United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 28, 2013

TO: Wayne R. Gold, Regional Director
Region 5

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Maryland Live Casino
Case 05-CA-083966

518-4020-0133
518-4020-8300
518-4070-5000

The Region submitted this case for advice on whether the Employer violated Section 8(a)(2) by insisting that any union seeking access to its facility for organizing purposes sign a labor peace agreement ("LPA") that required the union to waive the right to engage in a broad range of economic action against the Employer at any of its facilities for a fixed five-year term. The Region noted that this issue would have to be evaluated in light of prior Advice Memorandums in this area.[1] We conclude that the Employer did not violate § 8(a)(2) because it did not unlawfully assist or support any union that signed the LPA in exchange for access, and it did not discriminate among unions when it denied access solely to the union that refused to sign the LPA. Thus, the Region should dismiss this allegation in the charge, absent withdrawal.

FACTS

In 2007, the State of Maryland enacted legislation to permit video lottery gaming within the state. Under various requirements in Maryland's gaming statute, an applicant-employer must enter into an LPA with any union seeking to organize its employees. The gaming statute's requirements about the existence and content of an LPA are as follows:

> (1) the applicant or licensee has entered into a labor peace agreement with each labor organization that is actively engaged in representing or

[1] See *Viejas Casino*, 1999 WL 33221183, Case 21-CA-33117, Advice Memorandum dated December 30, 1999; *Westin Diplomat Hotel*, Case 12-CA-22026, Advice Memorandum dated April 19, 2002; *Riverside Community Hospital*, 2003 WL 21733708, Case 21-CA-35537, Advice Memorandum dated July 8, 2003.

attempting to represent video lottery and hospitality industry workers in the State;

(2) the labor peace agreement is valid and enforceable under 29 U.S.C. § 158;

(3) the labor peace agreement protects the State's revenues by prohibiting the labor organization and its members from engaging in picketing, work stoppages, boycotts, and any other economic interference with the operation of the video lottery facility within the first 5 years of the effective date of the video lottery operation license; and,

(4) the labor peace agreement applies to all operations at the video lottery facility that are conducted by a lessee or tenant or under a management agreement.[2]

In February 2009, PPE Casino Resorts Maryland, LLC d/b/a Maryland Live Casino ("the Employer") applied for a license to operate a casino with video lottery terminals on property leased from Arundel Mills Mall in Hanover, Maryland. In addition to the Employer, two other entities, i.e., Hollywood Casino Perryville ("Perryville") and the Casino at Ocean Downs ("Ocean Downs"), sought state licenses to operate video lottery casinos.

In early April 2009, Perryville entered into an LPA with Seafarers Entertainment and Allied Trades Union ("SEATU"). In exchange for Perryville's promise of neutrality during an organizing campaign and agreement to grant access to its employees, SEATU agreed to the following waiver of the right to engage in economic action:

With respect to Employer or any related company, the Union will not directly or indirectly: engage in, promote or condone any type or kind of picketing, strike, consumer hand billing, demonstration or publicity campaigns (as opposed to organizing literature and publicity directed solely to Employees subject to Paragraph 5 above), boycotts, slowdowns, walkouts, sit-ins or any other disruption or interference with business activities (including any disruption of corporate or shareholder meetings or voting relating to Employer or its related companies) or any other economic or concerted activity regardless of the reason for doing any of the aforementioned. The Union shall not engage in any legislative or referendum activity or lobbying efforts contrary to the interests of Employer or any related companies. The Union, on behalf of itself and

[2] MD. CODE ANN., State Gov't, § 9-1A-07(c)(7)(v).

> any affiliated pension funds or organizations, agrees to not purchase any of the public securities of Employer or its related companies. Employer will not engage in a lockout of the Employees.

This waiver was to remain effective until the parties entered into a collective-bargaining agreement.

