

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

DAVID'S JADE PALACE RESTAURANT

and

318 RESTAURANT WORKERS UNION

and

LOCAL 888 OF THE UNITED FOOD &
COMMERCIAL WORKERS

Party in Interest

Case Nos. 2-CA-35470-1
2-CA-35547-1
2-CA-35672-1

*Joane Si lan Wong, Esq., and
Geoffrey Dunham, Esq. for
the General Counsel*

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge: This case was tried in New York, New York, on March 2 and 3, 2004. The Amended Complaint alleges that Respondent, in violation of Section 8 (a) (1), (2) and (3), interrogated employees, isolated them and changed their income, discharged employees and rendered unlawful assistance to Local 888. In addition to the usual cease and desist and make whole remedies the General Counsel seeks a bargaining order. The Respondent filed an Answer denying that it had engaged in any unlawful activity. On the day before the hearing Respondent's Counsel notified Counsel for the General Counsel that neither Respondent's Counsel nor Respondent's principal would attend the hearing. Local 888 did not make an appearance herein. On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

Respondent David's Jade Palace Restaurant, a domestic corporation with an office and place of business at 156 S. Central Park Avenue, Hartsdale, New York, is engaged in the operation of a restaurant. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

Marie Koo has been the vice-president of 318 Restaurant Workers Union since January 1999. She testified credibly that the Union organizes workers, holds monthly legal workshops, conducts demonstrations and press conferences and conducts Union meetings and elections.

The purpose of 318 Restaurant Workers Union is to organize workers and assist them in fighting for better working conditions. Koo identified the constitution and by-laws of the Union which were adopted in 1980. The Union has represented employees in negotiations with employers. It has a contract with the Silver Palace Restaurant. It participated in an election at the Ocean Empire Restaurant. I find that 318 Restaurant Workers Union is a labor organization within the meaning of Section 2 (5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Respondent did not provide documents subpoenaed by Counsel for the General Counsel. Therefore, I permitted Counsel for the General Counsel to use secondary evidence to prove the elements of the case. David Ng did not appear in response to a subpoena issued by General Counsel. Consequently, I permitted Counsel for the General Counsel to offer a portion of his affidavit into evidence. The Respondent's Answer admits that David Ng is the owner and manager of Respondent and is a supervisor and agent of Respondent.

I found all the witnesses herein to be credible and I shall rely on their testimony.

B. Respondent's Operation and Employees

The testimony shows that David Ng, the owner of Respondent, is at the premises much of the time and that he personally oversees the operation of the restaurant and directs the employees. When Ng is not present, which occurs at least one day a week, assistant manager Tak Hing Ho, known as Jimmy Ho, is in charge of the restaurant. As a regular matter, Jimmy Ho gives assignments to employees: he assigns waiters and busboys to their stations at the beginning of each week, he instructs busboys to perform tasks such as cleaning the bathrooms, he gives days off to employees and he goes around to the tables and speaks to the customers. I find that Jimmy Ho is a supervisor and agent of Respondent.

The employees testified about the duties performed by the cashier Xue Cao Wong, who is usually known as Shirley and occasionally referred to as Don Don. The testimony shows that Shirley functions as a hostess and assigns customers to tables. Several witnesses said that Shirley has the authority effectively to recommend discharge. These witnesses recalled a time when a waiter took some juice to drink with his dinner. Shirley admonished him for this unauthorized action and she told Ng about the occurrence. The waiter was paid off and fired that night. The record shows that Shirley also gives instructions to the waitstaff, telling them what areas to clean, what problems to take care of and changing the method of accomplishing a task. I find that Shirley is a supervisor and agent of Respondent.

The employee witnesses identified Hing Ton Lam as the kitchen supervisor. Hing Ton Lam, also known as Fat Lam, is listed as a "fryer" in the exhibits. The record shows that Hing Ton Lam gives assignments to the other employees in the kitchen. He tells the cooks what to do, he decides in what manner all the dishes must be prepared, he decides when the kitchen will close and he determines when the staff must begin cleaning the kitchen. He assigns cleaning tasks to the employees. Hing Ton Lam gives days off to employees and he can change work schedules. Hing Ton Lam reports directly to David Ng about activities in the kitchen. Finally, Hing Ton Lam signs receipts on behalf of the restaurant for the delivery of food and uniforms. No other employees are authorized to sign receipts. I find that Hing Ton Lam is a supervisor and agent of Respondent.

