Mashantucket Pequot Gaming Enterprise d/b/a Foxwoods Resort Casino *and* United Food and Commercial Workers Union, Local 37, Petitioner and Mashantucket Pequot Tribal Nation, Intervenor. Case 34–RC–2392

March 17, 2011

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held July 31, 2010, and the administrative law judge's report recommending disposition of them.[1] The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 190 for and 145 against the Petitioner, with 8 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the judge's recommendations, and finds that a certification of representative should be issued.[2]

We adopt the judge's recommendation that the Employer's Objections 2 and 3 be overruled. The statements at issue, made by the Petitioner, its agents, and supporters, were relevant to the campaign and did not seek to create or inflame racial prejudice among the voters in the election. As a result, the statements do not constitute objectionable conduct.

To begin, we reject the Employer's argument that the allegedly objectionable statements were, in fact, racially inflammatory. The statements centered on the fact, controversial among some employees, that tribal members were given a preference in job opportunities by the Employer. The statements did not contain any reference to a negative stereotype of Native Americans.[3] At most, the statements reflected plausible assumptions that tribal members, because of the loss of their monthly stipends, would seek work within the unit, and that, in the event of future layoffs, the Intervenor's tribal preference law would be applied to allow members of the tribe with less seniority to keep their jobs over more senior, nonmember, employees. The record reflects that these assumptions were firmly rooted in legitimate concerns about the economic health of the Intervenor and the Employer.[4] Indeed, these statements are "racial remarks" only in the sense that they mention the tribe, its members, or the tribal preference law, and *Sewell* clearly does not prohibit the mere mention of race. See, e.g., *Baltimore Luggage Co.*, 162 NLRB 1230, 1233 (1967), enfd. 387 F.2d 744 (4th Cir. 1967).

Further, we reject the Employer's claim that the judge should have required the Petitioner to prove the veracity of the statements. *Sewell Mfg. Co.*, 138 NLRB 66, 72 (1962), states that the Board will set an election aside when a party "deliberately seek[s] to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals." *Sewell* places the burden "on the party making use of a racial message to establish that it was truthful and germane." Id. Subsequent Board decisions have made clear, however, that the burden-shifting "rule in *Sewell* is applicable only in those circumstances where it is determined that the 'appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election.'" *Bancroft Mfg. Co.*, 210 NLRB 1007, 1008 (1974) (quoting *Sewell*, supra at 71), enfd. 516 F.2d 436 (5th Cir. 1975); accord: *Englewood Hospital*, 318 NLRB 806, 807 (1995). Because we find that the statements at issue lacked inflammatory content and that they had a legitimate bearing on relevant campaign issues, the *Sewell* rule requiring a party to prove that statements are truthful does not apply. Because *Sewell* does not apply, we follow our usual practice of not inquiring into the truth or falsity of campaign statements. See *Midland*

[1] The judge was sitting as a hearing officer in this representation proceeding.

[2] The judge ordered that this case "be remanded to the Regional Director of Region 34 for the purpose of issuing the appropriate Certification." There is no need for a remand, however. Under Sec. 102.69 of the Board's Rules, the Board itself has the authority to issue a certification. Accordingly, we do not adopt the judge's recommendation to remand this case, but shall instead issue a certification of representative. See *Talmadge Park, Inc.*, 351 NLRB 1241, 1241 fn. 4 (2007).

[3] These statements include:

> Our jobs are really on the line with this new development of the tribe no longer getting their monthly stipends.
>
> [E]very one of our jobs are on the line. They will come to work here and are going to take tipped positions like mine and yours. . . . They will come in and take your job.
>
> It's getting scary now to think that the tribal members are losing their checks and [our] jobs are up for grabs.
>
> The tribe needs J O B S !!! plain and simple and even if just for that fact I VOTE YES!!!!
>
> Tribal stipends are ending Jan. 1st, 2011. Where do you think they are going to look for jobs . . . Wal*Mart, Home Depot . . . I think not.

