

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

KSL CLAREMONT RESORT, INC.
d/b/a CLAREMONT RESORT AND SPA

and

Case 32-CA-19833-1
32-CA-20077-1
32-CA-20178-1
32-CA-20276-1

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES UNION, LOCAL 2850,
HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES INTERNATIONAL UNION,
AFL-CIO

*Jeffrey L. Henze, Esq. and Jennifer A.
Jambor, Esq., Oakland, CA, for the
General Counsel
Patrick W. Jordan, Esq. and Daniel
A. Croley, Esq., of Jordan Law
Group, San Rafael, CA, for the
Respondent*

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Oakland, California, on February 18 and 19, 2003. The charge in Case 32-CA-19833-1 was filed by Hotel Employees and Restaurant Employees Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL-CIO (Union) on July 23, 2002. Thereafter, the Union filed the other captioned charges, and the Regional Director for Region 32 of the National Labor Relations Board (Board) issued various complaints. On January 10, 2003, the Regional Director issued the final complaint in this matter, namely, Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, alleging violations by KSL Claremont Resort, Inc. d/b/a Claremont Resort and Spa (Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

Prior to the commencement of the hearing the parties entered into a settlement agreement resolving all allegations of the Amended Consolidated Complaint other than certain Section 8(a)(1) issues as set forth herein.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from Counsel for the General Counsel (General Counsel), and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a California corporation with an office and place of business in Berkeley, California, where it is engaged in the operation of a hotel and spa. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000, and annually receives goods and materials valued in excess of \$5,000 which originate outside the State of California. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated Section 8(a)(1) of the Act by directing employees what to say in response to customers' inquiries about an ongoing labor dispute; by requiring employees to remove ribbons from their uniforms; and by promulgating a rule permitting employees to wear only one button, in addition to their nametags, on their uniforms while on duty.

A. Facts; Analysis and Conclusions

The Respondent is a world class 22-acre urban luxury resort hotel, with an extensive spa, tennis courts, pools, and a variety of dining experiences. The spa facility occupies twenty thousand square feet and contains thirty-five treatment rooms. It has front desk associates who greet the guests, massage therapists, therapists who deliver body treatments, estheticians who do facials, hair stylists, nail technicians, and locker room attendants. All spa employees have direct contact with guests. Between 100 and 140 employees provide these spa services.

Essentially, according to Denise Chapman, Director of Marketing, the Respondent is "selling luxury, we're selling pampering, we're selling service. We're selling a guest experience...our job is to provide ultimately a sense of relaxation." The Respondent attempts to present guests with a "hassle-free environment, that's very peaceful and relaxing...free of controversial issues.. when people come to the Claremont, they're looking for an escape." Employees' behavior and relationship with the guests must not detract from this experience, and

the record establishes that employees understand that they may be disciplined for raising any issues or initiating any discussions with guests that could be controversial or inconsistent with the Respondent's mission of providing pampering and relaxation.¹

.5 One union supporter, a massage therapist, testified that part of her job was to provide an atmosphere in which the guest or client could relax, that the 50-minute session would include playing mood music, and that quietude and serenity was very important to enhance this experience. Accordingly, she acknowledged that it would be inappropriate for a therapist to begin talking about her personal problems or political beliefs, or ask guests about their
10 problems; and it would be equally inappropriate to commence a conversation about the union situation. Basically, it is up to the guest to initiate any conversation other than friendly civilities or matters having to do with the therapy procedure itself.

Attention to detail is of paramount concern from the moment a guest enters the property.
15 The Respondent's employee handbook of approximately 70 pages contains a section entitled "Professional Appearance and Attire." The employee handbook contains extensive requirements regarding appearance, even including, for example, permissible types of jewelry that may be worn, and the length and color of fingernails. Employees are required to wear a variety of carefully selected and coordinated uniforms befitting the elegance of the surroundings
20 and the nature of their jobs. According to the handbook, all employees are required to wear a company-issued nametag "on the right side [of their uniform] approximately 2-3 inches below your collarbone," and "Individual decorations are not permitted on your nametag."

