

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

**SOARING EAGLE CASINO AND RESORT,
AN ENTERPRISE OF THE SAGINAW
CHIPPEWA INDIAN TRIBE OF MICHIGAN**

Respondent

and

CASE 07-CA-053586

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA (UAW), AFL-CIO**

Charging Party

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S CROSS-
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION
AND BRIEF IN SUPPORT THEREOF**

Now comes Counsel for the Acting General Counsel, Mary Beth Foy, and pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, files the following Cross-Exceptions to the Decision of the Administrative Law Judge Michael A. Rosas (JD-17-12), in the above matter, which issued on March 26, 2012.

CROSS-EXCEPTIONS

1. Exception is taken to the ALJ's: Conclusions of Law at page 14, Section 1, of his Decision and Order; Order at page 15, Section 1(b), of his Decision and Order; and Appendix, Notice to Employees, attached to his Decision and Order, wherein he fails to reference and include cease and desist language regarding Respondent's unlawful enforcement of its no-solicitation policy, as specifically set forth in the Legal Analysis section of his Decision and Order at subsection II, Merits, subsection A, The No-Solicitation Policy, page 12, lines 19-23.
2. Exception is taken to the ALJ's: Order at pages 15-16, Section 2, of his Decision and Order; and Appendix, Notice to Employees, attached to his Decision and Order, wherein he fails to include affirmative action language, including rescinding, in writing, the provisions of the no-solicitation policy found to be unlawful, and make said rescission known to employees, regarding the Section 8(a)(1) violation found, as specifically set forth in the Legal Analysis section of his Decision and Order at subsection II, Merits, subsection A, The No-Solicitation Policy, pages 11-12.
3. Exception is taken to the ALJ's: Conclusions of Law at page 14, Section 3, of his Decision and Order; Order at pages 15-16, Section 1(a) and 2(c), of his Decision and Order; and Appendix, Notice to Employees, attached to his Decision and Order, wherein he fails to reference and include cease and desist language, and affirmative action language, regarding Respondent's unlawful suspension of Susan Lewis, as specifically set forth in the Legal Analysis section of his Decision and Order at subsection II, Merits, subsection C, Suspension/Discharge, page 14, lines 37-39.
4. Exception is taken to the ALJ's Order at page 16, Section 2(e), lines 20-21, of his Decision and Order, wherein he orders Respondent to post Appendix, Notice to Employees, attached to his Decision and Order, "...at its casino facility in San Juan, Puerto Rico...."

**ACTING GENERAL COUNSEL’S BRIEF IN SUPPORT OF CROSS-
EXCEPTIONS**

SUMMARY OF THE CASE

Respondent is a governmental subdivision of the Saginaw Chippewa Indian Tribe of Michigan (Tribe). It is engaged in the operation of a hotel, restaurant, entertainment and gaming complex (Casino) located at 6800 Soaring Eagle Boulevard on the Federal government-recognized Isabella Indian Reservation in Mount Pleasant, Michigan. (GC-2, 3, 20-25).¹

In regard to Respondent’s Mt. Pleasant casino, at all material times, Ben Perez occupied the position of Senior Manager, Casino Housekeeping; Greg Falsetta occupied the position of Director of Human Resources for the Saginaw Chippewa Indian Tribe of Michigan (Tribe); Carla O’Brien occupied the position of Human Resources Manager; Lisa Morris occupied the position of Human Resources Assistant Manager; Andy Asselin occupied the position of CEO; Dennis Kequom occupied the position of Tribal Chief for the Tribe; Greg Lott occupied the position of Supervisor/Manager; Dorothy Munro occupied the position of Team Leader; Robert Rood occupied the position of Team Leader; and, Julia St. John occupied the position of Team Leader. (GC 19-STIP 2). Employee Susan Lewis was employed by Respondent from January 26, 2005, to November

¹ Respondent is interchangeably referred to as Tribe and Casino. References to the Acting General Counsel Exhibits, Respondent Exhibits, and the Transcript are referred to as GC, R, and TR, respectively. TR_____ refers to a specific page of the trial transcript. STIP____ refers to a numbered Trial Stipulation contained in GC 19, “Trial Stipulations.”