On September 1, 2009, Oceans Downs and United Food and Commercial Workers Local 27 ("UFCW") entered into an LPA similar to the one between Perryville and SEATU. One difference was that the waiver language did not prohibit UFCW, or its affiliated pension funds, from purchasing public securities of Ocean Downs or its affiliates.[3]

On October 1, 2009, the Employer also entered into an LPA with SEATU.[4] In ¶ 11 of that agreement, SEATU agreed to the exact waiver language quoted above. As with the Perryville–SEATU agreement, this waiver was to remain in effect until the parties entered into a collective-bargaining agreement. In exchange, the Employer agreed to remain neutral during an organizing campaign and to grant SEATU mutually agreed-on access to its employees.

On September 27, 2010, Perryville opened for business and on the next day, it recognized SEATU and UFCW as the exclusive bargaining representative of its employees in two separate units.

In December 2010, Oceans Downs and UNITE HERE Local 7 entered into the same LPA that this casino had executed with UFCW a year earlier, including the waiver of the right to engage in economic action. On about December 29, 2010, Ocean Downs recognized UFCW as the exclusive bargaining representative for a unit of its employees, and it opened for business in early January 2011. In October 2011, UFCW disclaimed its representational status in the Ocean Downs bargaining unit because, among other reasons, of a conflict with UNITE HERE Local 7. In mid-January 2012,[5] UNITE HERE Local 7 established a card majority at Ocean Downs and was recognized by that employer.

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[3] Another significant difference was that the LPA between Oceans Downs and UFCW permitted voluntary recognition by card check. The LPA that Perryville had executed required a non-Board, secret-ballot election after a minimum showing of interest established by signed cards.

[4] These parties had executed a prior LPA on September 23, 2009, but the details of that agreement are not known.

[5] All subsequent dates are in 2012 unless otherwise indicated.

In early March 2012, UNITE HERE International ("the Union"), in coalition with two allied labor organizations,[6] sent the Employer a letter requesting negotiations over the terms of an LPA. The Union also notified the Maryland Lottery Commission that the Employer had not met with it and its two allies. The Commission informed the Employer of its obligation to meet with these labor organizations. The Employer's attorney then informed the Union that he was not available to meet until April.

On March 19, the Employer and SEATU signed a new LPA ("the 2012 LPA") that explicitly superseded the parties' prior agreements. Although the waiver of economic action in ¶ 11 remained the same, this agreement differed from the parties' October 2009 LPA as follows: (a) the Employer did not have to remain neutral if another labor organization also initiated an organizing campaign; (b) the access provision was changed to specify which employee list SEATU would receive and to grant SEATU access to the employee break room on two agreed-on dates within the 30-day period after the facility opened, but it retained the language permitting other access that the parties had agreed to; and, (c) despite the continued reference to a Board-conducted election, the Employer now had the discretion to voluntarily recognize SEATU on a showing of majority status. Finally, ¶ 10 was changed so that the waiver of economic action in ¶ 11 was to remain effective for five years after the effective date of the Employer's gaming license.[7]

On April 6, the Union and the Employer met to discuss the terms of an LPA. The Union submitted a proposal containing terms materially different from the 2012 LPA, which the Employer rejected. The Employer concluded that the Union's proposal unduly restricted its legitimate managerial interests and contained provisions that would invade its employees' privacy.

On April 11, the Employer and UFCW entered into the 2012 LPA, with one change.[8] This agreement explicitly stated that because of UFCW's organizing efforts (in addition to those of SEATU's), the Employer was free of its obligation to remain neutral.

After additional requests by the Union that the Employer bargain over the terms of an LPA, the Employer offered the Union the 2012 LPA that SEATU and UFCW

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[6] Teamsters and Operating Engineers.

[7] However, the remainder of the LPA, except for one uncontested provision, became null and void when the parties entered a collective-bargaining agreement.

[8] SEATU and UFCW sought to represent different bargaining units and were not rivals. UFCW and the Union were interested in representing the same unit. The Union's two allies, Teamsters and Operating Engineers, were interested in representing the same unit as SEATU.

had recently signed. In its communications with the Union, however, the Employer noted that it was no longer required to remain neutral in response to an organizing campaign. It also emphasized that it was not interested in bargaining with the Union over an LPA with different terms, and that it believed doing so would violate the Act.

