

Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 07–CA–053586

October 27, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND SCHIFFER

On April 16, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 92. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Sixth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB 740 (2013), which is incorporated herein by reference.¹

¹ The Respondent excepted only to the judge's assertion of jurisdiction and not to his unfair labor practice findings. In the absence of exceptions, we find it unnecessary to address the judge's discussion of *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part, review granted in part 571 F.3d 53 (D.C. Cir. 2009), or whether the judge erred by applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), we agree with the modification to the judge's recommended Order to require the Respondent to compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

MEMBER MISCIMARRA, concurring.

I concur in this matter and agree with the judge's rulings, findings, and conclusions, and I adopt the judge's recommended Order as modified in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Contrary to the Respondent, the judge properly found that the Act is applicable to the Respondent's casino operation pursuant to *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). The Respondent did not file exceptions to the judge's unfair labor practice findings, with which I agree in any event. Thus, the judge properly found that Respondent's no-solicitation policy is facially invalid and overly broad because it prohibits employees from soliciting in any work area—defined as “any place where any employees perform job duties at the Casino”—without distinguishing between working time and nonworking time, and therefore the policy can be read to prohibit solicitation during nonworking time. See, e.g., *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (absent special circumstances, employees have a right to engage in solicitation on nonworking time). Further, the judge properly concluded that Respondent violated Section 8(a)(1) by prohibiting employees from discussing unionization in a nonworking area (the employee hallway). Finally, it is undisputed that the Respondent suspended and discharged employee Susan Lewis for engaging in union solicitation. Accordingly, unlike the judge, in finding that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Lewis, I would not apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or any other union.

WE WILL NOT maintain and enforce a no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

WE WILL NOT tell employees they cannot talk to other employees about the Union in the employee hallway.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the Board's Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Lewis whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Susan Lewis, and WE WILL, within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

WE WILL, within 14 days of the Board's Order, revise or rescind our no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas, and notify our employees in writing that we have done so.

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

The Board's decision can be found at www.nlr.gov/case/07-CA-053586 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