The handbook requirements regarding the wearing of jewelry are as follows:

25

JEWELRY

Rings: A maximum of **TWO** simple rings on each hand is allowed.

Wedding/engagement rings are considered one ring.

30

Necklaces: Extreme styles are not acceptable. No necklaces may show outside the uniform.

Brooches, Clasps or Pins: No attachments on any uniform other than name tag or pins officially designated by the Company.

35

¹ On February 7, 2002, a therapist was given a written warning for complaining to a guest about the Respondent's treatment of her as an employee. The guest complained that the therapist seemed to have a 'political agenda," and it made the guest feel very uncomfortable and brought the world of politics into her spa experience when she was "trying to get away from things by coming here." The conduct of the therapist was in violation of various standards of conduct, and she was "required to refrain from inappropriate comments or topics during services with guests."

40

Similarly, the same therapist was given another warning on July 18, 2002, and thereafter
45 terminated, for, inter alia, asking the guest whether she was a "spy" for the Claremont and talking about union matters in an effort to convince the guest to support her views, and placing a flier regarding a forthcoming August 1, 2002 Union demonstration against the Respondent in the pocket of the guest's robe. The "Disciplinary Action Form" states that , "Independent of the subject of the conversation, the guest was prevented from attaining any sense of peace, harmony or tranquility. The guest was denied the experience of being removed from the cares of the everyday world, which is the purpose of our treatments."

Earrings: Large and extreme styles are not acceptable. Employees may wear only one pair of earrings. Earrings are not allowed for male employees. Body piercing ornaments jewelry is not allowed in visible areas. Ankle bracelets are not allowed.

.5

On August 27, 2002 the parties entered into a Settlement Agreement in another case. Apparently the underlying complaint alleged that the rules prohibiting the wearing of other than designated jewelry was overly restrictive, and could be interpreted to prohibit employees from wearing union buttons or pins on their uniforms.² The settlement agreement provides, inter alia, that: "We will not maintain rules in our employee handbook that prohibit employees from wearing any union buttons or pins on their work uniforms or other work clothing..."; and "We will rescind/and or modify the rules in our employee handbook: prohibiting employees from wearing any union buttons or pins on their work uniforms or other work clothing..."

10

15

The Respondent's food and beverage employees are currently represented by the same Union and are covered by the provisions of a collective bargaining contract that has contained, since 1997, the following provision: "Employees covered under this agreement may at all times wear the standard union button in a conspicuous place while on the job. Standard buttons shall not be more than one inch in diameter and shall not be gaudy in nature." The Respondent has consistently applied this one-button rule to the spa employees as well. Thus, since December, 2001, when the Union's organizational campaign began, employees supporting the Union have been entitled to wear one union button on their uniforms, and no employee wearing just one union button has been told to remove it. One union supporter testified that she understood this was permitted in accordance with the Respondent's handbook, and that this was a common practice among union supporters.

20

25

In early December, 2001, the Union commenced an organizing campaign among the Respondent's spa employees, and it is continuing to date. During the course of the organizing campaign, the Union has engaged in a number of informational demonstrations outside the Respondent's property and has requested the public to boycott the Respondent because, inter alia, of its refusal to recognize the Union through a check of authorization cards. The Respondent has refused to agree to a card check to establish whether or not a majority of its spa employees desire to be represented by the Union, and has advised the Union that it is willing to let its employees make this choice through a Board-conducted election. The Union has declined this offer. Accordingly, the demonstrations have continued.

30

35

Denise Chapman testified that on April 28, 2002, the Union conducted a rally outside both entrances to the facility. It was widely attended and covered by the press and a television station. The next morning the Respondent was inundated with phone calls from guests and clients inquiring about the situation, and asking questions of the sales people and reservations agents, particularly about the implications of the labor dispute vis-a-vis their plans for forthcoming events at the hotel. Chapman was asked by sales managers in the reservations department to provide some guidance regarding the flood of phone calls, and, on the next day, April 29, 2002, she prepared and distributed the following memorandum addressed to Reservations Agents and Front Desk Agents:

40

45

² However, the actual practice of the Respondent had consistently been to permit the wearing of one union button.

