

Casino Pauma and UNITE HERE International Union. Cases 21–CA–103026 and 21–CA–114433

March 31, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON,
AND MCFERRAN

On June 25, 2014, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Charging Party filed a brief in opposition to the Respondent's exceptions. The General Counsel also filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions,³ and to adopt the recommended Order as modified.⁴

¹ We find no merit in the General Counsel's cross-exception that the judge erred by failing to rule on its motion to strike the declaration of Attorney Scott Wilson and attached exhibits, which the Respondent submitted with, and cited in, its posthearing brief. The Respondent requested that the Board take judicial notice of these nonrecord documents to show that the Board should decline jurisdiction based on the Respondent's owner's history of severe poverty and dependence on the Respondent's revenue to fund the owner's governmental operations. We agree with the judge that it is unnecessary to rule on the motion to strike because, even assuming that judicial notice is appropriate as to some of the documents, taking notice of the facts alleged therein would not affect the result in this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In finding that the Act applies to the Respondent's casino operation, the judge correctly relied on *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). He also relied on a trio of Board cases applying *San Manuel* to casino operations on other tribal lands: *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB 436 (2014), *Soaring Eagle Casino & Resort*, 361 NLRB 769 (2014), and *Chickasaw Nation Casino*, 359 NLRB 1472 (2013). The Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered each of those Board decisions invalid. However, a properly constituted Board has considered *Little River Band* and *Soaring Eagle* de novo and, in agreement with the rationale of the prior decisions, which were incorporated by reference, asserted jurisdiction over the respondents pursuant to *San Manuel*. See *Little River Band of Ottawa Indians Tribal Government*, supra, and *Soaring Eagle Casino & Resort*, supra. However, *Chickasaw Nation Casino* is still pending before the Board on de novo review. We therefore do not rely on the prior Board decision in that case in affirming the judge's jurisdictional finding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Casino Pauma, Pauma Valley, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(d).

“(d) 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. Substitute the attached notice for that of the administrative law judge.

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.

For the reasons stated by the judge, we find no merit in the Respondent's contention that *San Manuel* was wrongly decided, or that it has been implicitly overruled by the Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting union buttons, we do not rely on *Target Corp.*, 359 NLRB 953 (2013).

The General Counsel cross-exceptions to the judge's failure to address the complaint allegation that the Respondent violated Sec. 8(a)(3) by its April 18, 2013 email to employee Victor Huerta, who was seen wearing the union button, warning that he could be suspended if he ever did so again. In his conclusions of law, the judge found that the email violated Sec. 8(a)(1) inasmuch as the Respondent was enforcing an unlawful rule prohibiting the wearing of buttons by threatening to suspend or terminate employees who wore a union button. Further, the judge's remedy and Order require the Respondent to rescind the email, remove any reference to it from its files, and notify Huerta that it will not be used against him. We agree with the judge that it is unnecessary to pass on whether the Respondent's email also violated Sec. 8(a)(3), because finding that additional violation would not materially affect the remedy. See generally *Sunshine Piping, Inc.*, 350 NLRB 1186, 1186 fn. 2 (2007) (affirming the judge's finding that the employer violated Sec. 8(a)(1) by verbally counseling or warning an employee for wearing union insignia); *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (employer violated Sec. 8(a)(1) by issuing a conference report to an employee for complaining about various employment conditions as the report would inhibit the employee's protected right to criticize management).

⁴ We shall modify the judge's recommended Order by adding the customary provision that the Respondent cease and desist from violating the Act in any like or related manner. We shall also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB 694 (2014).

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 maintain or enforce a rule that prohibits you from wearing any union buttons or insignia.

WE WILL NOT threaten to discipline you, either orally or in writing, for wearing any union buttons or insignia.

WE WILL NOT watch or monitor you to see if you are wearing any union buttons or insignia.

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 rescind our handbook rule banning employees from wearing any union buttons or insignia.

WE WILL furnish you with an insert for your current employee handbook that (1) advises that the unlawful rule has been rescinded, or (2) provides a lawfully-worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to you a revised employee handbook that (1) does not contain the unlawful rule, or (2) provides a lawfully-worded rule.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the April 18, 2013 email we sent to employee Victor Huerta about violating the rule, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the email will not be used against him in any way.