A complete list of the complained-of statements can be found in the attached Decision on Objections.

[4] These concerns were based on newspaper articles about the financial difficulties of the Employer and Intervenor. Because the articles were introduced at the hearing by the Employer, we find no merit in the Employer's argument that the judge improperly relied on them in his decision.

National Life Insurance Co., 263 NLRB 127, 133 (1982).[5]

It has been observed that objections based on *Sewell* have generated wasteful postelection litigation, delaying the effectuation of the majority's will. See *Shepherd Tissue, Inc.*, 326 NLRB 369, 371 (1998) (Chairman Gould, concurring). We have not been asked to revisit *Sewell* here, but, we observe that *Sewell* is misused when a party attempts to characterize relevant, temperate campaign statements as objectionable merely because they touch on issues of race or national origin. See, e.g., *Pacific Micronesia Corp.*, 326 NLRB 458, 460–461 (1998) (union supporter's warning to Japanese managers not to show racial favoritism did not violate *Sewell*).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Food and Commercial Workers Union, Local 371, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time bartenders, beverage servers, lounge hosts, and bar porters employed by the Employer at Foxwoods Resort and Casino; but excluding all other employees, employees employed at the MGM Grand at Foxwoods, office clerical employees, managerial employees, confidential employees, and guards, professional employees, and supervisors as defined in the Act.

Thomas W. Mieklejohn, Esq., for the Petitioner.
Richard B. Hankins, Esq. and *Seth H. Borden, Esq.*, for the Employer.

DECISION ON OBJECTIONS

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut on September 22 and 23, 2010. On July 7, 2010, the Regional Director issued a Decision and Direction of Election. On July 31, 2010, an election was held and the Tally of Ballots showed that 190 votes were cast for the Petitioner and 145 votes were cast against union representation. There were eight ballots that were challenged and these were not sufficient in number to affect the outcome of the election.

On August 9, 2010, the Employer filed Objections to the Election and on September 3, 2010, the Regional Director issued an Order directing that a hearing be conducted with respect to the Petitioner's Objections 2 and 3. In substance, these alleged that the Petitioner and or its agents and/or employees made inflammatory appeals to voters' racial and ethnic prejudice regarding the granting of preferential employment rights to Native Americans.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

The facts in this case are not in dispute.

The Employer is the operator of a casino located on the property of the Mashantucket Pequot Nation. In part, proceeds from this operation go to the Nation and to the members of the tribe.

The bargaining unit consists of employees who serve drinks, including bartenders, beverage servers, lounge hosts and bar porters. Some of the employees in the unit have been employed since the opening of the casino in 1992. Many have more than 15 years of seniority. There is no dispute that pursuant to the Employer's policies and past practice, seniority has been used as the basis for selecting shift preferences and promotional opportunities. Although there have been no layoffs within this group seniority would play a role in the selection of employees for layoff if that became necessary.

In addition to promotional opportunities, employee income can be substantially affected by the selection of certain shifts. Thus, certain shift locations or shift times, (e.g. weekend evenings), will generate more income by way of tips than other shifts. Also, shift selection can affect employees in other ways. For example, employees with children may select shifts to suit their own schedules. Employees who don't like to be near smoke may choose not to work in the poker room. Seniority is used in determining which employees are offered full-time instead of part-time jobs. (This affects an employee's right to receive health benefits.) In addition to the above, seniority is used in the selection of vacations and holidays.

Suffice it to say that seniority is a major part of the unit employees' terms and conditions of employment.

> In 2007, the Nation promulgated a new law which states:
> When the Tribe is the Employer, it shall give preference in employment opportunities first to tribal members, then to spouses of tribal members and then to other native Americans; provided that the tribal member, spouse of tribal member or native American, as the case may be, meets the minimum necessary qualifications.