In late April, SEATU and UFCW requested additional access opportunities pursuant to the terms of the 2012 LPA.[9] On May 4, these two unions signed additional agreements with the Employer granting them limited access to the Employer's employees during orientation and training sessions to be held at the Employer's facility throughout the month. Specifically, each union received permission to have representatives inside the Employer's facility, but those representatives could only interact with employees as they transitioned between training sessions.

Around this same time, the Union began its efforts to organize the Employer's employees without having signed the 2012 LPA. According to the Union, it requested the same access to the employees that SEATU and UFCW had been granted, but the Employer denied the request absent the Union's agreement to the 2012 LPA.[10] The Employer actively frustrated the Union's efforts by removing Union representatives from its property, having them arrested for trespassing, and otherwise preventing them from gaining access to the employees while they were at the facility. Although the Union filed charges over the Employer's conduct, the Region did not find merit to those allegations.[11]

On June 2, the Employer voluntarily recognized SEATU and UFCW as the exclusive bargaining representatives for separate bargaining units at its casino. On June 4, Maryland granted the Employer its license to operate the casino. On June 6, the Employer opened for business, and about 1,100 employees work at the casino.

In late July, the Employer signed separate collective-bargaining agreements with SEATU and UFCW. Although covering different bargaining units, those agreements contain several identical terms. For example, they each contain clauses providing for

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[9] Again, the 2012 LPA permitted the signatories to reach agreement on additional access opportunities.

[10] The Union asserts that one of its officials met with the Employer's attorney in early May to ask how the 2012 LPA's terms regarding access, employee lists, and waiver of economic action would operate. The Union asserts that the Employer's attorney said he would get back to it regarding access, but never did. The Union official subsequently informed the Employer's attorney that the Union continued to object to ¶¶ 10 and 11 of the 2012 LPA.

[11] The Union is seeking review of the dismissed charge allegations in the Office of Appeals.

grievance-arbitration, no-strike/no-lockout, nine-year duration, and wage reopeners in the fourth and seventh years of the agreement. The breadth of the no-strike clause is similar to that of the waiver of economic action in the 2012 LPA. Each agreement also includes a "lobbying side letter" pursuant to which the signatory union will remain neutral if there is any type of lobbying, legislation, or referendum pertaining to creation of a casino or issuance of a casino license within 100 miles of the Employer's facility.

The Union contends that the Employer could not lawfully deny it the same access to its employees afforded SEATU and UFCW based on its refusal to sign the 2012 LPA. The Union refused to sign the 2012 LPA because, among other reasons, ¶ 10 maintains the waiver of economic action in place for a fixed five-year period, which may extend beyond the date of recognition. It also objected to the fact that the waiver of economic action in ¶ 11 extended to all of the Employer's facilities, rather than being limited to the casino in Hanover.

ACTION

We conclude that the Employer did not violate § 8(a)(2) because it did not unlawfully assist or support any union that signed the LPA in exchange for access, and it did not discriminate among unions when it denied access solely to the union that refused to sign the LPA. Thus, the Region should dismiss this allegation in the charge, absent withdrawal.

A. The Employer Did Not Unlawfully Assist or Support the Unions that Signed the 2012 LPA.

An employer may exclude non-employees from engaging in union activity on its property except in special circumstances where they would have no reasonable non-trespassory means to communicate their message.[12] The requisite special circumstances are not present simply because "non-trespassory access to employees may be cumbersome or less-than-ideally effective, but only where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them,'" such as mining camps, logging camps, or mountain resort hotels.[13] An employer seeking to avoid business

[12] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). See also *Raley's*, 348 NLRB 382, 386-87 & n.21 (2006) (no 8(a)(2) violation where employer permitted employees who supported favored union to engage in union activity on premises, but denied access to disfavored union's non-employee organizers; Board noted different access rights of employees and non-employees).