15, 2010, as a housekeeper in the Casino Housekeeping department of Respondent's Mt. Pleasant, Michigan casino. (GC 19-STIP 8, 29).² Lewis worked the second shift from 3:00 p.m. to 11:00 p.m. (GC 19-STIP 9).

In about February 2009, Respondent's employees became interested in joining the Charging Party (Union). (TR-55). Lewis initiated contact with a local UAW office and was put in contact with UAW international representative Nadja Rovias (TR-55). During the organizing campaign, from February 2009 to December 2010, Lewis engaged in numerous union activities. These union activities included attending union meetings, signing union authorization cards, and passing out and collecting cards from other employees. (TR-56-58, 60-61; GC 8, 9). Lewis was also interviewed in 2010, along with two other union activist employees,³ concerning their union activities and sympathies by the local Mt. Pleasant *Morning Sun* newspaper and the Central Michigan University radio station (FM 89.5). (TR-58-59; GC 5). Also in 2010, Lewis' picture was posted on the UAW KeeptheEagleSoaring.com website (TR-59; GC 6). Around March 30, 2010, Lewis and four other employees delivered a letter to Chief Kequom expressing their desires to organize with the Union. (TR-59-60; GC 7). By letters dated July 30, 2009 and March 10, 2010, the Union advised Tribal Chiefs Fred Cantu and Kequom regarding its efforts to organize Respondent's employees and

² Lewis was initially hired by Respondent on about July 13, 1988, and voluntarily quit on about December 10, 2002. (GC 19, STIP 6, 7).

³ Larry Moldenhauer and Dan Fry. (TR-58)

invited them to meet. (GC 15, 16). Respondent acknowledges receipt of both letters from the Union. (GC 19-STIP 11, 12, 13, 14).

On October 13, 2006, Respondent promulgated and implemented a “No-Solicitation Policy,” contained at Section 5.3 of its “Soaring Eagle Casino & Resort Associate Handbook” (Handbook) (GC 4, 19-STIP 3, 4). Respondent’s No-Solicitation Policy states the following:

- a. Item number 4 under “DEFINITIONS” includes “any place where any employees perform job duties for Soaring Eagle” as a “working area.”
- b. Item number 6 under “DEFINITIONS” includes “parking lots and roadways” as “Soaring Eagle premises.”
- c. Item number 2 under “PROHIBITED CONDUCT” prohibits employees “from soliciting in any work area.”
- d. Item number 3 under “PROHIBITED CONDUCT” prohibits employees “from posting notices, photographs, or other written materials on bulletin boards or any other Soaring Eagle premises.”
- e. Paragraph one under “ENFORCEMENT AND DISCIPLINE” requires that employees “shall notify” Respondent of any form of solicitation that is occurring or has occurred at SECR.
- f. Paragraph two under “ENFORCEMENT AND DISCIPLINE” states that “Any person violating this policy will be subject to disciplinary action up to, and including, termination.”

(GC 4, 19-STIP 5). Respondent’s disciplinary procedure is set forth at Section 7.8 of its Handbook. (GC 4).

Respondent issued a disciplinary “Department Record of Conversation” to Lewis on September 30, 2009, for distributing a UAW flyer in the women’s restroom and talking “pro union” to other employees on September 29, in violation of the No-Solicitation Policy. (GC 4, 10, 19-STIP 15). As a result of this discipline, Lewis was “given a copy of the solicitation policy and warned of the consequences if this behavior continues,” and advised “this could lead to further disciplinary action including termination.” (GC 10). Respondent acknowledges that on September 29, Lewis engaged in union solicitation activities that violated its No-Solicitation Policy. (GC 19-STIP 16). Respondent further acknowledges that on September 30, it disciplined Lewis by issuing a Department Record of Conversation to her for engaging in union solicitation activities in violation of its No-Solicitation Policy. (GC-STIP 15, 17).