The record shows that the following employees worked as waiters:

5 Tian Cai Fong, a/k/a Danny Fong
 Kai Pan Wong a/k/a Kevin Wong
 Shui Lun Ho a/k/a Ricky Ho
 Kam Kwok Mang a/k/a Ah Kwok
 Tsz Kan Li a/k/a Ah Li
 Zheng Xiang Lei a/k/a Ah Lu
 Jin Lin
 10 Tony Lau
 Ah Zheng

The record shows that two busboys were employed by Respondent: Pei C. Zhou and Yun Chen.

15 The kitchen staff was supervised by Hing Ton Lam as described above. These included four chefs, one order taker, one odd job person, one fryer in addition to Hing Ton Lam, and two cook's helpers.

20 C. The Employees Join 318 Restaurant Workers Union

Waiter Shui Lun Ho worked at the restaurant from February 2002 to May 24, 2003. He testified that when the waiters received their W-2 forms for the year 2002 they noticed a discrepancy between their actual earnings from tips and their reported earnings. The W-2 forms did not show all the tips actually earned by the waiters. Instead, a very small sum was reported to the IRS. The waiters were upset because every day when David Ng calculated their tips as shown on credit card charges he deducted 7.65% from the waiters' tip income as taxes. The W-2 forms showed that Ng did not report all the tip income to the IRS and that he did not pay the 7.65% to the IRS, but instead he kept the tip money for himself. After the waiters complained to Ng about the discrepancy the restaurant's accountant came to meet with them. The accountant said that the tax statement had been filed and could not be changed. At this time the waiters started talking about a Union. Shui Lun Ho signed a card for 318 Union on March 16, 2003.

35 Waiter Tsz Kan Li worked at the restaurant from March 2002 until May 24, 2003. In mid March 2003 he signed a card for 318 Union at the same time as waiters Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong. Li collected the cards and brought them to the 318 Union office.

40 On March 26 the six waiters who had signed cards for 318 RWU also signed a letter addressed to David Ng. The letter stated that they wished to be represented by 318 RWU and asked that the employer agree to a card check election and that the employer recognize the Union if it was supported by a majority vote.

45 On Saturday March 29, 2003 Marie Koo, vice-president of 318 RWU, hand delivered the letter to David Ng at the restaurant. Ng did not communicate with the Union in response to the letter and he did not agree to a card check election. Kai Pan Wong testified that he had seen Koo hand the letter to Ng. Later, as Kai Pan Wong was walking by the cashier station he saw Ng and Shirley reading the letter. Ng was asking Shirley about the English names appearing at the bottom of the letter; he wanted to know who had signed the letter.¹

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 ¹ The employees had signed the letter with their English names.

The record shows that 318 RWU filed its petition to represent a unit of full time and part time waiters and busboys in Case 2-RC- 22711 on April 18, 2003.

5 On May 1, 2003 a complaint was filed in federal court naming the Respondent and David Ng and seeking monetary, declaratory and injunctive relief for violations of the Fair Labor Standards Act and Articles 6 and 19 of the New York Labor Law. The plaintiffs are the six waiters who signed cards for 318 RWU as well as four other present and former waiters of the Respondent. The complaint alleges failure to pay minimum wages, failure to pay overtime wages, unlawful retention of tips and other violations relating to spread of hours and uniform costs. A few days after the filing of this complaint Ng told waiter Kai Pan Wong, one of the plaintiffs, that he would bring the tax matter to his bank. Ng said if worse came to worse he would have to give up his restaurant and they would all be ruined. Ng said that every day the waiters would have to sign their names next to the amount of tips they had received.

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D. The Employees Sign Cards for Local 888

20 Hei Sing Lam, who is also known as Small Lam, was a fryer working at the restaurant from September 23, 2001 until July 6, 2003. Hei Sing Lam testified that on April 20, 2003 he saw his supervisor, Hing Tong Lam, show a stack of about 20 cards to David Ng. Hing Tong Lam then proceeded to give some of these cards to over 10 employees present in the restaurant at that time. Hing Tong Lam gave Small Lam a card, which was in fact an authorization card for Local 888, and he asked Small Lam to sign the card. Hing Tong Lam also asked the other employees to sign the cards. David Ng was observing Hing Tong Lam when he obtained the employees' signatures on the Local 888 authorization cards.