[13] See *Lechmere, Inc. v. NLRB*, 502 U.S. at 539. See also *Leslie Homes*, 316 NLRB 123, 126 (1995), affd. sub nom. *Philadelphia Dist. Council of Carpenters v. NLRB*, 68 F.3d 71 (3d Cir. 1995).

disruptions may agree to waive its right to limit access in exchange for concessions by an interested union regarding the types of organizing activities it may conduct on the property, including bans on picketing, handbilling, or other economic activity.

Indeed, the Board has approved of agreements between an employer and an unrecognized union where, in exchange for certain access rights to the employer's premises for organizing purposes, the union agrees to ground rules applicable to organizing campaigns at the employer's unorganized facilities and to certain substantive terms to be included in any future collective-bargaining agreement.[14] At the same time, the Board made clear that such an agreement "must comport with Section 8(a)(2) and its goals of preserving union independence and protecting employee free choice."[15] As the Board noted in *Dana*, "Section 8(a)(2) is grounded in the notion that foisting a union on unconsenting employees and thus impeding employees from pursuing representation by outside unions [is] incompatible with 'genuine collective bargaining.'"[16] The totality of the facts in each case is assessed in determining whether an employer has engaged in lawful cooperation with, or has crossed the line and unlawfully supported, an unrecognized union.[17] Thus, an employer violates § 8(a)(2) when it engages in a pattern of conduct that exceeds ministerial cooperation with an unrecognized union by explicitly or implicitly this conveying a message to its employees that it favors their selection of that union.[18]

On the other hand, "a certain amount of employer cooperation with the efforts of a union to organize is insufficient to constitute unlawful assistance."[19] Permitting an

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[14] See *Dana Corp.*, 356 NLRB No. 49, slip op. at 7 (2010), enfd. sub nom. *Montague v. NLRB*, 698 F.3d 307 (6th Cir. 2012).

[15] *Id.*, 356 NLRB No. 49, slip op. at 8.

[16] *Id.*, 356 NLRB No. 49, slip op. at 4.

[17] *Id.*, citing *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973). See also *Coamo Knitting Mills*, 150 NLRB 579, 582 (1964) ("each case must be decided on the totality of its facts").

[18] See, e.g., *Windsor Health Care Facilities*, 310 NLRB 579, 590 (1993) ("If … the employer's support for the union exceeds the bounds of ministerial cooperation and evinces, rather, a pattern of assistance, or conduct of such a nature as leads employees to reasonably conclude that the employer favors their selection of the union, th[e]n any subsequent recognition is tainted and may not be supported by claimed majority support garnered as the fruit of such unlawful activity."), enfd. as modified 13 F.3d 619 (2d Cir. 1994).

[19] *Dana Corp.*, 356 NLRB No. 49, slip op. at 4, quoting *Longchamps, Inc.*, 205 NLRB at 1031.

otherwise independent union to use company time and property for organizing purposes, in itself, does not constitute unlawful employer assistance or support.[20] Moreover, "[a]n employer is … permitted to express to employees a desire to enter into a bargaining relationship with a particular union and, essentially, to inform employees that it will enter into a bargaining agreement upon proof of majority support."[21] Thus, "[t]he Board and courts have long recognized that various types of agreements and understandings between employers and unrecognized unions fall within the framework of permissible cooperation" that do not constitute unlawful assistance in violation of § 8(a)(2).[22]

Under *Lechmere*, the Employer here was under no legal obligation to grant non-employee union organizers access to its property for organizing purposes. There is no tenable claim that the special circumstances needed to apply the exception to the rule in *Lechmere* are present here because of the Employer's location, or that of its employees. Nonetheless, the Employer agreed to limit its exclusionary property right in exchange for an interested union's pledge not to disrupt its business by engaging in picketing, work stoppages, or other economic activity. Indeed, to obtain a state gaming license, the Employer was required by the Maryland gaming statute to have interested unions agree to these prohibitions on economic action for a five-year period.[23] In that context, it is difficult to conclude that the Employer was attempting to interfere with its employees' choice of a bargaining representative. More

