UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

WYNN LAS VEGAS, LLC

and Case 28-CA-23070

DAVID A. SACKIN, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT THEREOF TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

TO: Lester A. Heltzer, Executive Secretary
National Labor Relations Board
Office of the Executive Secretary

Respectfully submitted,

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I. INTRODUCTION

By its exceptions, Wynn Las Vegas, LLC (Respondent) seeks to have the Board grant it a "do-over" and ignore the results of earlier litigation in which Administrative Law Judge James M. Kennedy found that that Respondent discriminatorily suspended and warned its employee David A. Sackin (Sackin) in violation of the Act. After its discipline of Sackin, Respondent laid him off, relying upon his disciplinary record. Respondent now urges that it be permitted to re-litigate its discipline of Sackin to establish that any level of discipline to Sackin, not the discipline found unlawful by Judge Kennedy, would have resulted in his layoff. The Board should grant Respondent's exceptions only if it wishes to establish a new standard for a finding of discrimination whereby an employer may continue to re-litigate its unlawful disciplinary action against its employees so as to afford it an opportunity to establish some lesser level of discipline for the original offense that would justify or support subsequent actions against those same employees.

II. PROCEDURAL HISTORY

On December 14, 2010, Judge Kennedy issued his decision in Case 28-CA-22818, finding, among other things, that on August 21, 2009, Respondent suspended Sackin because of his activities as a union steward on behalf of the Transport Workers Union and because he intended to give testimony on behalf of his fellow employees in a hearing before the State of Nevada Labor Commissioner.[1] Judge Kennedy found that this discipline violated Section 8(a)(1) and (3) of the Act. This case is pending decision by the Board following the filing of exceptions by Respondent and cross-exceptions by Counsel for the Acting General Counsel.

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[1] JD(SF)-52-10, p. 20, lines 49-52 and p. 21, line 1.

On July 26, 2011, Administrative Law Judge John J. McCarrick issued his decision in Case 28-CA-23070, finding that "[s]ince Sackin was selected for layoff on June 15, 2010, solely because of his August 28, 2009 discipline found to be unlawfully discriminatory by Judge Kennedy, I conclude that Sackin's June 15, 2010 layoff likewise violated section 8(a)(1) and (3) of the Act as alleged."[2] This case is now before the Board on Respondent's instant exceptions.

By letter dated July 29, 2011, to the Executive Secretary of the Board, Respondent, on behalf of the parties, requested that both cases be consolidated for decision by the Board.

III. RESPONDENT'S EXCEPTIONS

In its exceptions, Respondent claims that it was denied due process and then proceeds to provide an offer of proof of what its witnesses would have testified to had Judge McCarrick not granted Counsel for the Acting General Counsel's Motion in Limine and applied the doctrine of collateral estoppel to preclude the re-litigation of Respondent's discipline of Sackin. Respondent's claim of denial of due process is belied by its initial litigation of Sackin's discipline before Judge Kennedy. Respondent fully litigated this discipline at the hearing before Judge Kennedy in Case 28-CA-22818. Had Judge Kennedy found that Respondent's discipline of Sackin was lawful, neither Respondent, Counsel for the Acting General Counsel, nor Sackin could claim a denial of due process, and this charge and complaint which the Region held in abeyance pending the decision by Judge Kennedy would have been withdrawn.

Only because Judge McCarrick did not permit Respondent to re-litigate its discipline of Sackin does Respondent now claim that it was denied due process. In his decision, Judge

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[2] JD(SF)-16-11, p. 5, lines 19-21.

McCarrick addressed Respondent's claim. Referring to the hearing before Judge Kennedy, Judge McCarrick wrote:

> Respondent's opportunity to convince a fact finder that it would have taken disciplinary action against Sackin absent his union or protected conduct has passed. The parties had an adequate opportunity to litigate that very issue.[3]

Counsel for the Acting General Counsel urges that due process gives Respondent one bite at the apple, not two or more until it obtains the results it seeks or is willing to accept.

With the issue of Sackin's discipline pending before Judge Kennedy, Respondent chose Sackin for layoff on June 15, 2010, solely because of this discipline. It recalled Sackin to work on November 30, 2010. Counsel for the Acting General Counsel submits that Respondent acted at its peril when it made the decision to layoff Sackin in reliance upon its discipline of him. When Judge Kennedy found that Respondent had disciplined Sackin because of his Union and his protected concerted activities, Respondent refused to be bound by that finding with respect to its layoff of Sackin. In effect, Respondent urges that while it may have had a bad motive for its suspension of Sackin, it would be able to establish a lawful motive had it been permitted to re-litigate its discipline of him.

