, and coerced employees in the exercise of statutory rights by threatening them with loss of wages and benefits if they selected a union as their bargaining agent; interrogated them concerning their union activities; and disparately and selectively prohibited employees from engaging in solicitations on behalf of a union. Respondent's timely filed answers deny the commission of any unfair labor practices.

Consolidated for hearing with the unfair labor practice charges were certain objections to an election conducted on October 9, 1995, in Case 14-RC-11554, which had been filed by the Joint Intervenors. For the most part, those objections overlap the unfair labor practice allegations. One additional objection asserts that "The Employer interfered with, intimidated, and coerced employees in the casting of votes by the presence of security guards at the entrance to the polling site." The Employer denies having engaged in any objectionable conduct. It also contends that the Joint Petitioner failed to timely support certain objections and that, even if some of its conduct were to be found in violation of Section 8(a)(1), it was too minimal in nature to have affected the results of the election.

On the entire record, including my observation of the witnesses and their demeanor, and after considering the briefs filed by the General Counsel, the Respondent-Employer and the Charging Party-Joint Intervenors, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a Missouri corporation, is engaged in the operation of a riverboat casino and excursion boats on the Mississippi riverfront, with an office and place of business in St. Louis, Missouri. In the course of its business during the 12-month period ending October 31, 1995, Respondent derived gross revenues exceeding \$500,000 and purchased and received

goods and materials at its St. Louis, Missouri facility valued in excess of \$50,000 directly from points outside the State of Missouri. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find and conclude that the Charging Party, the Joint Petitioners, and the Joint Intervenors are labor organizations within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Respondent operates a casino, providing gambling upon a multidecked boat which is permanently moored adjacent to a barge along the riverfront in St. Louis, Missouri. It is open to the public 20 hours per day, from 8 a.m. to 4 a.m., 7 days a week. To comply with State regulations, patrons are only permitted to embark every 2 hours. Once on board, they need not disembark at the end of their 2-hour "cruise." The casino is regulated by a State gaming commission. It employs about 1200 workers; approximately 440 of whom work in the unit<sup>1</sup> which was the subject of the petition filed in Case 14-RC-11554 on July 18, and the election conducted on October 9, 1995.<sup>2</sup>

The Unions campaigned through the summer and fall. Management was aware of the union activity and conducted what it characterized as an educational campaign, holding meetings with all of the employees in groups of 50 to 100 throughout September and early October. Managers and supervisors were trained on appropriate behavior during an election campaign and employees were encouraged to vote. The employees were told of management's preference to continuing to deal directly with its employees rather than through what General Manager Donald Patterson characterized as a "third party."<sup>3</sup> Its campaign, while thorough, was not of the heavy-handed variety all too frequently observed in American labor relations. Some of its conduct, however, is charged as violative of Section 8(a)(1).<sup>4</sup>

<sup>1</sup> The appropriate unit is:

All food and beverage employees, food court shift leaders, slot floor persons, token attendants, retail clerks and retail clerk lead, porters, hard count employees, hard count leads, soft count employees, soft count lead, cage cashiers, pit clerks, ticket sellers, ticket leads, general cashiers, general cash leads, main bank cashiers, ambassadors and hosts employed by the Employer at its Admiral riverboat casino, EXCLUDING slot repair technicians, food and beverage administrative assistant, dealers, shuttle bus drivers, shuttle leads, valet greeters, warehouse and mailroom employees, wardrobe department employees, call center attendants, revenue audit clerks, engineers, assistant engineers, electrician, office clerical and professional employees, guards, and supervisors as defined in the Act, and all other employees.

<sup>2</sup> All dates here are 1995 unless otherwise specified.

<sup>3</sup> The reference to a union as a "third party" or "outside third party" is a misnomer commonly employed in a derogatory or disparaging fashion.

