UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

MASHANTUCKET PEQUOT GAMING ENTERPRISES, d/b/a FOXWOODS RESORT CASINO and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO	Case No. 34-CA-12081

COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO JOINT MOTION TO VACATE AND SET ASIDE THE DECISION AND ORDER OF THE BOARD

I. INTRODUCTION

On April 22, 2008, Mashantucket Pequot Gaming Enterprises, d/b/a Foxwoods Resort Casino (herein Respondent) and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), AFL-CIO (herein the Union) filed a Joint Motion to Vacate and Set Aside the Decision and Order of the Board in *Foxwoods Resort Casino*, 353 NLRB No. 32 (2008)(herein the Motion) based on a settlement agreement between the parties resulting from the execution of a collective-bargaining agreement negotiated under tribal law. Counsel for the General Counsel opposes the Motion, unless the Board makes it clear in any vacatur order that the jurisdictional determination in the underlying representation case will remain binding on the parties.

II. PROCEDURAL HISTORY

Respondent operates a commercial gaming and entertainment establishment, including casinos, hotels, and retail shops, on the Mashantucket (Western) Pequot Tribe reservation in Mashantucket, Connecticut. On September 28, 2007, the Union filed a representations petition in Case No. 34-RC-2230 for a unit of full-time and regular part-time dealers. The Respondent opposed the Board's assertion of

jurisdiction on the grounds that it would impermissibly infringe on the tribe's status as a sovereign nation. On October 24, 2007, the Regional Director issued a decision and direction of election (herein DD&E) finding that the Board properly exercised jurisdiction pursuant to the Board's decision in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). A request for review of the DD&E was denied. An election was held on November 24, 2007, which the Union won. On December 3, 2007, the Respondent filed objections to the election, and on December 21, 2007, issued a supplemental decision on objections and notice of hearing. On January 16, 2008, the Board issued an order rejecting Respondent's appeal of the objections that had been overruled by the Regional Director. On June 30, 2008, the Board certified the Union as the exclusive collective-bargaining representative of the unit of dealers. See *Foxwoods Resort Casino*, 352 NLRB 771 (2008).

To test certification, Respondent refused to recognize and bargain with the Union. On July 18, 2008, the Region issued a Section 8(a)(5) complaint in Case No. 34-CA-12081 and, on August 20, 2008, filed a motion for summary judgment. On September 30, 2008, the Board granted the motion for summary judgment and ordered Respondent to bargain with the Union. *Supra*, slip op. at 1-2. The Board rejected Respondent's arguments that it was exempt from the Board's jurisdiction because those arguments had already been rejected in the underlying representation proceeding. *Id.* slip op. at 1. On October 2, 2008, Respondent filed a petition with the Second Circuit Court of Appeals seeking to vacate the Board's order.

Beginning in late 2008, the parties began bargaining pursuant to tribal law and, on January 27, 2010, reached a collective-bargaining agreement. The Union agreed to withdraw all unfair labor practice charges predating the contract, including the charge that resulted in the Board bargaining order.

III. ARGUMENT

In support of their Motion, the parties contend that the rights and interest of all parties have been protected and the policy objectives underlying the Board order have been satisfied due to their negotiating and agreeing to a collective-bargaining

agreement, and that vacating the order would advance the parties' bargaining relationship. Counsel for the General Counsel strongly disagrees. Although the Union is party to a collective-bargaining agreement negotiated under tribal law and an ensuing settlement agreement, employees and other unions who may file unfair labor practice charges against Respondent are not. Given the size and scope of Respondent's gaming and entertainment enterprises, it is likely that organizing campaigns will be conducted in the future and that unfair labor practice charges will be filed. When the Board vacates a decision pursuant to a settlement agreement there is no longer a court-enforceable order and the decision will have no res judicata or collateral estoppel effect against the parties. *Caterpillar, Inc.*, 332 NLRB 1116, 1116 (2000). Because the jurisdictional question was a "primary concern" in the representation proceeding, absent vacatur it will be res judicata not only with respect to future 8(a)(5) cases but also with respect to future 8(a)(1) or (3) cases. See *Verland Foundation*, 296 NLRB 442, 443 (1996) (precluding party in Section 8(a)(3) case from relitigating jurisdictional issue that had been of primary concern and thus was fully litigated in prior representation proceeding). Requiring the relitigation of the jurisdictional question in such future cases would waste the time and resources of the Agency and the parties, and would not further the public interest.

Even though the Motion does not expressly request vacatur of the underlying representation decision, it is not clear that the representation case would remain viable if the unfair labor practice case were vacated, absent a clear statement to the contrary from the Board in any order to vacate. In this regard, in *Pratt Institute*, 288 NLRB 1122, 1122 & n.3 (1988), the Board vacated a decision and order issued against the employer in a test of certification case pursuant to the union's request, which the General Counsel did not oppose. Although the Board denied the employer's request that it also vacate the underlying representation decision, the Board stated that the denial "should not be construed as a reaffirmance of the Decision and Direction of Election on its merits," and that it deemed the "underlying representation case to be closed.

Based on the above, a statement that the jurisdictional findings in the underlying representation case remains binding on the parties in future cases is necessary to preserve limited Agency resources and to further the public interest.

Dated at Hartford, Connecticut, this 25th day of May, 2010.

Terri A. Craig
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National Labor Relations Board
Region 34

Served by facsimile transmission only on the following:

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Richard B. Hankins, Counsel for Respondent
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AFFIDAVIT OF SERVICE OF copies of **COUNSEL FOR THE GENERAL COUNSEL'S OPPOSITION TO JOINT MOTION TO VACATE AND SET ASIDE THE DECISION AND ORDER OF THE BOARD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by facsimile transmission upon the following persons, addressed to them at the following addresses:

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Subscribed and sworn to before me this 25th day of May, 2010	DESIGNATED AGENT Terri L. Gupton NATIONAL LABOR RELATIONS BOARD