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30 Chef Yu Jia Chen worked in the restaurant from April 1994 until June 15, 2003. Chen testified that on April 19, 2003 he was with David Ng in the storage area of the restaurant when Ng ask him to sign a card for Local 888. Chen asked whether the card was to join a union. Ng replied that the card was not to join but would give Chen the right to vote. The next day Chen signed the Local 888 card and returned it to David Ng.

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35 Waiter Tsz Kan Li testified that on April 20 Hing Tong Lam gave him a card for Local 888 and said the boss wanted Li to sign it. Li spoke to his co-workers about the card. Then he teased Hing Tong Lam by asking whether he realized that the card was for a textile workers union.

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40 The record shows that Local 888 filed its petition in Case 2-RC-22714 on April 24, 2003 to represent a unit of all full-time and part-time kitchen staff (e.g., cooks, sous-chefs, preparers, etc.), cashiers, waiters and bus boys. General Counsel's Brief states that Local 888 withdrew its petition on February 27, 2004 and that the Regional Director approved the withdrawal on March 8, 2004.

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E. Assignments are Changed in the Restaurant

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45 Waiters Tsz Kan Li, Tian Cai Fong, Shui Lun Ho and Kai Pan Wong testified credibly that after David Ng received the signed letter on behalf of 318 RWU various changes were made at the restaurant.

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50 Nine waiters worked at the restaurant full-time and part-time. There were two busboys in the restaurant. Waiters at the restaurant were assigned to cover stations in pairs and considered themselves partners. They had a busboy assigned to help them. When customers

came in, they were assigned to tables by Shirley, the cashier. It was the custom for Shirley to distribute the customers evenly among the stations covered by various waiter partners so that opportunities to earn tip income would be equally available to all waiters. Tip income was not pooled during the busy weekend meal times and the distribution of customers would thus affect the waiters' earnings during the busiest times.

Tsz Kan Li testified that he had been assigned to partner with waiter Tony Lau. Unlike Li, Tony Lau had not signed a card on behalf of 318 RWU and Lau had not signed the March 26 letter. Li had often heard David Ng criticize Tony Lau for being slow, for bringing the wrong dishes to customers and for forgetting orders.² After the March 26 letter was delivered, Tony Lau was no longer Li's partner. Instead, Tony Lau was made the partner of Jin Lin who also had not signed up for 318 RWU. After a few weeks Jin Lin left and Tony Lau was assigned to partner with Ah Zheng a part-time waiter who then became full-time. Tsz Kan Li's new partner was Kai Pan Wong who was also a supporter of 318 RWU. Once Li and Wong became partners they noticed that the hostess was distributing customers unfairly. Instead of trying to distribute the number of customers brought to all the waiters equitably so that they would have an equal chance to earn tip income, the hostess brought more customers to Tony Lau and his partner, and fewer customers to the waiters who supported 318 RWU. All of the waiters noticed the change and complained to the hostess that it was unfair. She said this was David Ng's idea and that nothing was fair.

David Ng's affidavit sworn to on June 11, 2003 states that he received the signed letter from 318 RWU on a Saturday. Ng telephoned his wife because who prepares the payroll and he asked her to help him figure out whose signatures appeared on the letter. By 4 PM Ng knew who had signed the letter. Ng stated that he was "so upset" when he received the letter. When Ng learned that Tony Lau and Jin Lin had not signed he spoke to each of them separately. He asked each one why they had not informed him about the letter. Both Tony Lau and Jin Lin said that had not informed Ng because the others would not let them tell Ng. The affidavit admits that Ng changed the pairing of the waiters so that Tony Lau was paired with Jin Lin "because Tony and Jin Lin told me they refused to join 318."

Kai Pan Wong had also partnered with Tony Lau. After March 29 he was never assigned to work with Lau again. Wong noticed that he got fewer customers and that his income went down. Wong had regular customers who ate at the restaurant weekly and were always seated at one of his tables. After March 29 these customers were brought to Tony Lau.

Shui Lun Ho testified that he noticed that the 318 RWU supporters got fewer customers than the waiters who did not support the Union. A daily client list was kept at the restaurant showing how many customers had been served and to which tables they had been sent. Ho looked at the list and saw that Tony Lau and Ah Zheng got the most customers while Ho was getting fewer customers.

Tian Cai Fong also noticed that he and his partner, both of whom supported the Union, were getting fewer customers. Fong noted that assistant manager Jimmy Ho, who used to help him and his partner when his station was very busy, no longer came over to help him. Fong asked Jimmy why he no longer helped him but only helped Tony Lau. Jimmy replied that he had his orders.