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[20] See, e.g., *Tecumseh Corrugated Box Co.*, 333 NLRB 1, 6, 7-8 (2001) (employer did not violate § 8(a)(2) where its vice-president told employees that employer "liked working with unions" before introducing union representatives and allowing them to address employees on company time and property), citing *Jolog Sportswear*, 128 NLRB 886, 888-89 (1960) (no unlawful assistance where employer representative introduced union official to assembled employees and permitted him to address employees in hour-long meeting for which employees were paid; employer subsequently issued statements assuring employees of their free choice and its neutrality), affd. sub nom. *Kimbrell v. NLRB*, 290 F.2d 799, 802 (4th Cir. 1961).

[21] *Dana Corp.*, 356 NLRB No. 49, slip op. at 4-5 & n.11 (2010), citing *Coamo Knitting Mills*, 150 NLRB at 581, 595 (employer vice-president's speech to employees was not unlawful assistance where it contained neither promise of benefit nor threat of reprisal). See also *Tecumseh Corrugated Box Co.*, 333 NLRB at 7-8.

[22] *Dana Corp.*, 356 NLRB No. 49, slip op. at 4-5, 7 (employer did not violate § 8(a)(2) by entering with unrecognized union letter of agreement that set forth ground rules for additional union organizing at unorganized facilities, procedures for voluntary recognition upon proof of majority support, and certain substantive terms and issues to be included in any resulting contract; "Nothing in the Agreement, its context, or the parties' conduct would reasonably have led employees to believe that recognition of the [union] was a foregone conclusion….").

[23] See MD. CODE ANN., State Gov't, § 9-1A-07(c)(7)(v).

important, in *Dana*,[24] the Board recently approved of such agreements, so long as they do not violate § 8(a)(2).

In the current case, there is nothing in the challenged paragraphs of the 2012 LPA, specifically ¶¶ 10 and 11, that undermine § 8(a)(2)'s goals of preserving union independence and protecting employee free choice in the selection of their bargaining representative.[25] By entering into the 2012 LPA with SEATU and UFCW, the Employer was doing nothing more than expressing its willingness to enter into a bargaining relationship with these unions should they gain majority support, which is a permissible message to the employees that does not interfere with their § 7 right to choose or reject union representation.[26] Moreover, simply granting SEATU and UFCW non-employee organizers access to its facility to speak with employees and providing each of those unions with employee lists containing names and job classifications, as provided in the 2012 LPA, is the type of ministerial cooperation that the Board does not find to be unlawful assistance.[27]

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[24] 356 NLRB No. 49, slip op. at 7.

[25] The Union's arguments in support of the charge focus on unlawful assistance and the alleged disparate treatment of similarly situated unions. It does not assert that a union signatory to the 2012 LPA would be unlawfully dominated. In any event, the necessary elements for a finding of unlawful domination are not present here. See, e.g., *EFCO Corp.*, 327 NLRB 372, 376-77 (1998) ("A labor organization that is the creation of management, whose structure and function are essentially determined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration is dominated under Section 8(a)(2) of the Act."), enfd. 215 F.3d 1318 (4th Cir. 2000) (unpublished decision).

[26] See, e.g., *Dana Corp.*, 356 NLRB No. 49, slip op. at 7 (rejecting General Counsel's argument that letter of agreement between employer and unrecognized union, which set forth procedure for voluntary recognition of union and framework for future bargaining, amounted to "tacit recognition" of minority union in violation of § 8(a)(2)). See also *Tecumseh Corrugated Box Co.*, 333 NLRB at 7 (no § 8(a)(2) violation despite employer's vice-president noting employer "liked working with unions" before introducing union officials who addressed employees); *Coamo Knitting Mills*, 150 NLRB at 581, 595 (no § 8(a)(2) violation despite employer's vice-president informing assembled employees that "representatives of the Union will be in Coamo to solicit your membership. Although you are under no compulsion, we urge you to join. The Company will negotiate a contract with the Union, which we believe will be mutually beneficial.")