RE: Responding to Guest Questions About Union-Related Activities

.5 There has been some recent publicity related to Local 2850s campaign to unionize our spa, which might result in some guests telephoning with questions. When guests/clients call us to express concern over what they may have heard, or to ask questions, here's what they're seeking from us: Reassurance. They want to know that it's okay for them to come here. If they take the time to call us, chances are good that they want to patronize us and simply will feel more comfortable if they clarify a few things.

10 Here are some key points to help guide you in reassuring the guest who calls with questions. As a team, we need to deliver these messages clearly and consistently. If you encounter questions that you cannot answer, please tell the guest you'd be happy to call them back (or have someone call them back) with more information. Your SLT member can provide you with more assistance and I am always happy to assist.

Questions related to Spa Unionization Campaign

- 20 • The Claremont supports the right of our spa employees to make an informed decision on the issue of union representation. We're completely supportive of a secret ballot election and encourage the union to call for an election if they wish to pursue this. Out of respect for the right of our spa employees to make their own choice, we will not circumvent the election process.

Questions Related to Union-Publicized "Boycott"

- 25 • Discouraging guests from patronizing the resort directly affects our employees. Less business means less work for the employees. We cannot understand how the union could think less work would benefit our employees.

Overall Message

- 30 • Everyone here is dedicated to providing you with an exceptional experience during your visit. Let me assure you that the resort is fully staffed and we don't expect any inconvenience for our guests.

35 Chapman testified that the Respondent received no complaints from employees about this memorandum. Neither the General Counsel nor the Union presented any evidence that employees had any concerns about the memorandum or considered it to be improperly impinging upon their right to support, refrain from supporting, or maintain neutrality regarding the Union situation.

40 On July 23, 2002, the Union filed a charge alleging that the foregoing memorandum constituted unlawful coercion in that it forced employees to espouse the Respondent's point of view regarding the union situation. The Region agreed, and on September 18, 2002, the Regional Director issued a complaint alleging this as a violation. Thereupon, on December 20, 45 2002, Chapman directed the following memorandum to Reservation Agents and Front Desk Agents:

On April 29, 2002, I distributed a memo to you regarding guest's questions about Union-related activities. Some employees apparently felt we were asking them to adopt our position or response as their own. This was never intended, nor is it now the case. Then the National Labor Relations Board became involved due to unfair labor practice charges that were filed against the Claremont months later.

Please be advised we acknowledge your right to form, join or assist a union, or to decide against supporting a union. We respect your right to make that choice. Further, I am hereby withdrawing the April 29, 2002 memo, even insofar as it simply suggested guides you may use in reassuring our guests about the level of service they could expect.

While it is unfortunate a misunderstanding arose as to our intentions, I trust this memo clarifies the situation. In the event you have any additional concerns as to information to be provided to guests, please feel free to contact me at your convenience.³

The General Counsel, primarily relying on *Dawson Construction Co.*, 320 NLRB 116, (1995), argues that the April 29, 2002 memorandum is coercive in that it requires reservations agents and front desk agents to espouse the Respondent's point of view vis-a-vis the labor dispute, and thus may compromise their true feelings about the matter. I do not agree. It appears that the Board found a violation in *Dawson Construction Co.* because a neutral employer to a labor dispute discharged an employee for refusing its direct order to stand at an entrance to the employer's construction project with a reserve gate sign. The employee had specifically objected to this work assignment on the ground that he wanted to refrain from appearing partisan in the union dispute. The employer considered this to be an act of insubordination, and terminated the employee.

It does not appear that the Board in *Dawson* determined that it was unlawful for the employer to simply *request* that the employee hold the reserve gate sign; the employee may or may not have been willing to do so. Rather, as the Board stated at p. 117, "We conclude that an employer's right to establish a reserve gate does not extend so far as to *permit overriding an employee's Section 7 right to remain silent by requiring* him to participate in establishing that gate by holding the reserve gate sign." (Emphasis supplied.) In the instant case, no reservation agent or front desk agent voiced any concern or objection regarding communication with guests about union-related inquiries, and therefore the Respondent may not be found to have *overridden* their Section 7 rights.