<sup>4</sup> Although other unfair labor practice charges were filed during the campaign, the Board's investigations did not reveal any further alleged unfair labor practices or result in the issuance of any additional complaints. The General Counsel objects to Respondent's reference to these charges in its brief and takes umbrage to its reference to the Region's "intensive and exhaustive" investigations. The General Counsel seeks that those references be "stricken and wholly disregarded" in order to eradicate "the full prejudicial impact and effect of Respondent's conduct." I am solely concerned with the allegations before me. While Respondent is entitled to make a full record (and accordingly I

### B. Interrogation

According to the testimony of Roy Gladney, about 5 days before the October 9 election, when he reported to work for his job as a lead cook, he was called into (supervisor) Sous Chef Anthony Hill's office. No one else was present although others were in adjacent offices. Hill allegedly asked Gladney, "Was I basically for the Union or what?" Gladney, who was not identified as an open union supporter, claimed to have given Hill a noncommittal reply. Hill denied talking to Gladney one-on-one in his office or asking him whether he supported the Union or how he intended to vote. He acknowledged having had as many as three to five conversations with Gladney in the area around his office in which the subject of unions came up.

About 15 or 20 minutes later, Thomas Athanas, executive sous chef, initiated a conversation with Gladney when they happened to meet in the washroom. Athanas acknowledged that he did so in order to present his view of the unions, a view that was essentially, but not entirely, negative. In opening their conversation, Athanas asked Gladney, "What do you think of this union stuff?" He went on to describe good and bad aspects of union provided insurance, the downside of union dues, and the problems he had experienced in giving warranted discipline when he supervised in a hotel where the employees had union representation. Athanas admitted that he had similar conversations with other employees.

Both Hill and Athanas acknowledged that Food and Beverage Director Julie Isom had asked them to report to her the names of union-prone employees.

I was not impressed by Gladney's demeanor or candor. He was particularly inarticulate and vague, describing the conversations in generalities. He also displayed a less than credible demeanor when he sought to deny that he had received certain discipline; he appeared to assert that, if he didn't sign a warning, it hadn't been given.<sup>5</sup> I was more favorably impressed by both Hill and Athanas, noting that the latter, in particular, candidly acknowledged asking Gladney, "What do you think about this union stuff?" I also note that both admitted having received instructions, from their superior, to determine and report upon the union leanings of the unit employees. I credit their testimony.

Thus, while I find that Hill talked with Gladney and others about the Unions, and may have probed into their leanings, I find no credible evidence that he interrogated Gladney in the manner Gladney described. However, based on his own testimony, I must conclude that Athanas unlawfully interrogated Gladney and others. Even though their conversation took place in the men's room, it was initiated with the intention of conveying the manager's opposition to unionization and in order to elicit the employee's union predilections. That employee,

take official notice of the underlying record here), the fact that it may have committed no other violations, or that none were uncovered, is both presumed from the limits of the outstanding complaint and irrelevant to an analysis of 8(a)(1) allegations and objections. And, while the Region is to be commended for undertaking thorough investigations, its pique at, and its motion to strike, Respondent's use of the descriptive terms are unwarranted and a waste of scarce resources.

<sup>5</sup> He also failed to refer to the washroom conversation with Athanas when he gave his first affidavit although it had occurred within 20 minutes of his conversation with Hill. This leads me to conclude that, while he did not concoct this testimony, Athanas' version, set forth above, is the more reliable.

moreover, was not a known union supporter<sup>6</sup> and the interrogation was part of a pattern of conduct by this supervisor pursuant to at least general instructions from his superior. Under the circumstances, I find it coercive. *Yerger Trucking*, 307 NLRB 567, 569 (1992). It is irrelevant that Respondent's supervisors may not have asked employees how they intended to vote. See *Kellwood Co.*, 299 NLRB 1026, 1027 (1990).

#### C. Threats to Reduce Benefits

About a couple of weeks before the election, Linda Stanley<sup>7</sup> and Kristi Peterson, cocktail servers, were talking about the upcoming vote. Stanley asked Peterson how she felt about the Union and Peterson suggested to Stanley that choosing representation would not be a good idea because the Employer would then reduce wages and benefits. Stanley disputed Peterson's understanding.