[27] See, e.g., *Tecumseh Corrugated Box Co.*, 333 NLRB at 6, 7-8; *Jolog Sportswear*, 128 NLRB at 888-89. See also *Dana Corp.*, 356 NLRB No. 49, slip op. at 2, 7 (no § 8(a)(2) violation where letter of agreement required, among other things, employer to provide unrecognized union "list of the names and addresses of employees").

Nevertheless, the Union also asserts that the Employer engaged in other conduct that, together with this grant of access, constituted unlawful assistance of SEATU and UFCW.[28] We conclude that there is no merit to the Union's assertion. The Union failed to provide the Region with sufficient evidence to show that the Employer, independent from its refusal to grant the Union access to its facility absent execution of the 2012 LPA, engaged in conduct that would have thwarted employee free choice by conveying a message that the Employer wanted the employees to select SEATU or UFCW as their union.[29] Thus, the Region did not find that the Employer engaged in any other conduct that violated § 8(a)(2).[30] In these circumstances, the mere grant of access to SEATU and UFCW non-employee organizers, in exchange for each union's assent to the 2012 LPA, did not constitute unlawful assistance or support.

B. The Employer Did Not Violate § 8(a)(2) by Discriminating Among Similarly Situated Unions.

In a situation where, as here, rival unions are competing to represent a bargaining unit, § 8(a)(2) requires that an employer treat similarly situated labor organizations the same.[31] "Slight suggestions as to the employer's choice between

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[28] The Union relies on various Employer conduct to support this argument, including refusing to negotiate a separate LPA with the Union, amending the LPA with SEATU in March 2012 so as to give itself more discretion to treat rival unions differently, preventing the Union's organizers from gaining access to the employees while they were at the facility, and rapidly recognizing SEATU and UFCW before the Union had an opportunity to communicate with the employees.

[29] Compare, e.g., *Monfort of Colorado*, 256 NLRB 612, 613-14 (1981) (finding unlawful assistance based on employer giving favored union unlimited access to facility, supervisors watching while union solicited signed authorization cards, favored union's misleading statements about existence of contract and future employment, and employer's "rapid and unverified" grant of recognition of union), enfd. sub nom. *NMU v. NLRB*, 683 F.2d 305 (9th Cir. 1982); *Vernitron Electrical Components*, 221 NLRB 464, 465 (1975) (finding unlawful assistance based on employer requiring employees to attend union meetings during working time, observing whether employees signed authorization cards, and instantly recognizing union without neutral party verifying union's majority status), enfd. 548 F.2d 24, 26 (1st Cir. 1977).

[30] The Region is awaiting the Division of Advice's determination in the current matter to assess the Union's charge allegation regarding an Employer official telling employees that if they wanted to unionize, they should do so with SEATU or UFCW. Also, the Union is seeking review of the Region's dismissal of its other § 8(a)(2) charge allegations in the Office of Appeals. [*FOIA Ex. 5*
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[31] See *Raley's*, 348 NLRB at 384 (no § 8(a)(2) violation where employer permitted employees who supported favored union to engage in union activity on worktime, where employer did not prohibit employees supporting disfavored union from engaging in similar activity).

unions may have telling effect among [employees] who know the consequences of incurring that employer's strong displeasure. The freedom of activity permitted one group and the close surveillance given another may be more powerful support for the former than campaign utterances."[32] Thus, "when two unions are competing to represent a unit, an employer may not give discriminatory access to one union's nonemployee supporters while barring the other union's nonemployee supporters."[33] An employer that engages in such conduct violates § 8(a)(2).[34]

The Employer's conduct here does not show unlawful discrimination among the rival unions competing to represent its employees. The Employer agreed to waive its exclusionary property right under *Lechmere* in exchange for a union's assent to the 2012 LPA. SEATU and UFCW each signed the 2012 LPA and were granted access. In April and May 2012, the Employer offered the Union the same agreement.[35] Because the Union refused to sign, the Employer denied its request for access to the facility and took affirmative steps to keep the Union's non-employee organizers off its property when they attempted access. But, rather than establishing discriminatory treatment, these facts show that the Employer treated similarly situated unions the

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[32] *Machinists Lodge 35 v. NLRB (Serrick Corp.)*, 311 U.S. 72, 78 (1940).