CASINO PAUMA

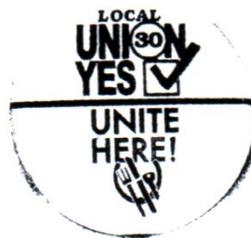
The Board's decision can be found at www.nlr.gov/case/21-CA-103026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Robert MacKay, Esq., for the General Counsel.
Scott A. Wilson, Esq., for the Respondent Casino.
Kristin L. Martin, Esq. (Davis, Cowell & Bowe, LLP), for the Charging Party Union.¹

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In April 2013, various unrepresented employees of Casino Pauma—including two food servers and a kitchen worker, housekeeper, slot machine technician, and lead engineer—began wearing a small white UNITE HERE button on their uniforms in support of the Union's organizing campaign (shown below).



The Casino responded by distributing a memo to all employees reminding them that the personnel handbook prohibited wearing “any badges, emblems, buttons or pins on their uniforms” other than their ID badge, and that they could be disciplined for doing so. The Casino also verbally threatened to suspend or terminate the employees who wore the union button if they did not remove it, and actually sent an email to one employee who was seen wearing the button (lead engineer Victor Huerta) warning that he could be suspended if he ever did so again. Finally, the Casino instructed its managers, supervisors, and other agents to “visually inspect” employees to ensure that they did not wear any pins or stickers on their uniforms or ID badges in the future. UNITE HERE timely filed unfair labor practice charges against the Casino, and the General Counsel subsequently issued the instant complaint. The complaint alleges that all of the Casino's foregoing actions violated Section 8(a)(1) of the National Labor Relations Act (the NLRA), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to form, join, or assist labor organizations.²

The Casino denies that it violated the NLRA as alleged. It contends that the statute does not even apply to the facility, as it is undisputedly owned and operated by the Pauma Band of Mission Indians and is located on the tribal reservation.³ Alter-

¹ Cheryl Williams, Esq. (Williams & Cochrane, LLP), made a limited appearance on behalf of the Pauma Band of Mission Indians solely to object to the subpoenas served on the tribe.

² The charges were filed on April 16 and September 30, 2013, and the consolidated complaint issued on November 22, 2013. The complaint was subsequently amended at the outset of the hearing in certain minor respects (Tr. 15–16), and again on the third day of hearing to specifically allege that the Casino's handbook rule is unlawfully overbroad on its face to the extent it prohibits union buttons (Tr. 324–325).

³ The tribe is also sometimes referred to in the record as the Pauma Band of Luiseno Mission Indians, or the Pauma Band of Luiseno Indi-

natively, it contends that, even if the statute does apply, there was no violation under Board and circuit court precedent as the Casino's policy disallowing union buttons is nondiscriminatory and necessary to protect its public image.

Following several pretrial conferences, a hearing on the foregoing issues was held on February 10–12 in Temecula, California. The parties thereafter filed posthearing briefs on April 25. Having fully considered the briefs and the entire record, for the reasons set forth below, I find that the Board has jurisdiction over the dispute and that the Casino violated the Act as alleged.⁴

I. JURISDICTION

The Board has repeatedly asserted jurisdiction over casinos notwithstanding that they are owned and operated by tribal governments and located on reservation lands. See *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), reaf'd. 345 NLRB 1047 (2005), enfd. 475 F.3d 1306 (D.C. Cir. 2007); *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), petition for rev. filed No. 13–1464 (6th Cir. April 15, 2013); *Soaring Eagle Casino & Resort*, 359 NLRB 740 (2013), petition for review filed No. 13–1569 (6th Cir. May 3, 2013); and *Chickasaw Nation Casino*, 359 NLRB 1472 (2013), petition for review filed No. 13–9578 (10th Cir. July 23, 2013).⁵

There is no basis in the record to distinguish these prior cases. The Casino is likewise a commercial gaming and entertainment enterprise, with gross revenue of over \$50 million in 2013,⁶ and the vast majority of its employees and customers are not members of the Pauma Band or any other Native American tribe. Indeed, of the Casino's 450–500 employees, only 5 are members of the Pauma Band. And the Casino draws over 10 times more customers every day on average (2900) than the Tribe's total membership (236).

ans. However, all parties agreed to refer to the tribe as the Pauma Band of Mission Indians (Jt. Exh. 1; Tr. 259).