² In addition, waiters Shui Lun Ho, Tian Cai Fong and Kai Pan Wong all testified that they had heard David Ng criticize Tony Lau for being slow, not having good manners, taking wrong orders and the like.

F. Tip Pooling Controversy and Termination of the Waiters

5 It was the custom at the restaurant for tips to be pooled on weekdays and at lunch. On Friday, Saturday and Sunday nights when the restaurant was most busy, tips were not pooled but waiters were credited with tips given at their stations. After March 29, 2003 the waiters who supported 318 RWU were receiving less tip income on weekends because of the unfair allocation of customers to their respective stations. These waiters began discussing the desirability of pooling tips on weekend nights so as to equalize tip income.

10 On Saturday May 24 as they sat at a table preparing beans and wontons the waiters discussed pooling tips for that night. Some of the waiters agreed to pool their tips. Tony Lau did not agree; he said they should ask David Ng. At around 4 PM Ng came out of the kitchen yelling. He asked whose idea it was to pool tips. He said, "I don't like it, I'm against it." Tian Cai Fong told Ng that the waiters had agreed to pool their tips that night. Ng asked whether this was Kam Kwok Mang's idea. According to Kai Pan Wong, Ng tried to get those waiters who wanted to pool tips to sign a blank piece of paper, but they refused. Then Ng called the waiters to a meeting in the bar area. Before the meeting began Ng sent the waiters who did not sign the letter for 318 RWU away from the area saying, "This is none of your business." David Ng then told the waiters that it was a house policy not to pool tips on weekends and he told the waiters that they could not pool the tips. Tsz Kan Li said the waiters wanted to pool the tips because the customer distribution was unfair. All the waiters said they wanted to pool the tips to make it fair for everybody. But Ng said, "It's never fair, it's always unfair, that's how it works." Ng reiterated that he would not permit tip pooling.

25 About 30 minutes later David Ng called a meeting of the waiters who supported 318 RWU. He questioned all the waiters individually, asking each one whether he would insist on pooling tips. When the waiters said they wanted to pool the tips, Ng said that he had no choice but to fire them. One of the waiters asked for a termination letter but Ng refused to provide one. Ng told the waiters to turn in their ties and vests. Ng summoned the police. The police made the waiters leave the restaurant but permitted them to enter one by one to collect their wages.

III. Discussion and Conclusions

A. Violations of the Act

35 David Ng admitted that he was "so upset" when he heard that the waiters were organizing to join 318 RWU. Ng admitted that he separately called Tony Lau and Jin Lin to see him and asked each waiter why he had not informed Ng of the organizing effort. Ng is the owner of Respondent and its highest ranking manager. He questioned each employee alone and away from co-employees. By asking why he had not been informed he clearly conveyed to the employees that he was displeased with the effort to organize a union. I find that under these circumstances this questioning was coercive and violated Section 8 (a) (1) of the Act. *Rossmore House*, 269 NLRB 1176, fn. 20 (1984).

45 David Ng admitted that he changed the pairing of waiters so as to ensure that waiters who supported the Union did not work as partners with waiters who had not joined the Union. The change had the effect of isolating the members of 318 RWU from the rest of the waitstaff. By this action Respondent violated Section 8 (a) (1) of the Act. *Masiogale Electrical-Mechanical*, 331 NLRB 534, 539 (2000).

50 The change in the pairing of waiters was coupled with a change in the manner of

assigning customers to the Union waiters. Shirley no longer tried to assign customers fairly so that all waiters had a chance to earn good tips on weekends. As a result, Union waiters received fewer customers to serve and were not sent their regular customers who were good tippers. Thus, the Union waiters were deprived of tip income. This change in customer
 5 assignment and concomitant reduction in income was a violation of Section 8 (a) (3) of the Act. Further, the income of the non-union waiters was increased as a result of the change in assignments and Respondent thus violated Section 8 (a) (3) of the Act.

Based on the credited testimony of the witnesses I find that on April 19, 2003 Ng asked
 10 chef Yu Jia Chen to sign a card for Local 888. Chen complied and later handed the card back to Ng. On April 20, Ng watched kitchen supervisor Hing Tong Lam hand out cards for Local 888 to more than 10 employees in the restaurant and ask them to sign the cards. On April 20, Hing Tong Lam gave Tsz Kan Lie a card and told him that Ng wanted Li to sign the card. By these actions Respondent rendered unlawful assistance and support to Local 888 and violated
 15 Section 8 (a) (2) of the Act.

