

**Silver Nugget Casino & RV Park and Professional,
Clerical & Miscellaneous Employees, Local
Union 995. Case 31-CA-12450-2**

14 October 1983

DECISION AND ORDER

**BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS**

On 8 June 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed 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 brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ We agree with the judge's conclusion that the Respondent did not violate Sec. 8(a)(5) and (1) of the Act by refusing to bargain with the Union solely on the ground that words and conduct of the Respondent's president demonstrate the absence of an agreement to recognize the Union, implied or otherwise. *Trevoze Family Shoe Store*, 235 NLRB 1229 (1978). As a result, we find it unnecessary to pass on the judge's discussion concerning *Snow & Sons*, 134 NLRB 709 (1961), *enfd.* 308 F.2d 687 (9th Cir. 1962), line of cases and *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). The judge mistakenly states that the complaint alleges violations of Sec. 8(a)(1) and (3) of the Act; the complaint alleges violations of Sec. 8(a)(5) and (1) of the Act.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was heard before me at Las Vegas, Nevada, on April 26, 1983, pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 31 on October 29, 1982,¹ and which is based on a charge filed on September 14 by Professional, Clerical & Miscellaneous Employees, Local Union 995 (the Union). The complaint alleges that Silver Nugget Casino & RV Park (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (the Act).

Issues

Whether or not on September 1 Respondent agreed to recognize the Union as the exclusive collective-bargaining representative in a warehouse unit on proof of major-

¹ All dates herein refer to 1982 unless otherwise indicated.

ity as demonstrated by a card check. The General Counsel contends such an agreement may be found implicit in the conversation which occurred between the union officials and Respondent's president on that date. Respondent contends that no such agreement may be inferred from the conversation and asserts that under the Supreme Court's decision in *Linden Lumber Div.*, 419 U.S. 301 (1974), it is entitled to insist on the Union proving its majority status in a National Labor Relations Board conducted election.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs and they have been carefully considered.

From the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

At the hearing, Respondent admitted that it is a Nevada corporation with an office and principal place of business located in North Las Vegas where it operates a small casino, restaurant, and recreational vehicle park. It further admits that its annual gross revenue exceeds \$500,000 and that it annually purchases and receives goods or services valued in excess of \$2,000 from sellers and suppliers outside Nevada. Accordingly, Respondent admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent admits and I find the Union to be a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

As noted, Respondent operates a small casino and recreational vehicle park in North Las Vegas. Within the facility it operates various games of chance and one or more liquor bars and restaurants. The basement of the facility houses various department headquarters as well as the casino warehouse. The warehouse receives goods from vendors and stores them until called for by the appropriate department. To this end it stores gaming papers and equipment, liquor, and foodstuffs. Although there is a dispute regarding the employee status of one of the individuals, it is apparent that Respondent employs two permanent full-time warehousemen. On occasion it has also employed temporary and/or permanent part-time warehousemen.

The RV Park, located a short distance from the casino, consists of a convenience store which sells beer, foodstuffs, and recreational vehicle accessories. It rents camping space to customers desiring to park near the casino. It has approximately five employees who perform various sales and stocking duties there. In addition, Respondent employs two or more minibus drivers. Their

duties principally consist of transporting customers, often senior citizens, to the casino from various retirement homes or communities in the Las Vegas area.

In mid-August, the two warehousemen signed union authorization cards. These were turned over to Union Organizer John Jones. On September 1 Union Secretary-Treasurer Richard S. Thomas and Jones visited Respondent's president, Ed Nigro, at his office in the casino. At 10:30 that day they handed Nigro a demand letter in which they asserted that the Union "represents a majority of the warehouse employees at the Silver Nugget Casino & RV Park." They requested Respondent to engage in collective bargaining but concluded with the following statement: "Should you have any good-faith doubt as to our majority representation, please be informed that we would be willing to have a mutually agreed upon third party conduct a card check to determine whether or not Local No. 995 represents the majority of the above-mentioned employees."

