

**Flamingo Las Vegas Operating Company, LLC and International Union, Security, Police and Fire Professionals of America (SPFPA). Cases 28–CA–069588 and 28–CA–073617**

December 10, 2014

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

On April 25, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB 873 (2013). Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

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 Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

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 affirm the judge's rulings, findings, and conclusions,<sup>1</sup> and adopt the judge's

<sup>1</sup> Contrary to our dissenting colleague, we agree with the judge that the Respondent unlawfully created an impression among its employees that their union activities were under surveillance when it provided them with antiunion flyers on October 7 and 16, 2011. As found by the judge, when the Respondent presented employees with a flyer depicting a blank union authorization card and a written admonition against signing it at an October 7 preshift meeting, employees who had signed cards had not done so openly, nor was there evidence that they wanted the Respondent to be aware of their involvement in the campaign. Thus, and unlike *Bridgestone Firestone South Carolina*, 350 NLRB 526 (2007), on which our colleague relies, by presenting them with the flyer without explaining how the authorization card had been obtained, employees reasonably could conclude that their union activities were being monitored. *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014). And, contrary to the dissent, by neither naming the source of the flyer nor stating that it was voluntarily provided by a security officer, "employees [were] left to speculate as to how the employer obtained the information, "causing them reasonably to "conclude that the information was obtained through employer monitoring." *Id.* quoting *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009), *affd.* and incorporated by reference 357 NLRB 633 (2011), *enfd.* 498 Fed. Appx. 45 (D.C. Cir. 2012) (emphasis in original).

recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB 873, which is incorporated herein by reference.<sup>2</sup> The

We similarly agree with the judge that the Respondent's posting and distribution of its October 16 antiunion flyer with its thinly veiled barb at employee Francis Bizzarro ("We realize it's a pretty BIZARRE situation, but it looks like a small group is trying to convince all of you that you need to sign up. . ."), likewise created an impression of surveillance. Contrary to the dissent, employees reasonably would conclude from the October 16 flyer that the Respondent was monitoring Bizzarro's union activities and that *their* activities likewise might be under surveillance.

<sup>2</sup> Member Johnson joins in finding that Security Director Eric Golebiewski violated Sec. 8(a)(1) by promising employees improved terms and conditions of employment in order to dissuade them from supporting the Union, and by threatening employees with more strictly enforced work rules and job loss if they selected the Union as their collective-bargaining representative. As to the first violation, he agrees that Golebiewski went beyond merely informing employees about a previously arranged transfer of a disliked supervisor. He told them they would "really like" their *new* supervisor, thus implying an attempt to remedy an employee grievance in response to the organizational campaign. As for the threat violation, he notes that the current Board has previously cited with approval this finding in the now-vacated decision. See *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 245 (2014). Further, in light of the finding that Golebiewski also unlawfully interrogated security officers at the 4-hour preshift meeting on October 14, 2011, Member Johnson would find it unnecessary to pass on whether Golebiewski also interrogated Security Officer Ty Evans in mid-November 2011. In his view, that finding is cumulative and does not affect the remedy.