Some time later, Peterson walked into the service bar when Stanley and Matt Faust, then beverage manager, were there. Peterson asked Faust to tell Stanley what he had told her. She asked what she was referring to and either Stanley or Peterson asked, "If a union was voted in, would [our] wages go down." He replied, "Well, there's a possibility." He did not explain how or why that would happen or otherwise amplify his remark.<sup>8</sup>

The cocktail servers and bartenders met with their managers or supervisors for daily pre-shift meetings. In a preshift meeting on October 4, someone asked Lynne Adolph, the beverage manager who had just replaced Faust, whether their wages and benefits would go down if they voted for union representation. As Adolph recalled her reply, she told the eight or so employees present that "there was no contract negotiated and your wages could go up or could go down, there was no way of knowing." She also told the employees that union dues would cost them \$500 per year.<sup>9</sup>

<sup>6</sup> Compare this with *McDonald Land & Mining Co.*, 301 NLRB 463 (1991), cited by the Employer, where the employee who was questioned was an open union adherent.

<sup>7</sup> Previously known as Linda Kerr or Linda Kerr-Neuner.

<sup>8</sup> While Stanley was a current employee, testifying in a credible manner and potentially against her own economic interest, I have chosen to accept Faust's similar version. (Stanley claimed that he said that wages "would" go down and that they employees would do that themselves if they voted a union in.) Faust was a former supervisor who had left Respondent's employ involuntarily and, while he relied on a reference from the Casino to ultimately secure other, and apparently lesser, employment as an airline reservation agent, he did not appear to be seeking to curry Respondent's favor by shading his testimony. I note that, while he testified to being trained to reply to questions such as this with an explanation that wages and benefits could go up or down depending on the course of negotiations, and said that he "usually" did so, he did not claim that he made such a statement to Stanley and Peterson. Peterson had left the St. Louis area and was not readily available to testify.

<sup>9</sup> Adolph, who had received the same training as Faust, denied telling them that their wages and benefits "would" be lowered "immediately" as recalled by Stanley and Natalie Jando. All of these witnesses testified with credible demeanor. Jando's notes of that meeting, however, persuade me that Adolph's version is the most accurate. In those notes, Jando initially wrote, "Lynne Adolph: Says co. can reduce pay, hrs, benefits [sic] if union voted in." She subsequently amended those notes, crossing out "can" and replacing it with "will" and adding "immediately" at the end of the sentence. I find her original notes, essentially corroborating Adolph, to be the most accurate. And, while there is no contradiction of Jando's testimony respecting the reference to \$500

An employer's predictions as to the negative effects of unionization must be supported by objective fact to avoid the sanctions of Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-619 (1969). Statements that "reasonably communicate the views that a union cannot compel concessions in negotiations [or] guarantee the retention of all present benefits because such benefits are subject to bargaining" and thus "accurately reflect the bargaining process," do not violate Section 8(a)(1). *Pilliod of Mississippi, Inc.*, 275 NLRB 799 (1985). The statements of Faust and Adolph, I find, fall short of this standard.

Thus, according to his own testimony, Faust told the employees, with no reference to the bargaining process, that there was a "possibility" that wages would go down if a union were to be voted in. Similarly, with just an ambiguous reference to the fact that negotiations had not begun, Adolph told them that wages could go up or down. I do not believe that either of these statements "accurately reflect[s] the bargaining process." I find them to be implied threats of loss of wages or benefits, in violation of Section 8(a)(1). *Medical Center of Ocean County*, 315 NLRB 1150, 1154 (1994); *Parkview Acres Convalescent Center*, 255 NLRB 1164, 1180-1181 (1981).<sup>10</sup>

#### D. Application of No-Solicitation Rules

In late September or early October, Stanley invited another cocktail server to come to a gathering of union supporters at another bar. Their conversation occurred while they were working. That other employees apparently reported the conversation to Faust. Faust approached Stanley and said that "he was going to tell me this one time and one time only. I could not speak about the Union on the floor." He did not otherwise discipline her.<sup>11</sup>