⁴ Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Where appropriate, language and translation difficulties have also been taken into account, as well as the effects of age and time on memory, particularly of details such as dates that would have no importance to the witnesses themselves.

⁵ See also *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1002 (9th Cir. 2003) (affirming district court order enforcing Board subpoena against respondent tribal organization, as jurisdiction was not plainly lacking).

⁶ The Casino declined to stipulate to the exact amount of its annual revenues. However, there is no dispute, and the record establishes, that the Casino's gross revenues and interstate transactions satisfy the Board's commerce standards for asserting jurisdiction. See GC Exh. 1(m); Tr. 22–28.

Further, there is no evidence that applying the NLRA would abrogate any treaty rights. In fact, there is no treaty whatsoever between the U.S. Government and the Pauma Band (Jt. Exh. 1; Tr. 33–35). Moreover, the Casino repeatedly assured its employees, in writing, both before and during the relevant events here, that they were “protected” by Federal law and the NLRA. The Casino even gave employees the address and telephone number of the Board's Regional Office in San Diego to learn about their “rights” (CP Exhs. 6–9).⁷

Nevertheless, the Casino now argues that the Board should decline jurisdiction, citing the Pauma Band's history of severe poverty and total dependence on the Casino's revenue to fund the tribe's governmental operations. As factual support for this history, the Casino's posthearing brief references and attaches various nonrecord documents (34 in all), including Federal and State Government reports, newspaper articles, an American Gaming Association report, the Pauma Band's own website and correspondence, and a Wikipedia page. The Casino asserts that these documents are publicly available on the internet and that the facts therein are appropriate for judicial notice under FRE 201 (Judicial Notice of Adjudicative Facts).⁸

Such judicial notice might well be appropriate with respect to the truth of statements contained in the cited Federal and State Government reports, to the extent they are not subject to reasonable dispute as required by FRE 201 and fall within the hearsay exception for public records under FRE 803(8) or are corroborated. See, e.g., *San Manuel*, 341 NLRB at 1055 fn. 3 (taking administrative notice, based in part on reliable government sources, that the casino there was located on the reservation). However, as indicated by the General Counsel and the Union, judicial notice is clearly not appropriate with respect to the uncorroborated hearsay statements contained in the cited newspaper articles, American Gaming Association report, and Wikipedia page, absent a showing or basis to conclude that the statements properly fall within an exception to the hearsay rule and/or are free from reasonable dispute, i.e., that the stated facts are generally known or their accuracy can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1022 (9th Cir. 2009), cert. denied 131 S.Ct. 3055 (2011); and *McCrary v. Elations Co.*, mem. 2014 WL 1779243 at *1 fn. 3 (C.D. Cal. Jan. 13,

⁷ There is no contention that the Casino is equitably estopped, by its prior assurances to employees, from now challenging the Board's exercise of statutory or discretionary jurisdiction to address and remedy the alleged unfair labor practices. However, pursuant to FRE 801(d)(2), the Casino's prior statements admitting jurisdiction, which were offered by the Union and received into evidence without objection (Tr. 255), may properly be considered in evaluating the Casino's contrary arguments here. See 2 McCormick on Evidence Sec. 256 (7th ed., database updated March 2013), and cases cited there, including *Russell v. UPS, Inc.*, 666 F.2d 1188, 1190 (8th Cir. 1981) (prior statements or admissions of a party may properly be received and considered under FRE 801(d)(2) even if in the form of an opinion or a conclusion of law).

⁸ The Casino does not contend that the facts in the attached documents may properly be noticed as legislative or “background” facts, which are not subject to the requirements of FRE 201. See Advisory Committee's Note to FRE 201(a), and Graham, 21B Fed. Prac. & Proc. Evid. Sec. 5103.2 (2d ed. database updated April 2014).

2014). See also *Rivas v. Fischer*, 687 F.3d 514, 520 fn. 4 (2d Cir. 2012); and *American Prairie Construction Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009), and cases cited there.