Member Johnson disagrees with his colleagues on three issues. First, while they find it unnecessary to pass on whether Field Training Officer Larry Myatt's statement to employee Francis Bizzarro about "not inciting the men" was an unlawful promulgation of a work rule, he would expressly find that it was not. See, e.g., *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243 and fn. 5 (finding that statement directed solely to one employee and never repeated to any other employees as a general requirement did not constitute a work rule). Second, he disagrees that the Respondent's reproduction of a union authorization card on an October 7, 2011 flyer created an unlawful impression of surveillance of union activity. Bizzarro had been distributing authorization cards for at least a week before the flyer appeared, and the authorization card reproduced on the flyer was given to management by another security officer, who voluntarily and *sua sponte* reported that he had received the card from Bizzarro. Notwithstanding the fact that the Respondent did not disclose the name of the security officer who turned the authorization card over, it is obvious that the Respondent could get authorization cards from employees who wished to turn them over. Under these circumstances, employees would not reasonably conclude from the flyer that the Respondent was monitoring their activities. See *Greater Omaha Packing Co.*, 360 NLRB 493, 495 fn. 7 (Member Johnson, dissenting); see also *Bridgestone Firestone South Carolina*, 350 NLRB at 527 ("An employer does not create an unlawful impression of surveillance where it merely reports information that employees have voluntarily provided."). Third, he similarly disagrees with finding that circulation of the Respondent's "BIZZARE" flyer on October 16 created an unlawful impression of surveillance. Although it is clear that the "BIZZARE" statement is a thinly veiled reference to Bizzarro, employees would not reasonably believe that the Respondent was engaged in covert surveillance of his union activity. As the judge found, it was an "open secret" at this time that Bizzarro was distributing authorization cards. Accordingly, be-

judge's recommended Order, as further modified herein, is set forth in full below.<sup>3</sup>

### ORDER

The National Labor Relations Board orders that the Respondent, Flamingo Las Vegas Operating Company, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees that they should not incite other employees and should keep their mouths shut or there will be consequences, or otherwise instructing employees not to engage in concerted activities.

(b) Threatening employees with more strictly enforced work rules and job loss if they select the Union as their collective-bargaining representative.

(c) Threatening employees with discipline, including discharge, if they select the Union as their collective-bargaining representative.

(d) Threatening employees by informing them that they were disloyal because they supported the Union and engaged in union activities.

(e) Coercively interrogating employees about their union membership, activities, and sympathies.

(f) Soliciting complaints and grievances from employees and promising improved terms and conditions of employment in order to discourage employees from supporting the Union.

(g) Promising employees improved terms and conditions of employment by informing them that an objectionable supervisor had been transferred from its facility to dissuade them from supporting the Union.

(h) Creating an impression among employees by printed communication that their union activities were under surveillance.

(i) Creating an impression among employees that their union activities were under surveillance by displaying a blank union authorization card.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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cause employees would have no reason to believe that the Respondent's knowledge of Bizzarro's activities was the result of its surveillance of him, employees would not reasonably conclude that the Respondent was surveilling their activities either. Member Johnson would also not find the "BIZZARE" flyer unlawfully coercive on any other ground. See *Jimmy John's*, 361 NLRB 283(2014) (derogatory comment about union supporter not unlawful).

<sup>3</sup> We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB 694 (2014).

(a) Within 14 days after service by the Region, post at the Flamingo, O'Sheas, and Bill's, all located in Las Vegas, Nevada, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent at all three properties mentioned above and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former security officers employed by the Respondent at any time since September 3, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

### 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 instruct you that you should not incite other employees and should keep your mouths shut or

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<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

there will be consequences, or otherwise instruct you not to engage in concerted activities.

WE WILL NOT threaten you with more strictly enforced work rules and job loss if you select International Union, Security, Police and Fire Professionals of America (SPFPA) (the Union) as your collective-bargaining representative.

WE WILL NOT threaten you with discipline, including discharge, if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten you by informing you that you are disloyal because you support the Union and engage in union activity.

WE WILL NOT coercively interrogate you about your union membership, activities, and sympathies.

WE WILL NOT solicit your complaints and grievances and promise you improved terms and conditions of employment in order to dissuade you from supporting the Union.

WE WILL NOT promise you improved terms and conditions of employment by informing you that an objectionable supervisor has been transferred from the property to dissuade you from supporting the Union.

WE WILL NOT create an impression among you through our printed flyers that we are watching your union activity.

WE WILL NOT create an impression among you by displaying a blank union authorization card that we are watching your union activity.

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

FLAMINGO LAS VEGAS OPERATING COMPANY,  
LLC

The Board's decision can be found at [www.nlr.gov/case/28-CA-069588](http://www.nlr.gov/case/28-CA-069588) 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.