Subsequently, Stanley attended one of the mandatory meetings held by the Employer with respect to the forthcoming election. In that meeting, the Casino presented an employee who spoke about her negative experiences while working in a unionized facility. Server Patricia Hollmann then asked why, if management could present an employee to "bash" the Union, they could not speak positively about it without being reprimanded. Patterson, the general manager, who was conducting the meeting, initially ignored the question. When pressed, he asked Hollman, "Are you speaking positively or negatively?" She replied, "Positively." Stanley interjected that when she had spoken about the Union while on the floor, she had been told by a manager that she could not do that. Patterson asked her whether she had been speaking positively or negatively. When

per year in dues, neither is there any evidence to establish that Adolph erred in making such a statement.

<sup>10</sup> I note, with some interest, Respondent's acknowledgment in brief that the statements attributed to Faust and Adolph (i.e., the "bargaining from scratch" or "benefits could go down" type of remarks) "belong to a class of remarks which employees can, and with some regularity do, misapprehend." If employers recognize that such statements are frequently heard by employees as threats, and continue to utilize them in responding to organizational campaigns, possibly with the expectation that they will be so misconstrued, perhaps a reevaluation of Board precedent in this area is warranted. See *Gissel*, supra at 617.

<sup>11</sup> Faust's version is substantially the same. He also admitted telling one other employee "not to talk about unions while she was on the floor." The complaint, as amended, does not allege Faust's statement to Stanley as an independent 8(a)(1) violation. However, it was so treated in the hearing and in Respondent's brief. I consider it to have been fully litigated and thus appropriately before me.

she replied "Positively," he told her, as he had told Hollmann, "Well then, you were soliciting and you're not allowed to solicit on the . . . Casino floor."<sup>12</sup>

I credit the mutually corroborative testimony of Stanley and Hollmann. Patterson's version relates that he was asked why employees who favored the Union could not express their views in the work place. His reply, he claimed, was "[t]hat they had a no-solicitation rule and that people who were pro-union or anti-union did not have a right to express their views in the work place." I also note his acknowledgment that, in his opinion, speaking positively about a union in the work place would have constituted solicitation. His opinion in this matter is simply wrong. Solicitation involves asking another to do something, such as sign a card, come to a meeting, or buy merchandise. It does not encompass all expression of opinions.

Respondent maintains a no-solicitation rule, the validity of which is not in question here.<sup>13</sup> There is some evidence of common solicitations, in the work areas and elsewhere, for Tupperware, Avon, and related products. There is some further evidence of supervisory knowledge of those solicitations at some points in time, both directly and implicitly from the scope of the sales activity throughout the boat. There is no evidence of enforcement of the no-solicitation rules beyond what is described above; indeed, there is some evidence that Respondent largely waived its rules to avoid confrontations during the organizing campaign.

I need not reach the question of disparate treatment as between prounion and antiunion activity here, however.<sup>14</sup> Respondent allows its employees to engage in all manner of personal conversations among themselves while they are working. The statements by both Faust and Patterson (even as they described them) would prohibit employees from talking about the unions, a subject of great mutual concern, under similar circumstances, whether the employees were speaking favorably or unfavorably about union representation. Such a prohibition is overbroad, invalid, and violative of Section 8(a)(1). As the

<sup>12</sup> She was, in fact, soliciting an employee to join her at a meeting of prounion employees.

<sup>13</sup> That rule purports to bar solicitation by employees during "working hours" and by both employees and nonemployees "during work time and while on company premises." On its face, this language would appear to impose unlawful restrictions on union activity inasmuch as "working hours connotes periods from the beginning to the end of the work shift, including the employees' own time." *Valley Community Services*, 314 NLRB 903, 913 fn. 23 (1994), citing *Contemporary Guidance Services*, 291 NLRB 50, 66-67 (1988); and *Essex International*, 211 NLRB 749 (1974). However, the Employer's rule, as set out in both the employee handbook and the supervisors' manual, specifically provides that solicitation may not occur while either the employee who is soliciting or the employee being solicited is working, thus at least implicitly clarifying the rule so as to set permissible limits on solicitation.