Further, in *Dawson*, of course, the discharged construction employee was not hired to carry a reserve gate sign. In the instant case, the reservation agents and front desk agents are specifically hired to answer guest's questions. It may be reasonably presumed that guests who phone or approach the Respondent's representatives and inquire about the Union situation are seeking the Respondent's point of view, not the personal point of view of the agent. Therefore it is the guest, not the Respondent, who places the agent in the position of having to either relate the Respondent's point of view or demur, and advise the caller that someone else will have to answer the inquiry. In the latter situation, the agent is put in the position of having to notify a supervisor that the agent is not comfortable presenting the Respondent's point of view. Accordingly, the situation is unlike *A. O. Smith Automotive Products Co.*, 315 NLRB 994

³ Chapman testimony was consistent with the clarification of her intentions as set forth in this memo. Thus Chapman testified that the original memorandum was intended to suggest guidelines for responding to guests' questions, and provided a means by which employees could refrain from answering questions and refer them to a manager.

(1994), where an employer's "pressuring employees to make an observable choice or open acknowledgment of their union sympathies" has been found to be unlawful. Here it is the guest, not the Respondent, who has placed the agent in the position of having to make an observable choice or openly acknowledge his or her union sympathies.

.5

Accordingly, I shall dismiss this allegation of the complaint.

10

15

As noted above, the Respondent has maintained a policy of permitting the wearing of one union button on an employee's uniform. The union button that employees have consistently worn measures three-quarters of an inch by one inch, has a blue background, a gold image of a clenched fist, and gold lettering with "Union" at the top, and "Committee" at the bottom. As a response to this union button, some employees began wearing "smiley face" buttons or buttons stating "I Love My Job," smaller than the size of a quarter, to demonstrate their opposition to the Union. The Respondent permits the wearing of this type of button as it is, in effect, an anti-union button and therefore conforms to the one-button policy.⁴

20

25

The Respondent has prohibited the wearing of more than one button of any type. Also, it has prohibited the wearing of orange Band-Aids on employees' bodies or uniforms. Kevin MacDonald, Director of the Club and the Spa, asked an employee why she was wearing the Band-Aid and was told that it was symbolic of the "pain" the employees were experiencing. MacDonald required the employees to remove these Band-Aids and they did so. On another occasion employees were wearing paper stickers on their uniforms with a union-related message. MacDonald directed the employees to remove the stickers as they were not a union "button" and, in addition, because these employees were at the same time wearing the

30

On October 11, 2002, MacDonald instructed two employees to remove orange-yellow ribbons, fastened with a small safety pin, from their uniforms. The ribbons, forming a half-bow about four inches in length, were worn to express solidarity or "mourning" for two employees who had allegedly been discriminated against because of their union sympathies.

35

Following the tragic events of the September 11, 2001 terrorist attack, the Respondent provided counseling and support groups for employees as many employees were fearful and apprehensive. Also, the employees and supervisors were permitted to wear American flag pins or small red, white and blue ribbons on their uniforms as a symbol of unity and an expression of grief. The wearing of these items lasted for perhaps two months.

40

45

The General Counsel argues that the one-button rule is facially invalid and violative of the Act, and that the Respondent has also violated the Act by requiring the massage therapists to remove the orange-yellow ribbons because this constitutes enforcement of the one-button rule. In relation to the union button, the ribbon, while a different configuration and made of different material, is roughly four times larger, more colorful, and much more conspicuous than the union button. Moreover, the ribbon bears no indicia of its purpose. A ribbon may have various connotations. It is reasonable to assume, and I find, that the ribbon virtually invites inquiries regarding its significance from those who do not know its union-related message,