The record shows that a few days after Ng learned of the waiters' organizational activities and after the federal action was brought relating to tax, tip and wage violations, Ng told waiter Kai Pan Wong that he might have to give up his restaurant and they would all be ruined.
 20 A few weeks after this conversation the Union member waiters, having watched their weekend tip earnings evaporate under the discriminatory changes instituted by Respondent, decided that they wished to pool tips on weekends to make up for the lack of fairness in assigning tables. When Ng heard of this he came yelling out of the kitchen, he questioned the waiters in an effort to learn whose idea this was and he singled out the Union members for a meeting to discuss the issue. When the waiters informed Ng that they wanted to pool tips because the customer
 25 distribution was unfair he replied, "It's never fair ... that's how it works." Then Ng discharged the Union member waiters. Ng's ostensible reason for the discharges was that Respondent had a policy that tips would not be pooled on weekends. I find, however, that this is a pretext. I find that Ng's real reason for discharging the waiters was that the waiters had joined 318 RWU and that they had joined in a suit to enforce their legal rights as employees. Ng admitted that he was "so upset" when he learned that the waiters had joined 318 RWU. Just days after Ng
 30 learned about 318 RWU he brought Local 888 cards to the workplace and had them signed by his employees.³ Even if I had not found that the purported violation of a policy against pooling tips on weekends was a pretext to discharge the employees, I would find that the discharges were unlawful. The record contains no evidence to show that, absent the employees' union and
 35 concerted activities, the Respondent would nevertheless have fired them for asking to pool tips on weekends. *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F. 2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982).

Respondent violated Section 8 (a) (3) of the Act by discharging Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong because these employees joined the Union. Respondent also violated Section 8 (a) (1) of the Act because the discharge was in retaliation for the protected, concerted activity of filing a federal case to vindicate the employees' rights and in retaliation for their protected, concerted activity in joining together to
 45 decide on a tip pooling policy.

³ As the General Counsel points out, since 1972 it has been the policy of the New York State Department of Labor in interpreting and enforcing the state labor law that tip pooling "must be completely voluntary, initiated by the employees themselves... and not made part of the
 50 terms of hire or conditions of continuing employment." Thus, Ng's purported attempt to enforce his ban on tip pooling was a violation of Section 196 (d) of the State Labor Law.

B. Request for a Bargaining Order

5 The General Counsel argues that 318 RWU enjoyed majority support in the petitioned-for unit before Respondent terminated the Union supporters. The General Counsel urges that the petitioned-for unit is an appropriate unit and that a bargaining order is warranted because there is no realistic possibility of erasing the lingering effects of the unfair labor practices and conducting a fair election by traditional means.

10 I find that a unit of waiters and busboys is an appropriate unit. The waiters have a community of interest in wages, and working conditions. They are paid by a combination of hourly wages and tips. They work together in the dining room as partners, receiving assignments to their tables from the hostess. They have the same skills and functions. Although no argument was made herein that the only appropriate unit includes both kitchen and dining room employees, I note that the kitchen staff do not work in the dining room, have no customer contact, do not share in tips, do not receive direction from the hostess and have wholly different skills from the waitstaff. Thus, there would be no impediment to finding that the kitchen staff constitutes a separate unit from the waitstaff. *Washington Palm, Inc.*, 314 NLRB 1122, 1126-1129 (1994).

20 The record shows that Respondent employed nine waiters and two busboys. Six of these employees signed cards for 318 RWU and the same employees signed the petition asking Respondent to recognize the Union. Thus, when the Respondent received the employees' letter on March 29 asking for a card check and recognition of 318 RWU and when the Union filed its representation petition on April 18 the Union represented a majority of the Respondent's employees in an appropriate unit.

30 In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court described two types of cases where a bargaining order should issue because a fair and reliable election cannot be held. One type of case involves "outrageous" and "pervasive" behavior. The second type involves less extraordinary and less pervasive unfair labor practices. In those cases the Board should "take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election ... by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance be better protected by a bargaining order, then such an order should issue." 395 U.S. 614-615.