Section 4(a) defines employment opportunities as "hiring, transfer, promotion, training, and retention, including in any reorganization or layoff."

In 2009, the above-described law was amended to add a Section 5(d) that stated inter alia;

> In addition to any other preference provided herein . . . when the Tribe is the Employer, it shall provide to Tribal Members and to spouses of Tribal Members . . . preference in shift assignments.

There is no dispute that the Employer adopted the above laws as part of its employment policies.

It appears that while good times were rolling, the tribal preference policies had a limited impact on the employees. Nevertheless, in February 2010 a contrempts did arise because a bar

[5] Accordingly, we do not rely on the judge's finding that the statements were relevant and truthful or that the employees had a "reasonable basis" for believing the statements were accurate.

porter position in a high roller lounge opened up and a member of the Tribe was given the job notwithstanding the fact that a number of other employees with greater seniority were passed over.

If anyone has forgotten, the Great Recession began around 2008 and people fearing for their jobs, began to pay down their debts and reduce there discretionary spending. (I would categorize gambling as an aspect of discretionary spending.) Thus, for the employees and the employer, the good times were coming to a halt.

On July 10, 2010, (after the Regional Director's Decision and Direction of Election), an article appeared in the New London Day, a newspaper circulated in the general area of the casino. Among other things, the article stated:

> Mashantucket Pequot tribal members have been informed that their monthly distributions of [Foxwoods] revenue will be eliminated at year's end. In a July 1 letter to members, the Mashantucket Pequot Tribal Council cites "the financial challenges the Tribe ha been facing over the past few years" in announcing that the "incentive distributions will cease as of December 31, 2010."
>
> Six months of payments remain, beginning with July's, which was distributed a week ago. The payments, which are made to adult tribal members, have been significantly reduced in recent years but ranged last summer between $90,000 and $120,000 a year, on average, a tribal source said at the time. The tribe has about 450 adult members.
>
> In its July 1 letter, the council informed the membership that it will introduce a "self reliance initiatives program" next week that will preview workshops for tribal members and their spouses. Over the coming months, the workshops will cover such topics as . . . Employment Opportunities."

Thereafter, on July 14, 2010, another article was written, this time in the Norwich Bulletin. This stated inter alia;

> The Tribe . . . is looking to restructure about $2 billion in total debt. A recent decision to end incentive payments to tribal members at the end of this year is a way to help the debt negotiations along, gaming industry analysts say.
>
> . . . .
>
> Some casinos in Las Vegas and Atlantic City are closing down entire floors in order to cut expenses. Foxwoods might have to go even further. Barrow predicts in two years Foxwoods will have to embark on a major reconfiguration that could result in closing its older casino, coupled with an expansion of gaming space at MGM.
>
> Foxwoods Resort Casino, which opened in 1992 and was Connecticut's first casino, is the world's largest gambling establishment.
>
> "They're going to have to close something down," Barrow said. "Foxwoods has just gotten too big."

Not surprisingly, these newspaper reports were widely commented on by the employees. And given the possible prospect of job reductions, tribal preference in terms seniority for hiring, promotions, shift preferences and layoffs became a focal point.

It should be noted that this case is not about the legal right of the Nation to promulgate laws or rules that give preference to tribal members or other native Americans in relation to employment decisions at the Casino. And in this respect, I need not reach any conclusion regarding the legal propriety of such preferences. The only thing at issue is whether the nature of statements on this subject by the Union, its agents or third parties, during the course of an election campaign, were made in such a manner as to improperly prejudice the voters.

Statements about the tribal preferences were made directly by paid union agents, by employees who the Union concedes acted as union agents, and also by regular employees who were not union agents. They were made in the form of letters, leaflets and facebook postings.

Leaflets Letters and Web Postings

The Union issued a leaflet captioned "FACT OR FICTION" that was distributed during the critical period, (between the date the petition was filed until the date of the election) and this included the statement; "Unions bring real seniority. Having a contract will prevent being passed over by other people due to favoritism or tribal involvement."