Given the Pauma Band's ownership and operation of the Casino, judicial notice is also inappropriate with respect to reasonably disputable statements from the tribe's website and correspondence supporting the Casino's position. Cf. *Passa v. City of Columbus*, 123 Fed. Appx. 694, 698 (6th Cir. 2005) (judge improperly took notice of city attorney's website to establish the truth of an adjudicative fact supporting the city's position given that the city attorney was a part of the city).⁹

In any event, it is ultimately unnecessary to decide whether it is appropriate to take FRE 201 judicial notice of any or all of the 34 documents for the truth of one or more of the statements therein. Even if such notice were taken over the objections of the General Counsel and the Union as requested by the Casino, the prior Board decisions would still be factually indistinguishable. See *San Manuel*, supra (tribe had no resources for many years prior to the casino); and *Soaring Eagle* (casino revenues constituted 90 percent of tribal income), above. See also *Chickasaw Nation*, 359 NLRB 1472 fn. 4; and *Little River Band*, 359 NLRB 641 fn. 5 (tribe's reliance on casino revenues to fund its governmental operations and programs does not make the casino's operations governmental as well).¹⁰

The Casino also argues that the Board's prior decisions are simply wrong, citing the Supreme Court's recent opinion in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (May 27, 2014).¹¹ However, as the Casino acknowledges, the Court in *Bay Mills* reaffirmed its earlier precedents (which the dissenting Justices would have overruled) addressing tribal sovereign immunity from lawsuits by States. The Board was well aware of those precedents and distinguished them. See, e.g., *San Manuel*, 341 NLRB at 1063 fn. 22 (distinguishing the Court's prior opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), one of the principal precedents the Court cited and followed in *Bay Mills*).¹²

⁹ As noted by the General Counsel and the Union, judicial notice of such documents is also inappropriate here, at least to the extent they address how the Casino's revenues are distributed, given Attorney Wilson's statements at the hearing, during discussions about unresolved subpoena compliance issues, that the Casino would not be putting on any such evidence because it is irrelevant. See Tr. 21–29, 36, 256–258. However, I would reach the same conclusion regardless.

¹⁰ It is therefore likewise unnecessary to rule on the General Counsel's and the Union's motions to strike Attorney Wilson's declaration and attached exhibits, which the Casino submitted with and cited in its posthearing brief in support of its request for judicial notice.

¹¹ The General Counsel's motion to strike the Casino's June 2 notice of the Court's *Bay Mills* opinion is denied. The Casino's notice is somewhat lengthy (5 pp.), and thus fails to comport with the 350-word limitation announced in *Reliant Energy*, 339 NLRB 66 (2003), governing such postbriefing notices filed with the Board on exceptions to an ALJ's decision. However, it consists mostly of excerpts from the Court's majority and concurring opinions. While it also contains brief explanations why the excerpts are significant, the explanations were helpful in understanding and addressing the Casino's position.

¹² As indicated by the following excerpt, the Board majority in *San Manuel* also found some support in the court's opinion:

Accordingly, consistent with *San Manuel*, et al., I find that the NLRA applies and that the Board has jurisdiction over the dispute. See generally *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

II. THE ALLEGED UNFAIR LABOR PRACTICES

It is well established that employees have a right under the NLRA to wear union insignia, particularly during an organizing campaign, and that a rule prohibiting them from doing so is unlawful unless the employer can show special circumstances justifying the restriction. *Republic Aviation Corp.*, 324 U.S. 793 (1945); *Pay 'n Save Corp. v. NLRB*, 641 F.2d 697, 700 (9th Cir. 1981); and *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939 (D.C. Cir. 1999). See also *NLRB v. Starbucks Corp.*, 679 F.3d 70, 77 (2d Cir. 2012); *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1214 (6th Cir. 1997); and *NLRB v. Malta Construction Co.*, 806 F.2d 1009, 1022 (11th Cir. 1986). The Board has found such special circumstances in various situations, including where the ban would unreasonably interfere with the public image the employer had established through appearance rules as part of its business plan. See *W San Diego*, 348 NLRB 372, 377 (2006) (hotel's ban on any adornments other than minimal jewelry, pursuant to its business plan to create a distinct, trendy, and chic "wonderland" atmosphere, was lawful to the extent it applied to servers who wore professionally designed all-black uniforms and a small "W" pin while in public areas).¹³