⁴ Although there is testimony from two of the General Counsel's witnesses that on one or two occasions they saw some employees wearing two "Smiley Face" or "I Love My Job" buttons at the same time, they did not point this out to their supervisors and there is no evidence that the Respondent or its supervisors have ever knowingly permitted the wearing of more than one button.

particularly in a context of a personal one-one-one private 50-minute session with a therapist; indeed, under such circumstances, a guest might consider it an act of rudeness *not* to ask the significance of the ribbon. Whether intentional or not, to invite such inquiries, and thereby contrive or create a situation whereby a guest may be confronted with a message adverse to both to the Respondent and to the guest's level of comfort and relaxation, is clearly contrary to the policy, acknowledged by the employees, that the initiation of conversations detracting from the pampering and relaxing experience expected by the guests are impermissible. I shall dismiss this allegation of the complaint regardless of the lawfulness of the one-button rule, *infra*.

I shall also dismiss the allegation that the one-button rule is unlawful.⁵ The Respondent's stringent adherence to its over-all concept of providing guests and clients a world-class getaway experience is clear from the foregoing record evidence and need not be reiterated. The attention to detail regarding the conduct and personal appearance of employees, and, in particular, the requirement that they wear prescribed appropriate uniforms bearing name tags and with no other adornments other than one permissible union-related button, is also clear from the record. This policy has been consistently enforced,⁶ and it is significant that such a restriction is included in a collective bargaining agreement with the same Union covering employees in a different unit, thus further indicating the importance that the Respondent attaches to this rule. Clearly, the one-button rule was not initiated upon the advent of the Union and is not discriminatorily motivated or enforced; rather, it is designed to balance the dictates of the Act with the Respondent's long-standing marketing concept of presenting a consistent image and product to its customers. Accordingly, I agree with the Respondent's position that its one-button rule is permissible. See *United Parcel Service*, 312 NLRB 596, 597 (1993), *enf. denied*, 41 F. 3d 1068 (6th Cir. 1994); *Nordstrom Inc.*, 264 NLRB 698, 700 (1982); *Evergreen Nursing Home*, 198 NLRB 775, 778-779 (1972); *United Parcel Service*, 195 NLRB 441 (1972); *Houston Coca-Cola Bottling Co.*, 256 NLRB 520-524 (1981).

Accordingly, I shall dismiss the complaint, as amended, in its entirety.

⁵ I find without merit the General Counsel's contention that the one-button policy has been found unlawful in a case currently before the Board and that the matter is therefore *res judicata*. In that case, *KSL Recreation Corporation, d/b/a Claremont Spas and Resort*, JD (SF)-93-02, 2002 WL 31746558 (N.L.R.B. Div. of Judges) (November 25, 2002), the Administrative Law Judge, *inter alia*, makes clear at fn. 7 that, "The parties settled and severed the portions of the complaint dealing with the Respondent's 'Union button rule'. That formal rule is not before me and I do not address it." Then the Administrative Law Judge goes on to determine that the Respondent violated the Act by precluding an *off-duty* employee from wearing, on her uniform, two buttons. It is also clear from a reading of excerpts of the transcript of that proceeding, introduced in the record, that the lawfulness of the one-button rule was not being questioned. Further, I rely upon the representation of Respondent's counsel that he did not present evidence in that proceeding regarding the validity of the one-button rule, as it was his understanding that the Region, in approving the partial settlement agreement in that case, *supra*, had agreed that the one-button rule was valid.

⁶ The September 11, 2001 terrorist attack was clearly an exceptional event that does not compromise the integrity of the Respondent's policy; indeed, even then the Respondent's management group met to determine whether the wearing of American flag pins or small red, white and blue ribbons should be permitted under the circumstances, and it was decided that such items, together with providing counseling, were appropriate and befitting the situation from a human-relations and business standpoint.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

.5

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged in the amended complaint.

10

On these findings of fact and conclusions of law, I issue the following recommended:

ORDER⁷

The amended complaint is dismissed in its entirety.

15

Date: June 6, 2003

20

Gerald A. Wacknov
Administrative Law Judge

25

30

35

40

45

⁷ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.