A second leaflet issued directly by the Union during the critical period stated inter alia;

> Tribal members are losing their incentive payments. Management is talking about career counseling for older workers. Health insurance costs are on the rise. What will happen in the next fifteen months if we don't vote for the union?

Also during the critical period, the Union's distributed a flyer that was also posted on its website. This contained the following message:

> REMEMBER
> Unions bring real seniority. Having a contract will prevent being passed over by other people due to favoritism or tribal involvement.

A leaflet that was not issued by the Union but that was authored and distributed by an employee contained the following statement:

> **Job Security**—We all know about Tribal preference, you knew about it when you were hired. What we don't need is for the Tribe to come in and rob us of our seniority. Tribal gets hired in a position before someone switching jobs in-house or someone from the outside . . . fine. A Tribal person should not get hired in a position and then move to number 1 or 2 in seniority just because they are Tribal and then bump someone who dedicated 15/20 years of their life to Foxwoods down. NO! Tribal stipends are ending January 1st, 2011. Where do you thing they are going to look for jobs . . . Wal-Mart, Home Depot . . . I think not.
>
> Our management has their hands tied; the Tribe makes the calls. Bad calls have been made for 18 years +. All they are concerned about is THEIR money and lifestyles . . . not OURS!. The UFCW wants to help us again to lock in our benefits and get better pay and have better lives . . .

> OPEN YOU EYES PEOPLE . . . THIS IS OUR LAST CHANCE! VOTE YES JULY 31st!

The Employer also offered into evidence another employee authored and distributed letter which contained the following statements:

> Another issue that is of concern is that of seniority preference for the tribe. No one is saying that they shouldn't be hired, but as it stands right now a member of the tribe who gets a job automatically gets #1 seniority. This is a big issue for a lot of us and probably one of the biggest "hot points."

Facebook Postings

A good deal of discussion about the election took place on Facebook. And for the purposes of this case, the Union conceded that any statements made by employees Janet Cochran and Cheryl Haase can be attributable to the Union. The Union also stipulated that these statements were made during the critical period and were widely disseminated amongst the employees who were eligible voters. In some cases, Cochran and Haase posted on their own facebook pages, comments made by other employees with indications that they agreed with those comments.

The Employer points to the following statements:

On July 11, 2010, employee Debra-Grillo Cole posted a link to the New London Day article and commented;

> This is the article of the Tribe being in debt 2 billion $$ and from the tribal checks coming to a halt Dec. 31st and if 20 members come into our department they will go to the head of the line, and just think your seniority #20 today can become #40 tomorrow.

With respect to the above, the Employer argues that this statement should be attributable to the Union because Cochran, (conceded to be a union agent), "indicated that she would be copying Ms[.] Grillo-Cole's post onto her own face book page."

The Employer notes that in subsequent postings, Ms. Grillo-Cole urged other employees to use this issue in order to obtain union authorization cards.

On July 14, 2010 employee Moria Moore posted a message that was answered by Jodi Lyn Walkonen who stated:

> Hopefully it will sink in—Union dues is a small price to pay to keep your job, your hours and your benefits . . . Think about it people—there are THOUSANDS of people out of work right now who would jump on the chance to take our jobs with no benefits, and don't think our tribe hasn't thought of that!.

The Employer argues that the Walkonen posting should be attributable to the Union because the Union's organizing Director, Keri Hoehne and conceded agent Cheryl Haase indicated on their facebook pages their approval of the Walkonen posting.

Later on July 14, Janet Cochran added her comment to the face book page and stated:

> LOOK OUT! Because change is coming. It is going to surely happen to all of us if you do not protect yourself now! . . . Tribal stipends will be cut in January . . . . translation: every one of our jobs are on the line. They will come to work here and are going to take tipped positions like mine and yours. So if you are seniority 20 you may become seniority 40 overnight. They will come in and take your job.