As indicated above, the Casino's handbook appearance rule here broadly prohibits employees from wearing "any badges, emblems, buttons or pins on their uniforms" other than their ID badge. Thus, it plainly encompasses union buttons and is presumptively unlawful. Further, although many employees wear uniforms, unlike in *W San Diego* the Casino does not contend that the rule is intended to prevent any variation in employee appearance or create a distinct or unique look in general. Indeed, the uniforms themselves vary; some employees are given white shirts, some are given brown shirts, and some are given purple and gray striped shirts. In addition, employees are expressly permitted by the rule to wear other "casual business attire"—which "includes, but is not limited to: slacks, khakis, sport shirts, skirts and dresses, turtlenecks, and sweaters"—and they frequently wear their own pants, socks, and shoes. Employees are likewise permitted by policy or practice to sport other items, including decorative badge clips and frames of any

Oklahoma Tax Commission [], upon which our dissenting colleagues relies, is distinguishable. At issue in that case is amenability of a tribe to suit by a State government to collect a tax on commercial transactions on a reservation; whereas, in the instant case, the Federal Government's regulatory power is at issue. Moreover, the Court found that the State could hold the tribe liable for taxes on sales by Indians to non-Indians because such liability imposed only a minimal burden on the tribe. [485 U.S.] at 512–515.

¹³ As discussed in the above-cited cases, the Board has also found special circumstances in other situations not relevant here, such as where the employer showed that the size or placement of the buttons could be unsafe or cause damage, or the wording or message on the buttons could exacerbate employee dissension.

color (including hot pink) or design (including zebra or leopard stripes).¹⁴

Nevertheless, the Casino argues that its rule is justified because union or other “emblematic” buttons containing a political or religious message might offend its customers. The Casino asserts that, while it has permitted other, decorative items, it has consistently required employees to remove any such “emblematic” buttons or pins, including those supporting U.S. Troops or celebrating U.S. holidays such as Independence Day (July 4th) and Christmas.¹⁵

However, there are two significant problems with this argument. First, it is contrary to the evidence, which indicates that the Casino has allowed employees to wear a variety of holiday pins on the casino floor over the last several years.¹⁶ Moreover, the rule applies to all employees, even though some do not work on the casino floor or around customers.¹⁷

Second, even assuming the argument was supported by the facts, it is contrary to law. The Board has repeatedly held that employer bans on all buttons or emblems, including union buttons, are not justified merely because employees have contact with customers. See, e.g., *Target Corp.*, 359 NLRB 953, 981 (2013); *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 35 (2007); *Ark Las Vegas Restaurant*, 335 NLRB 1284, 1288 (2001); *Mauka, Inc.*, 327 NLRB 803, 809–810 (1999); and *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982). See also *Pay ‘n Save*, above (rejecting employer’s similar argument that its button ban was meant to avoid the appearance of an endorsement of a controversial position that might offend customers). Further, there is nothing remarkable about the union button here that might arguably justify the Casino banning it from public areas. As indicated above, the button is relatively small and does not contain any vulgar or offensive language or images.¹⁸

¹⁴ R. Exh. 2; GC Exhs. 4, 7, 11; Tr. 60, 72, 82–85, 99, 102–103, 113–114, 119–121, 155, 164–165, 171, 174–177, 180, 200–201, 235–240, 308–309, 338–341, 356.

¹⁵ See Tr. 301, 314–315, 302, 334.

¹⁶ See in addition to the record citations in fn. 14 above, Tr. 92–93, and 200–227. I discredit the testimony of the Casino’s general manager and HR director that they simply did not notice such items being worn by employees around customers. The general manager admitted that he is on the casino floor for 16 hours every Friday and Saturday night, is “very aware” of employees, and is “very hands on” (Tr. 313). The HR director likewise admitted that she walks through the casino at least twice a day and sees a lot of employees (Tr. 354). See also Tr. 335 (everyone in supervision is supposed to enforce the rule); and GC Exh. 5 (acknowledging that standards and policies had been “relaxed” prior to April 2013).