Respondent points to some language in Judge Kennedy's decision to support its re-litigation claim. It urges that Judge Kennedy found that some form of discipline of Sackin was appropriate, claiming that Judge Kennedy took issue with the level of discipline and not that discipline itself was appropriate. When considered it context, Judge Kennedy's discussion of Respondent's motivation for disciplining Sackin fails to establish Respondent's claim that Sackin should have been discipline by something short of a suspension. Judge Kennedy wrote:

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[3] JD(SF)-16-11, p. 4, lines 47-49.

> While Respondent contends it would have terminated Sackin whether or not he was engaged in protected activity, I find that the degree of punishment in this case was not supported by the underlying facts and instead the discharge was due to its animus against protected conduct—his union stewardship and his willingness to testify in the Labor Commissioner hearing. Respondent characterizes the eleven violations as an anomaly, which this no doubt was. Sackin's tardiness resulted in a chain of events that Respondent unconvincingly claims was an egregious, blatant disregard for the rules. Even so, Sackin was simply trying to be a good employee and get to his table on time; in doing so, he broke some minor rules. In that sense, some admonishment or counseling was appropriate, perhaps at the cost of the attendance points he should have incurred. Certainly, none of these infractions seriously impacted the health or safety of any patrons, nor did it jeopardize the integrity or security of the casino. And, there is no showing that customers even noticed, much less that the Wynn's decorum concerns were affected. Yet, Respondent chose to suspend Sackin and skip lesser disciplines, jumping him from admonishment to a second last and final written warning, the last step short of firing him. Plus, on top of the written warning and suspension he was verbally warned that his conduct would now be under severe scrutiny.[4]

Judge McCarrick considered this same argument from Respondent in Case 28-CA-23070. He found:

> Judge Kennedy's comments on the degree of discipline that Respondent imposed relate only to Respondent's motive in issuing discipline. Respondent's contention that Judge Kennedy left open whether a lesser degree of discipline may have been appropriate is not supported by the record. Further, Judge Kennedy's gratuitous remarks that, "some admonishment or counseling was appropriate", are *dicta* as they were not essential to Judge Kennedy's finding of Respondent's anti union animus. Judge Kennedy's central conclusion is that Respondent's discipline meted out to Sackin was unlawful. A lesser form of discipline was not meted out. Respondent's argument that some lesser form of discipline would have been justified, is mere speculation.[5]

The speculative nature of Respondent's request to re-litigate Sackin's discipline establishes why there is no case on point to support Respondent's request. If Respondent demonstrated that Sackin violated one rather than eleven of its policies,[6] would that erase the unlawful motive found by Judge Kennedy? Is there some tipping point where one or two policy violations do not establish an unlawful motive but more than that do? Would an

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[4] JD(SF)-52-10, p. 15, lines 28-43.
[5] JD(SF)-16-11, p. 4, lines 6-14.
[6] JD(SF)-52-10, p. 16, line 10.

admonition or verbal counsel never reduced to writing establish a disciplinary record on which Respondent could rely in selecting Sackin for layoff? Judge McCarrick considered such speculation when granting Counsel for the Acting General Counsel's Motion in Limine at hearing. He included his statements at hearing in his decision:

> What counsel is asking me to do [here] is to assess a hypothetical situation that didn't exist -- that hasn't existed. The individual -- Mr. Sackin -- did not receive some lesser discipline. He was suspended for five days. That's what I'm dealt with, that's what Kennedy decided on. I'm basically going to find -- I'm going to take notice of Judge Kennedy's decision and I'm going to defer to it. I find that for me to parse out some hypothetical situation based on comparators, is creating something out of whole cloth. That's not what happened. Could it have happened? Well, maybe it could have, but it didn't. The man was suspended, he didn't receive a lesser discipline. And as such, I find I am bound by Kennedy's decision and I will grant General Counsel's Motion in Limine to preclude any further evidence on the issue of the discipline that Mr. Sackin received.[7]

IV. CONCLUSION

Based on the foregoing, the Board should deny Respondent's exceptions and affirm Judge McCarrick's decision finding that Sackin's layoff from June 15 to November 30, 2010, violated Section 8(a)(1) and (3) of the Act.

Dated at Las Vegas, Nevada, this 14th day of September 2011.

Respectfully submitted,

/s/ Stephen E. Wamser

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[7] JD(SF)-16-11, p. 5, lines 1-12.

CERTIFICATE OF SERVICE

I hereby certify that the ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT THEREOF TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in Case 28-CA-23070, was served via E-Gov, E-Filing, electronic mail, and regular mail on this 14th day of September 2011, on the following:

Via E-Gov, E-Filing:

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