On the same day that the Norwich article appeared, Janet Cochran, posted a comment on Catherine Quinn's page that stated:

> This should be a big wake up call for all and any who may be on the fence about union . . . not only this article but the fact that the tribe is losing their monthly stipends . . . . [C]learly . . . OUR JOBS ARE ON THE LINE!. Vote "yes" on the 31st!!

On July 15, employee Sue Latham posted the message that union dues could guarantee her "job security." This generated a comment on her face book page by Cochran who stated:

> Having this protection is our right. We have to abide by federal laws don't we? We pay federal taxes don't we? Read the papers . . . the recent articles concerning the tribe no longer getting their monthly stipends should be a good indication that our jobs are not secure. We need all the help we can get so vote "yes" on the 31st.

On July 16, the Union's organizing director, Keri Hoehne posted a comment that referred to a meeting held on July 15 and stated:

> It's getting scary now to think that the tribal members are losing their checks and [our] jobs are up for grabs. Hopefully more people will put their thinking caps on.

This posting by Hoehne was followed up by a facebook comment by Janet Cochran who stated:

> You are absolutely right Nicole . . . our jobs are really on the line with this new development of the tribe no longer getting their monthly stipends. And I am glad if this union is voted in we'll have federal law vs. tribal law. Far better protection.

Following the Cochran posting, another employee, Jamie Moran added her opinion by stating:

> Hey if you're looking for votes, or should I say more votes, has anyone talked to anyone who is now or has been a lounge hostess, they are in a stand still, they have been for years (waiting for a re-bid), but I don't think they understand the impact this new tribal ruling could affect them, when they have been there for years and someone comes in and takes their job, just cause they can . . .

On July 23, a series of comments were made on the facebook page of employee Sue Latham. Comments were made by a variety of people including Janet Cochran and Cheryl Haase. The employer points to one by an employee named Mandy Sylvia who stated:

> Tribal members are losing their incentive payments. What will happen in the next fifteen months if we don't vote for the union? Let's not find out. Vote YES FOR UFCW LOCAL 371 on Saturday, July 31st.

Also on July 23, a series of comments were posted by various people in response to a posting by employee Sue Latham. In support of its objections, the employer points to a posting by employee Mandy Sylvia who stated:

> We cannot take a chance on the upper management anymore. [T]hey have proven time and time again that they are NOT on our side, they can't be, they have to be with the tribe. The tribe needs J O B S!!! Plain and simple even if just for that fact I VOTE YES!!!

On July 25, in a thread started by employee Jamie Schneider, a former employee named Leslie Kernozek posted this comment:

> The tribe isn't even getting "incentive payments" @ the end of the year . . . what do you think you'll be getting from now on?

The Employer argues that this comment should be attributable to the Union because Cochran indicated her approval of Kernozek's comments by hitting the "Likes" designation for this comment.

On July 31, employee Mandy Sylvia posted the following comment on her facebook page:

> I asked questions today about Tribal employees and where their seniority will lie. Tribal will be at the bottom BUT when there is a rebid they WILL pick first. IF there are layoffs it will go by seniority, if there are tribal in the mix WE will be let go before they are. UNION at least gives a fighting chance.

Other Statements

The Employer offered the testimony of employee Cynthia Ayotte who testified that on or about July 28 or 29, she was visited by a man who asked if she "would like to know about the tribes, tribal people taking her job." Ayotte testified that when she reported this to the Union, Keri Hoehne told her that she would talk to this person about the complaint.

Analysis

In *Sewell Mfg. Co.,* 138 NLRB 66 (1962), the Board held that an employer's campaign propaganda intended to inflame racial prejudice, deliberately seeking to overemphasize and exacerbate racial feeling by irrelevant, inflammatory appeals, was sufficient cause to set aside an election. See also *YKK (USA) Inc.,* 269 NLRB 82 (1984).

