

Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino and International Union, UAW, AFL-CIO.¹ Case 34-CA-12081

September 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on July 11, 2008, the General Counsel issued the complaint on July 18, 2008, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 34-RC-2230. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).)² The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On August 20, 2008, the General Counsel filed a Motion for Summary Judgment. On August 20, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response. The Charging Party also filed a response.

Ruling on Motion for Summary Judgment³

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the basis that the Board lacks jurisdiction, or in the alternative, should decline jurisdiction over the Respondent, and on the basis of its objections to the election in the representation proceeding.⁴ Specifically, the Respondent reasserts

¹ The Union's name appears above as corrected in the General Counsel's Motion for Summary Judgment.

² The parties have stipulated that, in addition to the record in the representation proceeding, certain enumerated documents should also be included in connection with any motion for summary judgment filed in the instant case.

³ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁴ The Respondent also contests the validity of the Union's certification on the basis that the Board lacked statutory authority to act with two members on June 30, 2008, when it issued the Decision and Certification of Representative in the underlying representation case, 352

its arguments that it is exempt from the Board's jurisdiction because it is a sovereign nation, and that even if the Board has jurisdiction under the Act, it should exercise its discretion and not assert jurisdiction over the Respondent because to do so would significantly impinge on the Respondent's tribal sovereignty. The Respondent further maintains that the Board should defer to the jurisdiction of the Respondent's adjudicatory bodies. These arguments were considered and rejected by the Board in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁵

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, with an office and place of business located on tribal land⁶ in Mashantucket, Connecticut (its facility), has operated a commercial gaming and entertainment establishment, including gaming casinos, hotels, restaurants, and retail shops.

NLRB No. 92. However, this defense is without merit for the reasons stated above in footnote three.

⁵ We also deny the Respondent's request that the complaint be dismissed.

Chairman Schaumber concurred in denying the Respondent's request for review in the underlying preelection representation proceeding (unpublished order dated November 21, 2007). In so doing, he recognized that although he dissented in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), affd., 475 F.3d 1306 (D.C. Cir. 2007), rehearing en banc denied (2007), that case is extant law. Chairman Schaumber remains of the view he expressed in *San Manuel Indian Bingo & Casino*. See McBride and Court, *Labor Regulation, Union Avoidance and Organized Labor Relations Strategies on Tribal Lands: New Indian Gaming Strategies in the Wake of San Manuel Band of Indians v. National Labor Relations Board*, 40 J. Marshall L. Rev. 1259 (2007). Nevertheless, he agrees that the Respondent has not presented any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra. In light of this, and for institutional reasons, Chairman Schaumber agrees with the decision to grant the General Counsel's Motion for Summary Judgment.

⁶ The Respondent denies sufficient knowledge regarding the allegation that its facility is located on tribal land in Mashantucket, Connecticut, but admits that its operation is on the Mashantucket Reservation, which is land held by the U.S. government in trust for the Nation.

During the 12-month period ending June 30, 2008, the Respondent, in conducting its business operations described above, purchased and received at its facility goods valued in excess of \$50,000 directly from points located outside the State of Connecticut, and derived gross revenues in excess of \$500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, International Union, UAW, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held on November 24, 2007, the Union was certified on June 30, 2008, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time licensed dealers employed by the Employer at its Connecticut Casino, including poker dealers, table game dealers, and dual rate dealers; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated July 3, 2008, the Union requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. Since July 3, 2008, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since July 3, 2008, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino, Mashantucket, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Union, UAW, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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

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

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

All full-time and regular part-time licensed dealers employed by the Employer at its Connecticut Casino, including poker dealers, table game dealers, and dual rate dealers; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Mashantucket, Connecticut, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 34, 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

⁷ 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."

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 July 3, 2008.

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

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 fail and refuse to recognize and bargain with International Union, UAW, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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.

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

All full-time and regular part-time licensed dealers employed by us at our Connecticut Casino, including poker dealers, table game dealers, and dual rate dealers; but excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

MASHANTUCKET PEQUOT GAMING ENTERPRISE
D/B/A FOXWOODS RESORT CASINO