<sup>14</sup> I would note that there is a distinction between presenting an anti-union employee during a campaign meeting and prohibiting prounion solicitation on the floor. They are different forums and an employer who does the former is not treating prounion employees disparately when he prohibits the latter. I would also note that Stanley was engaged in solicitation before Faust spoke to her. However, he did not merely prohibit her from soliciting but more broadly prohibited her from talking about the union in any fashion. Noted, too, is his admission that he did not intervene when he heard employees speaking negatively concerning union representation.

Board held in *Valley Community Services*,<sup>15</sup> "when employees are permitted to talk freely among themselves while working, an employer may not prohibit them from talking about their union activities, at least when those discussions do not rise to the level of a solicitation or distribution."

#### E. Objections

In the election conducted on October 9, there were 264 votes against union representation, 90 votes for the Joint Intervenors, and 11 votes for the Joint Petitioner. The Joint Intervenors filed timely objections to the conduct of that election on October 16.

I have found certain aspects of Respondent's conduct violative of Section 8(a)(1), specifically Athanas' interrogation of Gladney,<sup>16</sup> Faust's and Adoph's implied threats of loss of wages or benefits and Faust's and Patterson's prohibitions on union discussions in the work place. As the Board has long held, "conduct violative of Section 8(a)(1) is, a fortiori, conduct that interferes with the exercise of a free and untrammelled choice in an election." *Dal-Tex Optical*, 137 NLRB 1782, 1786-1787 (1962).

Respondent, however, argues that, in the context of the unions' overwhelming loss and the limited scope of the unfair labor practices, the objections should be overruled as the misconduct could not have affected the election results. I must reject this contention. Whether by happenstance or intention, the unfair labor practices all occurred within 1 to 1 weeks of the election, when they were most likely to have an impact which would last until the employees entered the voting booth. They were committed by four different supervisors and managers, including the general manager, and reached more than a few employees. Under these circumstances, they cannot be said to have been isolated or otherwise de minimus. I find that they warrant that the election be set aside and a new election conducted.<sup>17</sup>

There remains one additional objection, that the Employer interfered with the conduct of the election by stationing guards

<sup>15</sup> 314 NLRB 903, 913 (1994), citing *Litton Systems*, 300 NLRB 324 (1990); and *Cannon Industries*, 291 NLRB 632, 634 (1988).

<sup>16</sup> This incident only came to light during the pretrial preparation of Gladney. I reject Respondent's contention that it may not be considered as objectionable because the Union failed to provide evidence of it within 7 days, as required by the Board's Rules and Regulations, Sec. 102.69(a). That Rule only requires that the objecting party provide the Regional Director with "the evidence available to it to support the objections" within 7 days. Here, the objection alleged interrogation by "the Employer." Gladney was interviewed by a Board Agent on October 26, giving evidence respecting an interrogation by Hill. Apparently, his name and address had been timely furnished to the Regional Director as the Employer does not object to consideration of that evidence. By timely providing the name and address of the witness to the alleged objectionable conduct, the Union has met its obligation under 102.69(a). The evidence need not be disregarded merely because the employee may have forgotten to mention it or the Board agent may have failed to inquire about additional incidents in the initial interview. See *Star Video Entertainment*, 290 NLRB 1010 (1988).

<sup>17</sup> Compare the instant facts with *Gold Shield Security*, 306 NLRB 20 (1992), a single-interrogation not disseminated or overheard by anyone else in a unit of 60; *Liquitane Corp.*, 298 NLRB 292 (1990), interrogation affecting only 2 employees in a unit of 104 employees committed 2 months before the election; and *Allied-Signal*, 296 NLRB 211 (1989), a single threat affecting 1 or 2 employees, which was related to concerted, not union, activity in a unit of more than 1000 employees.

and supervisors at the entrance to the polling place. The evidence reflects the following:

Security is a major issue in a casino; guards are as ubiquitous as fleas on a dog. Ten percent of the Casino's employees are engaged in security. Security employees are stationed in and around the Casino at all times, at its entrances and walkways, in or around the area of the atrium, on the gambling floors, and in the counting rooms. Employees and patrons are observed by hidden cameras and view points. Guards, uniformed and in plain clothes, regulate access to the casino, and keep minors out. The employees are used to their presence.