The facts in *Sewell* demonstrated a pattern of negative racial appeals by the employer in Georgia during the early 1960s when racial segregation was still prevalent and when organizations such as the NAACP and CORE were seeking to change a long history of discrimination based partly on fears of miscegenation. In that case, the employer mailed to employees a picture showing a close up of an unidentified black man dancing with an unidentified white woman, and a caption underneath in bold letters stating: "The C.I.O. Strongly Pushes and Endorses the F.E.P.C." The employer included a reprint from a Mississippi newspaper with a picture captioned: "Union Leader James B. Carey Dances With A Lady Friend," and a story headed: "Race Mixing Is An Issue as Vickers Workers Ballot" This mailing was followed by a letter calling attention to the union's support of NAACP and CORE. Before the election, the employer distributed copies of "Militant Truth," a South Carolina monthly, containing statements such as: "It isn't in the interest of our wage earners to tie themselves to organizations that demand racial integration, socialistic legislation, and free range of communist conspirators." The Board concluded that this propaganda directed to race "so inflamed and tainted the atmosphere in which the election was held that a reasoned basis for choosing or rejecting a bargaining representative was an impossibility." The Board stated:

> [A]ppeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere "prattle" or puffing. They have no place in Board electoral campaigns. The Board does not intend to tolerate as "electoral propaganda" appeals or arguments which can have no purpose except to inflame the racial feeling of voters in the election.
>
> That is not to say that a relevant campaign statement is to be condemned because it may have racial overtones. [138 NLRB at 71.]

In contrast to *Sewell,* the Board, on the same day, decided *Allen-Morrison Sign Co.,* 138 NLRB 73 (1962). In that case, the Board concluded that an employer's letter was "temperate in tone and advised the employees as to certain facts concerning union expenditures to help eliminate segregation," adding that it was "not able to say that the Employer resorted to inflammatory propaganda on matters in no way related to the choice before the voters." The election was upheld.

Extrapolating, one can conclude that so long as a party limited itself to truthfully stating the other party's position on racial matters and did not deliberately exacerbate racial feelings by irrelevant or inflammatory appeals, an election will be upheld, but the burden would be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against that party.

In *NLRB v. Schapiro & Whitehouse, Inc.,* 356 F.2d 675 (4th Cir. 1966), the Circuit applied Sewell to union propaganda. It concluded that literature distributed by a union on two occasions shortly before an election which urged employees, most of whom were blacks, to consider and act on race as a factor in the election was so irrelevant and inflammatory as to invalidate the election. In doing so, the court specifically approved the Sewell standards (at 679).

However, in *Archer Laundry Co.,* 150 NLRB 1427 (1965), the Board upheld an election where instead of racial appeals designed to engender race hatred, they were designed to engender "racial self-consciousness." See *also NLRB v. Sumter Plywood,* 535 F.2d 917 (5th Cir. 1976), where an election was upheld in circumstances where racial appeals emphasized that unionization was one way by which the blacks could strive to achieve equality in American society. In those circumstances the Court concluded that the racial appeals were not irrelevant to the election issues. See also *Aristocrat Linen Supply Co.,* 150 NLRB 1448 (1965); *Coca-Cola Bottling Co.,* 273 NLRB 444

(1984); and *Dai-Ichi Hotel Saipan Beach*, 326 NLRB 458 (1998).

In order to be objectionable, the Board requires that race or ethnicity appeals must be significant and sustained. *Beatrice Grocery Products*, 287 NLRB 302 (1987); *Brightview Care Center*, 292 NLRB 352 (1989); *Zartic, Inc.*, 315 NLRB 495 (1994); and *Dai-Ichi Hotel Saipan Beach*, supra. Compare *Catherine's, Inc.*, 316 NLRB 186 (1995). See also *Singer Co.*, 191 NLRB 179 (1979) (limited remark found not objectionable). See also *KI (USA) Corp.*, 309 NLRB 1063 (1992), where in a divided opinion the Board found that the union's reproduction of letter from a Japanese official concerning American workers was not objectionable.