[33] *Raley's*, 348 NLRB at 387, n.21, citing *Lechmere, Inc. v. NLRB*, 502 U.S. at 535. See also *Jolog Sportswear*, 128 NLRB at 888 (no unlawful assistance for permitting union official to address employees on company time and property where no representative of anti-union group requested same access); *Detroit Medical Center Corp.*, 331 NLRB 878, 878 (2000) (no objectionable conduct in representation proceeding where employer granted access to union that requested access; employer had no obligation to offer access to rival union that did not request access).

[34] See, e.g., *Kosher Plaza Supermarket*, 313 NLRB 74, 85 (1993) (finding § 8(a)(2) violation where employer permitted favored union to address employees on working time and the denied disfavored union's request for equal access); *Ella Industries*, 295 NLRB 976, 979-80 (1989) (finding § 8(a)(2) violation where employer denied request from president of disfavored union for access equal to what had been granted officials of favored union).

[35] The Union asserts that the Employer did not offer it the same LPA that was offered to SEATU and UFCW. It asserts that in early May 2012, when one of its officials met with the Employer's attorney, he asked the attorney for specifics regarding the 2012 LPA's access provision, but was never given a response. Thus, the Union asserts that the Employer never offered it access to the employees during the orientation sessions in May 2012, which was granted to SEATU and UFCW. However, the Union subsequently made clear to the Employer that it remained unwilling to agree to ¶¶ 10 and 11 of the 2012 LPA, which concern the waiver of economic action and the duration of that waiver. As a result, the Union would not have agreed to the 2012 LPA even had the Employer further explained the extent of the access it would have received under the agreement.

same.[36] The Employer would have run afoul of § 8(a)(2) here only if it had denied the Union equal access after the Union had signed the 2012 LPA.[37] Because there was no such discrimination here, the Employer lawfully denied the Union access to its facility.[38]

The Union takes the position, however, that once the Employer granted SEATU and UFCW access to its facility, § 8(a)(2)'s goal of ensuring employee free choice in the selection of a bargaining representative prevented the Employer from denying it access to the facility even though it refused to sign the same LPA as those other organizations. In other words, the Union asserts that it could not be forced to accept the same LPA as a condition of equal access. The Union does not cite to any § 8(a)(2) authority to support its position. Rather, it relies on the § 8(a)(5) principle that an employer may not insist on a contract term that affects employee activities outside of the workplace or employment relationship because that is a permissive subject of bargaining.[39] The Union contends that the geographic scope and duration terms of the economic action waiver in ¶¶ 10 and 11, which apply the waiver to all of the Employer's facilities for a five-year term that may extend beyond recognition, have no "nexus" to organizing the employees at the Employer's facility in Hanover. [40] Thus, if

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[36] Compare *Raley's*, 348 NLRB at 386-87, n.21; *Jolog Sportswear*, 128 NLRB at 888; *Detroit Medical Center Corp.*, 331 NLRB at 878. See footnotes 31 and 33 for the conduct at issue in these cases.

[37] Compare, e.g., *Kosher Plaza Supermarket*, 313 NLRB at 85; *Ella Industries*, 295 NLRB at 979-80.

[38] See *Viejas Casino*, 1999 WL 33221183, Case 21-CA-33117, Advice Memorandum dated December 30, 1999; *Westin Diplomat Hotel*, Case 12-CA-22026, Advice Memorandum dated April 19, 2002; *Riverside Community Hospital*, 2003 WL 21733708, Case 21-CA-35537, Advice Memorandum dated July 8, 2003, which stand for the principle that an employer does not discriminate among unions by denying equal access solely to the union that refuses to sign an agreement similar to the 2012 LPA here. [*FOIA Ex. 5*

.] However, those aspects of the 2012 LPA do not support a finding of unlawful assistance or support under § 8(a)(2) where the Employer is insisting that *any* union seeking access to its premises sign that agreement.