In the instant case, the election was conducted in an amphitheater on the barge to which the boat is affixed. That amphitheater is accessed from a central atrium through two sets of doors. The area in the front of that theater where the voting took place cannot be observed from the atrium. For the election, the Employer permitted the employees to board using the central entranceway, one normally reserved for patrons, rather than through the separate employee entrance. With special permission of the State Gaming Commission, they were also allowed to bring their children on board, so as to save them the cost of day care.

The Employer stationed a guard in the atrium who directed the employees to, and kept patrons and supervisors out of, the voting area and prevented the voters' children from impermissibly entering the casino itself. The atrium was not an unusual place for employees to see guards although they were stationed more frequently at the entrances to the gambling floor, at the end of the atrium, rather than at its center. One employee reported observing a guard supervisor in that area (not a direct supervisor of anyone in the voting unit). His rank was observable from the colors of his blazer, slacks, and badge; he was not in uniform and he was not otherwise identified. According to the head of the Employer's security department, supervisors had been directed to stay out of that area during the election.

There is no evidence that any of the guards made note of who entered the voting area. They could not tell whether an employee entering the theater actually voted. Nor was there any evidence of electioneering or other conversations between the guards and the employees beyond simple directions to the polling place (which was also identified by signs). The guards did not enter the theater.

I find that the Employer had legitimate reasons for stationing guards where it did, particularly compliance with state regulations concerning minors in a casino and the effective direction of traffic within the atrium. The employees were used to having such a security presence throughout the casino and the guards engaged in no improper conduct. Their presence under these circumstances is not objectionable. *Coca-Cola Bottling Co.*, 232 NLRB 717, 720, 721 (1977).<sup>18</sup>

Based upon the foregoing, I shall recommend an order requiring that the results of the election conducted on October 9, 1995 in Case 14-RC-11554 be set aside and a new election conducted.

<sup>18</sup> Compare *Coca-Cola Bottling* with *Antenna Department West*, 266 NLRB 909, 914-915 (1983), where the employees' supervisor, who had personally committed unfair labor practices, remained in the immediate voting area for an extended period of time, making comments which emphasized his authority over those employees.

#### CONCLUSIONS OF LAW

1. By interrogating employees concerning their union membership, activities and desires, by implicitly threatening employees with loss of wages and other benefits if they voted for union representation, and by disparately prohibiting employees from talking about the Unions while they were working while permitting them to engage in other nonwork-related conversations, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Sections 2 (6) and (7) of the Act.

2. By the foregoing conduct, the Employer has engaged in objectionable conduct warranting that the election conducted on October 9, 1995, in Case 5-RC-14133 be set aside and a rerun election conducted.

3. The Respondent has not engaged in any unfair labor practices not specifically found herein.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.<sup>19</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

The Respondent, President Riverboat Casinos of Missouri, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activity, membership or desires.

(b) Implicitly threatening employees with loss of wages and other benefits if they voted for union representation.

(c) Disparately prohibiting employees from talking about the Unions while they are working while permitting them to engage in other nonwork related conversations

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

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

(a) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."<sup>21</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reason-

<sup>19</sup> The violations found herein, while serious enough to warrant a remedy, are not of a nature warranting that a management official be directed to read the notice to the employees.

<sup>20</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.

<sup>21</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 Judgement Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

able 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 October 16, 1995.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that Case 14-RC-11554 be severed from Case 14-CA-23814 and be remanded to the Regional Director of Region 14 who shall conduct a rerun election at such time as he deems the circumstances permit a free choice on the issue of union representation.<sup>22</sup>

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<sup>22</sup> The objectionable conduct found here does not warrant any particular or extraordinary form of notice or a requirement that the election be conducted offsite.