40 In this case, the Respondent engaged in outrageous and pervasive behavior. The owner of the Respondent, David Ng, committed a number of "hallmark" violations of the Act which justify a bargaining order. Upon learning of his employees' support for 318 RWU David Ng isolated all the employees who had joined the Union, he took steps which resulted in cutting their tip income during the lucrative weekend mealtimes and increasing the income of the waiters who did not support the Union, he brought in another union and had supervisors sign up employees for that union and, when the Union supporters tried to take collective action to restore their lost income, he used that as a pretext to discharge every employee who had joined 318 RWU. Thus, the possibility of erasing the effects of the unfair labor practices and conducting a fair election is not present. Employees still at the restaurant would remember that the owner got rid of every supporter of 318 RWU just weeks after the employees organized the Union. The non-union employees would recall the unlawful interrogation to which they were subjected by the owner when Ng asked them why they had not informed him of their co-workers' organizing efforts. They would recall that they were rewarded for their lack of support

for the Union by being given increased tip earnings. Employees would recall the unlawful support given to Local 888. They would recall the fired employees standing outside the restaurant with the local police. Running an election in these circumstances would only reward the Respondent for its past unfair labor practices. *M.J. Metal Products*, 328 NLRB 1184 (1999);
 5 *Joseph Stallone Electrical Contractors*, 337 NLRB 1139 (2002).

Conclusions of Law

10 1. By asking employees why they had not informed the owner about organizing efforts among the unit employees the Respondent violated Section 8 (a) (1) of the Act.

2. By changing pairing of waiters to isolate those employees who supported the Union the Respondent violated Section 8 (a) (1) of the Act.

15 3. By changing the pairing and assignments of waiters so that employees who supported the Union earned less tip income on weekends and employees who did not support the Union earned more tip income on weekends the Respondent violated Section 8 (a) (3) of the Act.

20 4. By rendering unlawful assistance and support to Local 888 Respondent violated Section 8 (a) (2) of the Act.

25 5. By discharging employees Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong because they joined the Union and engaged in protected, concerted activities the Respondent violated Section 8 (a) (1) and (3) of the Act.

6. The following employees constitute an appropriate unit for collective bargaining:

30 All full-time and part-time waiters and busboys employed at the Respondent's facility located at 156 S. Central Park Avenue, Hartsdale, New York.

7. By refusing to bargain with 318 Restaurant Workers Union since March 29, 2003 the Respondent has violated Section 8 (a) (5) of the Act.

35 **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.

40 The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as
 45 computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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

50 ⁴ 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.

Continued

ORDER

5 The Respondent, David's Jade Palace Restaurant, Hartsdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

10 (a) Coercively interrogating any employee about union support or union activities.

(b) Changing its employees' assignments to isolate union supporters.

15 (c) Changing its employees' assignments to decrease the income of union supporters and increase the income of employees who do not support a union.

(d) Rendering unlawful assistance and support to Local 888 or any other union.

20 (e) Discharging or otherwise discriminating against any employee for supporting 318 Restaurant Workers Union or any other union, or for engaging in protected, concerted activities.

(f) 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.

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

30 (a) On request, bargain with 318 Restaurant Workers Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and part-time waiters and busboys employed at the Respondent's facility located at 156 S. Central Park Avenue, Hartsdale, New York.

35 (b) Within 14 days from the date of the Board's Order, offer Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

40 (c) Make Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

45 (d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional

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102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(f) Within 14 days after service by the Region, post at its facility in Hartsdale, New York, copies of the attached Notice marked "Appendix."⁵ Copies of the Notice, on forms provided by the Regional Director for Region 2, 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 29, 2003.

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(g) 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.

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Dated

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Eleanor MacDonald
Administrative Law Judge

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⁵ 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."

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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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting 318 Restaurant Workers Union or any other union or for engaging in protected, concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT change our employees' assignments to isolate union supporters.

WE WILL NOT change our employees' assignments to decrease the income of union supporters and to increase the income of employees who do not support a union.

WE WILL NOT render unlawful assistance to Local 888 or any other union.

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

WE WILL, on request, bargain with the 318 Restaurant Workers Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and part-time waiters and busboys employed at the Respondent's facility located at 156 S. Central Park Avenue, Hartsdale, New York.

WE WILL, within 14 days from the date of this Order, offer Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Shui Lun Ho, Tsz Kan Li, Zheng Xiang Lei, Kam Kwok Mang, Danny Fong and Kai Pan Wong, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

David's Jade Palace Restaurant

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346