[39] The Union cites *Mental Health Services, Northwest*, 300 NLRB 926, 927 (1990), where an employer unlawfully insisted to impasse during contract negotiations on a management rights clause that prohibited the union or employees from influencing any of the employer's sources of funding.

[40] The Union objects to these two terms because they interfere with its institutional goals. Regarding the geographic scope of the waiver, the Union notes that the Employer operates other hotel and gaming facilities that are traditionally within its purview. Thus, the waiver would interfere with its organizing efforts at those

the Employer is permitted to insist on those terms as a condition for granting equal access, it could obtain more concessions from a union by violating § 8(a)(2) than it could obtain during contract negotiations subject to 8(a)(5). However, the distinction between mandatory and permissive bargaining subjects is not relevant in the § 8(a)(2) context. The Employer has a complete exclusionary property right under *Lechmere*, and it is permitted to seek concessions from a union in exchange for relinquishing that right. As discussed above, the terms of the 2012 LPA did not confer unlawful assistance or support to a signatory union. Thus, the primary concern here is that the Employer treat similarly situated unions the same.[41] The Employer did that by offering to grant the Union equal access if it signed the same LPA as the other two unions. When the Union refused, the Employer's subsequent denial of access was lawful.

Finally, as stated previously, the Employer's conduct must be assessed in light of the Maryland gaming statute that requires it to enter into an LPA with any union seeking to organize its employees as a prerequisite to obtaining a gaming license. That statute mandated much of the language in the 2012 LPA, including many of the terms that the Union found unacceptable in ¶¶ 10 and 11.[42] Other entities operating casinos in Maryland, such as Perryville and Ocean Downs, entered into similar LPAs with SEATU and UFCW. Indeed, in December 2010, an affiliate of the Union, UNITE HERE Local 7, also enter into such an LPA with Ocean Downs.[43] The Union asserts that it did not challenge the legality of that agreement because, unlike the Employer, Ocean Downs does not operate multiple facilities, meaning the waiver on economic action is limited to one facility, and it agreed to remain neutral and recognize the

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locations without granting it any access rights there. Regarding the duration of the waiver, the Union asserts that it would undermine its ability to effectively bargain a first contract with the Employer. It notes that it agreed to a similar waiver with Ocean Downs, and that it has yet to reach agreement on a first contract with that employer after one year of negotiations.

[41] See *Raley's*, 348 NLRB at 384, 386-87 & nn.21-23 (no § 8(a)(2) violation where employer permitted employees who supported disfavored union same use of its facility as those who supported favored union; moreover, no 8(a)(2) discrimination where employer denied access to *non-employee* organizers of disfavored union because supporters of favored union were *employees*).

[42] See MD. CODE ANN., State Gov't, § 9-1A-07(c)(7)(v) ("the labor peace agreement protects the State's revenues by prohibiting the labor organization and its members *from engaging in picketing, work stoppages, boycotts, and any other economic interference* with the operation of the video lottery facility *within the first 5 years* of the effective date of the video lottery operation license") (emphasis added).

[43] The waiver of economic action in that agreement is very similar to the waiver in ¶ 11 of the 2012 LPA. That waiver, as is also true here, remains in place beyond recognition and until the parties enter a first contract.

Union based on a card check. But those distinctions with the 2012 LPA have no bearing on whether a different employer is treating similarly situated unions the same. As discussed above, the Employer offered the Union the same arrangement as SEATU and UFCW. That the Union found certain terms in the 2012 LPA unacceptable does not result in finding that the Employer unlawfully assisted the other unions who were granted access to its facility because they signed the 2012 LPA.

Based on the preceding analysis, we conclude that the Region should dismiss, absent withdrawal, the aspect of the charge alleging that the Employer violated § 8(a)(2) by insisting that any union seeking access to its facility for organizing purposes sign the 2012 LPA.

/s/
B.J.K.