¹⁷ See Tr. 307 (rule applies regardless of where employee works); and Tr. 179, 181–196 (rule was enforced against pantry attendant who wore union button even though she works in the kitchen all day and does not go on the casino floor). The record indicates that employees might occasionally be seen walking to or from their cars by customers who sometimes park in the designated employee parking area on the far side of the casino, near the rear employee entrance (R. Exh. 1; Tr. 281–284, 294). However, there is no evidence that the Casino bars employees from having stickers or emblems on their cars. Nor is there any evidence that customers have complained about seeing employees wearing emblematic buttons in the parking lot.

¹⁸ Compare *Leiser Construction, LLC*, 349 NLRB 413 (2007), and cases cited therein. The Union presented evidence that similar inoffen-

Accordingly, consistent with the above-cited precedent, I find that the Casino violated Section 8(a)(1) of the Act as alleged.¹⁹

CONCLUSIONS OF LAW

1. Casino Pauma is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a handbook rule prohibiting employees from wearing any union buttons, and enforcing that rule by threatening to suspend or terminate employees who wore a union button and instructing its managers, supervisors, and agents to surveil employees to see if they were wearing a union button, Casino Pauma has interfered with, restrained, and coerced employees in the exercise of their rights, in violation of Section 8(a)(1) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring the Casino to cease and desist and to take certain affirmative action. Specifically, the Casino will be required to rescind the subject handbook rule and advise the employees that this has been done in the manner set forth in *Target Corp.*, above. The Casino will also be required to rescind the April 18, 2013 email it sent to Huerta about violating the rule, and to notify him in writing that this has been done and that it will not be used against him in any way. In addition, the Casino will be required to post a notice to employees, in both English and Spanish, assuring them it will not violate their rights in this or any like or related manner in the future. Finally, as the Casino communicates with employees by email, it shall also be required to distribute the notice to employees in that manner, as well as by any other electronic means it customarily uses to communicate with employees.²⁰

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended²¹

ORDER

The Respondent, Casino Pauma, Pauma Valley, California, its officers, agents, successors, and assigns, shall

divise union buttons are commonly worn by represented employees who work in public areas at other casinos in California and Nevada (Tr. 368–412; CP Exhs. 1–5, 19–21). I credit this evidence, but would reach the same conclusion without it based on the Board and court decisions cited above.

¹⁹ It is either stipulated or undisputed that the Casino took the alleged actions previously described above. See Jt. Exh. 1; GC Exhs. 3, 5, 10, 13; CP Exh. 7; Tr. 42, 67–68, 91–92, 103, 116–118, 162–164, 188–195, 234, 247–248, 303–304. Although the complaint alleges that the Casino’s April 18, 2013 email to Huerta also violated Sec. 8(a)(3) of the Act, it is unnecessary to address this additional allegation as it would not materially affect the remedy. See *Fairfax Hospital*, 310 NLRB 299 fn. 4 (1993).

²⁰ The Union’s additional request for litigation costs is denied. See *Waterbury Hotel Mgmt.*, 333 NLRB 482 fn. 4 (2001).

²¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from
 - (a) Maintaining or enforcing a rule that prohibits employees from wearing any union buttons or insignia.
 - (b) Threatening to discipline employees, either orally or in writing, for wearing any union buttons or insignia.
 - (c) Surveilling employees to see if they are wearing any union buttons or insignia.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Rescind its handbook rule banning employees from wearing any union buttons or insignia.
 - (b) Furnish all current employees with inserts for their current employee handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.
 - (c) Within 14 days of the Board's order, rescind and remove any reference from its files to the April 18, 2013 email it sent to employee Victor Huerta about violating the rule, and, within 3 days thereafter, notify Huerta in writing that this has been done and that the email will not be used against him in any way.
 - (d) Within 14 days after service by the Region, post at its facility in Pauma Valley, California, copies of the attached

notice marked "Appendix" in both English and Spanish.²² Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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, the notices shall be distributed by email, as well as by 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. In the event that, during the pendency of these proceedings, 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 employees and former employees employed by the Respondent at any time since April 1, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director 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.

²² 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."