In *Honeyville Grain Inc. v. NLRB*, cert. denied (2/20/07), the Supreme Court refused to take certiorari and let stand a ruling by a divided Tenth Circuit that found that references to the Mormon faith of the owners did not tilt the election. The majority opinion of the Tenth Circuit stated: "While we in no way condone the inappropriate, unwarranted, and unjustified religious references, substantial evidence from the record considered as a whole supports the [National Labor Relation Board's] conclusion that the comments were not inflammatory or central to the Union's campaign."

In my opinion, the statements relied on by the Employer in this case are insufficient to set aside this election.

Firstly, the statements in their entirety are not demeaning to members of the Nation or to Native Americans in any way. They do not, on their face or by implication, appeal to racial or ethnic stereotypes and cannot, in my opinion, be construed as inflammatory. They simply state a fact; that the casino has a policy of granting seniority preference to tribal members.

Secondly, in the summer of 2010, employees had a reasonable basis for believing that their job security and seniority rights were at risk and, in my opinion, the statements accurately reflected those concerns.[1]

It should be recalled that the economy started to slide in late 2007 and that this slide accelerated into 2010.[2] Unemployment increased dramatically and employees everywhere had reason to be concerned about retaining their jobs. At the casino, the employees had additional reason to be concerned because two local newspapers reported in July 2010 that due to business losses, the members of the tribe owning the casino would cease receiving substantial annual sums of money that are derived from the casino's revenues. These articles pointed out that members of the tribe would be urged and helped to find employment. And given that it was the policy of the Employer to give seniority preference to tribal members and their spouses, the nontribal employees had every reason to conclude that a particular group of people would be able to exercise a form of super seniority to everyone else's potential detriment in a variety of employment situations including the selection for hiring, layoffs, promotions, shift selection, job selection etc.

It is therefore not surprising nor unreasonable that the subject of tribal preferences became a serious subject of communication amongst the employees of the casino. Because it is my opinion that the statements made by the Union and employees had a reasonable basis for believing them to be accurate, these statements, (dealing with terms and conditions of employment), were therefore truthful and relevant to the election campaign.[3]

Based on the above, I conclude that the Employer's Objections to the Election do not have merit.

CONCLUSION OF LAW

The Petitioner has not engaged in any objectionable conduct warranting setting aside the election.

ORDER

The representation case should be remanded to the Regional Director for Region 34 for the purpose of issuing the appropriate Certification.[4]

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[1] The Employer cites *Hobco Mfg. Co.*, 164 NLRB 862 (1967), and *Staub Cleaners, Inc.*, 171 NLRB 332 (1968), enfd 418 F.2d 1086 (2d Cir. 1969), in support of its position. In both cases, rumors were circulated to the effect that an employer intended to replace all black workers if the Union won the election. In *Hobco*, the Board overruled the objections stating inter alia, that the rumor was not widely circulated. In *Staub*, the Board overruled the objection because the Union disassociated itself from the rumor. In both cases, the circulated rumors had no basis in fact. This is unlike the present case where the statements regarding seniority preferences for tribal members accurately reflects the Employer's existing policy and therefore nontribal employees could reasonably conclude that if layoffs did occur in the future, they could be adversely affected.

[2] There seems to be a consensus that the recession ended in June 2010. But employment is a lagging indicator and the official unemployment rate reached and has stayed at close to 10 percentage.

[3] I note that the newspaper articles and the statements concerning tribal preferences were made by the Union and employees as early as 2-½ weeks before the election. There is, however, no indication in this record that the Employer attempted to counter any of these statements or that it attempted to show that the statements were not true.

[4] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Decision may be filed with the Board in Washington, D.C. within 14 days from the date of this Decision and recommendation. Exceptions must be received by the Board in Washington by November 17, 2010.