Thomas testified as follows:

A. (Mr. Thomas): We presented him [Mr. Nigro] with a letter. He read the letter. He expressed some surprise that particularly one of the gentlemen had signed the card. I asked him if he would like to look at the cards because there was really nothing to hide in a two-man unit. He said he would. I presented him with the cards. He examined them in detail, again expressed some surprise, indicated he did not have a position at that point, and would let us know something in a couple of days.

Q. (by Mr. Norton): And did anything further occur at that meeting?

A. No. We left and the meeting only lasted some 15 minutes and we were to contact him—I believe that was on a Wednesday—we were to contact him a couple of days later, which would have been a Friday.

Q. And did you receive a response from him?

A. Yes.

Q. By what means?

A. By mail. By letter.

Q. (By Mr. Efroymsen): Again, Mr. Thomas, it is true, is it not, that Mr. Nigro, during the course of the meeting on September 1st at no time told you that he would recognize the union if you demonstrated a majority of the shipping and warehousing people, is that correct?

A. That is correct. There was no conversation as to whether or not he would or he wouldn't.

Q. Didn't Mr. Nigro in that meeting tell you he wanted a couple of days to think about it?

A. He said he would let us know what his decision was in a couple of days.

Q. And the next communication you had with Mr. Nigro was the only response you ever had from Mr. Nigro either in the meeting or at anytime thereafter with respect to your demand request . . . was the letter you received from Mr. Nigro, is that correct?

A. That is correct.

The letter to which Thomas refers is from Nigro to Thomas dated September 2. In the letter Nigro stated:

Be advised that the Silver Nugget has a good faith doubt concerning your claim in that Teamsters Local Union No. 995 represents a majority of its employees in a unit which is appropriate for collective bargaining under the National Labor Relations Act.

If you wish to pursue this matter further, we suggest you utilize the procedures of the National Labor Relations Board.

The parties stipulated that on September 7 the Union filed a petition in Case 31-RC-5390 seeking an NLRB election in the warehousemen's unit. They further stipulated that on November 15 pursuant to a withdrawal request filed by the Union the Regional Director withdrew the notice of hearing on the petition and approved the withdrawal request. No election has been held.

The General Counsel's complaint alleges no other violations of the Act.

IV. ANALYSIS AND CONCLUSIONS

The complaint alleges that the foregoing facts establish that Respondent "impliedly agreed to recognize" the Union upon a showing of majority status, and that Respondent failed to honor that agreement. Respondent argues that the facts do not show that any agreement to recognize was ever reached, either express or implied.

The General Counsel principally relies on the Board's decision in *Snow & Sons*, 134 NLRB 709 (1961), *enfd.* 308 F.2d 687 (9th Cir. 1962). In that case the Board found an employer violated Section 8(a)(5) and (1) of the Act when it reneged upon an agreement to recognize the union once proof of majority in an appropriate unit had been shown. This analysis appears to have been modified by the Supreme Court's decision in *Linden Lumber Div. v. NLRB*, *supra*, despite the fact that the Court specifically reserved answering that question. It agreed with the Board, however, that in the absence of other unfair labor practices, an employer is free to insist on a Board election to prove the union's majority status. As a corollary, the decision permits an employer, accused of no unfair practices and which has made no agreement regarding voluntary recognition, to present to the Board any reasonable arguments it may make with respect to the scope of the unit. Such issues are routinely normally dealt by the Regional Director of the Board during the preelection hearing.