Respondent issued a disciplinary “Fair Action Notice” (FAN) to Lewis on August 30, 2010, for talking to other employees concerning non-work related issues, including union card-signing activities on August 25, in violation of the Personal Conduct Policy contained in the Handbook at Section 7. (GC 4, 12, 19-STIP 18). As a result of this discipline, Lewis received a written warning and was admonished that she “had already been given a Record of Conversation for doing the same thing to another housekeeper.” (GC 12). Respondent acknowledges that on August 25, Lewis engaged in union solicitation activities that violated its No-Solicitation Policy. (GC 19-STIP 19). Respondent further acknowledges that on

August 30, it disciplined Lewis by issuing a FAN to her for engaging in union solicitation activities in violation of its No-Solicitation Policy. (GC-STIP 18, 20).

Respondent issued a disciplinary FAN to Lewis on October 23, 2010, for passing out blue wrist bands stating “BAND TOGETHER 2010” to other housekeeping employees and placing one on another employee on October 4, in violation of the No-Solicitation Policy. (GC 4, 13, 19-STIP 21, 25). As a result of this discipline, Lewis received a suspension. (GC 33). Respondent acknowledges that on October 4, Lewis engaged in union solicitation activities that violated its No-Solicitation Policy, including putting a blue wrist band on a housekeeping employee and handing out blue wristbands to other housekeeping employees in the side employee hallway around the end of her shift, before she punched out at 11:00 p.m. (GC 19-STIP 22, 23). Respondent further acknowledges that on October 23, it suspended Lewis by issuing a FAN to her for engaging in union solicitation activities on October 4, in violation of its No-Solicitation Policy. (GC 4, 13, 19-STIP 21, 22, 24).

Respondent acknowledges that in October 2010, Senior Manager, Casino Housekeeping, Ben Perez, told Lewis that she could not engage in solicitation activities, including talking to other employees about unions, in the employee hallway. (GC19-STIP 26).

Respondent acknowledges that the employee hallway is an employee area of the casino, from which casino patrons are prohibited, consisting of two hallways: a main employee hallway and a side employee hallway.⁴ (GC 19-STIP 34, 36, 40). Respondent acknowledges that the side employee hallway consists of two time-clocks; employee bathrooms; employee locker rooms; a pre-shift meeting room; and security, surveillance, maintenance, and housekeeping offices. (GC 19-STIP 38). Respondent acknowledges that employee activities take place on occasion in the employee side hallway such as “employee appreciation day”⁵ during which employees congregate, play games and eat food. (GC 19-STIP 39). Respondent acknowledges that the main employee hallway consists of three time clocks, an employee break room,⁶ an entrance to the food and beverage service area, and a security stand leading to entry doors out to the main casino. (GC 19-STIP 37).

Respondent issued a disciplinary FAN to Lewis on November 15, 2010, for soliciting for the Union in another housekeeper’s Bathroom B⁷ work area on November 7, in violation of the No-Solicitation Policy. (GC 4, 14, 19-STIP 27, 29). As a result of this discipline, Lewis was discharged. (GC 14). Respondent acknowledges that on November 7, Lewis engaged in union solicitation activities

⁴ There are employee-entrance doors that lead from the employee parking lot into the employee hallway area. (GC 19-STIP 35).

⁵ Employee appreciation days took place in the employee hallway area in about October 2011 and October 2009. (GC 19-STIP 39).

⁶ Respondent acknowledges that the employee break room is a non-work area. (GC 19-STIP 41).

⁷ There are three bathrooms located on the casino floor, designated as Bathroom A, Bathroom B, and Bathroom C. (GC 19-STIP 30).

that violated its No-Solicitation Policy, including soliciting for the Union in another housekeeper's Bathroom B work area, by entering Bathroom B from her Section 2 work station about 3:12 p.m. and engaging in conversation at that time with another housekeeper assigned to work at the same time in Bathroom B on the casino floor.⁸ (GC 19-STIP 28, 31). Respondent further acknowledges that on November 15, it discharged Lewis by issuing a FAN to her for engaging in union solicitation activities on November 7, in violation of its No-Solicitation Policy. (GC 4, 14, 19-STIP 27, 29).

Respondent acknowledges that except for Lewis, no other employees employed by Respondent have been disciplined or discharged for violation of Respondent's No-Solicitation Policy implemented on October 13, 2006. (GC 19-STIP 10).

The facts of this case are succinctly set forth in further detail by ALJ Rosas in his March 26, 2012 Decision.