I do not deem it necessary to determine, on these facts, whether *Snow & Sons* has been abrogated altogether by *Linden Lumber*. First, there is no evidence that an agreement to recognize was ever reached. Union Secretary-Treasurer Thomas did not testify that an agreement was reached. Indeed, he specifically stated that it was not. It is true that he showed both authorization cards to Respondent's owner, Nigro, but only to put to rest Nigro's disbelief that one of the employees had signed a card. Thomas admitted that Nigro then responded that he had no position to take with respect to the demand at

that time and would need a day or two to formulate a response. The response which followed almost immediately was to the effect that Respondent doubted that the Union represented a majority "in an appropriate unit." On this evidence all parties agree that Respondent did not explicitly agree to recognize the Union on the basis of the cards. The General Counsel argues, nonetheless, that such an agreement should be implied from the circumstances. He relies on *Gregory Chevrolet*, 258 NLRB 233, 240 (1981), for the proposition that when an employer agrees to look at the cards it "has undertaken a determination which he could have insisted be made by the Board and he may not thereafter repudiate the route that he himself had selected." That case relies on *Sullivan Electric Co.*, 199 NLRB 809 (1972), as well as *Snow & Sons*.

First, the cases cited by the General Counsel, *Gregory Chevrolet*, *Sullivan Electric*, *Harding Glass Industries*, 216 NLRB 331 (1975), and *Idaho Pacific Steel Warehouse Co.*, 227 NLRB 326 (1976), are easily distinguished. In each of those cases the employer committed additional unfair labor practices. Respondent is not accused of doing so. Thus the case law is not apposite to the facts, or even the theory, presented here.

Second, even though Nigro looked at the cards he responded that he had not formulated a position but would do so shortly. He kept his word and responded by letter the very next day. Thus his words and conduct demonstrate the absence of an agreement, implied or otherwise. He simply asked the Union to wait until he could intelligently reply. An agreement to recognize may not be implied from such a request. Nigro's response was prompt, and the Union did not rely to its detriment or change its position. It simply agreed to wait for his response. As no detrimental reliance has been shown, nor was it likely in view of the quick response, I can infer no agreement to recognize.

It may well be that Nigro did not doubt that a majority of the warehousemen had signed cards but there is still the question of the appropriate unit. The Union is party to a master agreement covering so-called backend employees of 35 to 40 casinos in the Las Vegas area. That contract covers warehousemen as well as minibus drivers and RV Park employees if the casino employs such classifications. In addition to the two warehousemen, Respondent employs at least two backend classifications which the Union traditionally represents, the two to four minibus drivers and the five RV Park employees. Given the fact that since the Union traditionally represents such employees in this industry and since it can reasonably be expected to seek to apply its master agreement wage levels to Respondent, Respondent was well within its right to argue that a unit broader than only

warehousemen would be the appropriate unit. I make no judgment regarding that,² only to observe that if *Snow & Sons* were mechanically applied the right even to make the argument would be abrogated. As the Supreme Court in *Linden Lumber* specifically preserves that right, I must conclude that it, not *Snow*, controls. Had Respondent committed unfair labor practices precluding an election the result might well be different. *Linden Lumber*, 190 NLRB 718 (1971), *Sullivan Electric Co.*, supra, and *Green Briar Nursing Home*, 201 NLRB 503 (1973).

Thus, on two grounds the complaint must be dismissed. First, the General Counsel has not proven that a recognition agreement was reached between Respondent and the Union, and second, as no other unfair labor practices have been alleged, *Linden Lumber*, rather than *Snow & Sons*, applies. See also *Trevoze Family Shoe Store*, 235 NLRB 1229 (1978). Respondent therefore has the right to insist on proof of majority in a Board election in a unit the Board, rather than the Union, deems appropriate. The complaint should be dismissed.

Upon the foregoing findings of fact and upon the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Silver Nugget Casino & RV Park, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has failed to prove that Respondent engaged in any violation of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³

The complaint is dismissed in its entirety.

² Respondent's position cannot be characterized as without merit. For example, in *Walker-Roemer Dairies*, 196 NLRB 20 (1972), the Board, in part relying on industry practice, expanded the petitioned-for unit to include certain employees where the union traditionally represented them in similar businesses. A similar argument might well have been permitted here had the petition been processed.

³ If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections then shall be deemed waived for all purposes.