I. Cross-Exceptions Nos. 1 and 2

In the Legal Analysis section of the ALJ's Decision and Order at subsection II, Merits, subsection A, The No-Solicitation Policy, he states in pertinent part, at page 12, lines 19-23:

⁸ Lewis left Bathroom B about 3:19 p.m. on November 7. (GC 19-STIP 32).

...the Tribe's enforcement of this policy was unlawful because it was limited to situations involving union solicitation. The Tribe concedes that, except for Lewis, no other employees have been disciplined or discharged for violating its no-solicitation policy. Thus, the Tribe promulgated a discriminatory no-solicitation policy and applied it in a discriminatory manner in violation of Section 8(a)(1).

Accordingly, in Section 1 of the ALJ's Conclusions of Law, and Section 1(b) of his Order, as well as the Appendix, Notice to Employees, he references and sets forth, cease and desist language regarding Respondent's unlawful promulgation of its no-solicitation rule. However, the ALJ failed to reference or include, cease and desist language regarding Respondent's unlawful enforcement of its no-solicitation rule. Additionally, the ALJ failed to include affirmative action language in his Order, as well as the Appendix, Notice to Employees regarding this Section 8(a)(1) violation, including ordering Respondent to rescind, in writing, the provisions of the no-solicitation policy found to be unlawful, and make said rescission known to employees.

Thus, Counsel for the Acting General Counsel requests that the Board correct the ALJ's Conclusions of Law section to include reference to Respondent's unlawful enforcement of its no-solicitation rule, and correct the Order and Appendix, Notice to Employees, attached to the ALJ's decision, to include: (1) Section 8(a)(1) cease and desist language regarding Respondent's unlawful enforcement of its no-solicitation rule; and (2) Section 8(a)(1)

affirmative action language regarding Respondent's unlawful enforcement of its no-solicitation rule, including ordering Respondent to rescind, in writing, the provisions of the no-solicitation policy found to be unlawful, and make said rescission known to employees.

II. Cross-Exception No. 3

In the Legal Analysis section of the ALJ's Decision and Order at subsection II, Merits, subsection C, Suspension/Discharge, he states in pertinent part, at page 14, lines 37-39:

Under the circumstances, the Tribe violated Section 8(a)(3) and (1) when it suspended and subsequently discharged Lewis for engaging in union solicitation in the employee hallway and Bathroom B.

Accordingly, in Section 3 of the ALJ's Conclusions of Law, and Sections 1(a) and 2(c) of his Order, as well as the Appendix, Notice to Employees, he references and sets forth, cease and desist language regarding Respondent's unlawful discipline and discharge of Lewis in violation of Section 8(a)(3) and (1). However, the ALJ failed to specifically reference or include, cease and desist and affirmative action language regarding Respondent's unlawful suspension of Lewis.

Thus, Counsel for the Acting General Counsel requests that the Board correct the ALJ's Conclusions of Law section to include reference to

Respondent's unlawful suspension of Lewis, and correct the Order and Appendix, Notice to Employees, attached to the ALJ's decision, to include: (1) Section 8(a)(3) and (1) cease and desist language regarding Respondent's unlawful suspension of Lewis; and (2) Section 8(a)(3) and (1) affirmative action language regarding Respondent's unlawful suspension of Lewis, including ordering Respondent to remove from its files any reference to the unlawful suspension, and within three days thereafter notify Lewis, in writing, that this has been done and that the suspension will not be used against her in any way.

III. Cross-Exception No. 4

In the ALJ's Order at page 16, Section 2(e), lines 20-21, of his Decision and Order, he inadvertently orders Respondent to post Appendix A, Notice to Employees, attached to his Decision and Order, "...at its casino facility in San Juan, Puerto Rico...." Counsel for the Acting General Counsel requests that the Board correct the ALJ's Order to correctly reference Respondent's casino facility located in Mt. Pleasant, Michigan, as reflected throughout the Findings of Fact section of his Decision and Order at pages 2-7.

CONCLUSION

Counsel for the Acting General Counsel requests that the Board grant
Counsel for the Acting General Counsel's cross-exceptions.

Respectfully submitted this 25th day of May, 2012.

/s/ Mary Beth Foy

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