United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 2, 2000

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Wyndham Hotel LAX 512-5012-1737
Case 31-CA-24088 512-5012-6735

This case was submitted for advice on whether the Employer promulgated a lawful rule of access for off-duty employees, and otherwise lawfully applied that rule against an employee who was invited to remain on the Employer's premises after her employment shift ended.

The Employer and the Union, Hotel and Restaurant Employees Local 814 (HERE), have been unsuccessfully negotiating for a bargaining agreement. The Employer's revised House Rule 19(m) provides that employees may be immediately discharged for:

> unauthorized use of guest rooms or guest facilities. Unauthorized presence at guest functions or in guest areas, including (but not limited to) guest rooms, restaurants, bars, lounges or meeting rooms. Employees may not actually socialize with, date, or meet with guests, associates or visitors on property, unless part of a bona fide job responsibility.

Alleged discriminatee Diaz, who is virtually illiterate and speaks little or no English, began working for the Employer as a room attendant in January 1999. At that time, Diaz received a Spanish version of an employee handbook; that handbook did not contain the Employer's House Rules. Diaz had her daughter read the handbook to her and recalls no mention of any policy against returning to Hotel premises after hours.

On August 24, after Diaz completed her shift at 4:30 p.m., a Union organizer approached Diaz in the employee hallway. The organizer told Diaz that another union, the SEIU from New York, was staying at and also holding meetings in the Employer's Hotel. The organizer stated that after the SEIU finished its current business meeting, it wanted to meet with employees of the Hotel. Diaz

accompanied the organizer to the SEIU meeting room, where the SEIU meeting was still in progress.

After the SEIU group completed its meeting, they invited Diaz to address the group. Diaz spoke briefly in Spanish, translated by the HERE Union organizer, about the Employer's failure to sign a bargaining agreement. The SEIU group became angry, put on HERE Local 814 buttons, and proceeded to the Hotel lobby to demand to speak to the Hotel manager. Diaz, still in uniform, accompanied the SEIU group. After a brief confrontation in the lobby, Hotel personnel told the SEIU group that they would call the Hotel manager. The SEIU, still accompanied by Diaz, returned to the meeting room where the Hotel manager soon arrived. After a heated exchange, which the manager threatened to throw the SEIU group out of the Hotel. Diaz was visibly present throughout this incident.

The following day, an Employer personnel manager summoned Diaz and asked her what she had been doing with Hotel guests the previous evening. Diaz replied that they had invited her. The manager stated that Diaz would receive a warning for being on Hotel property after her shift had ended. When Diaz again protested that the guests had invited her, the manager stated that Diaz had to ask permission to stay on Hotel property. Diaz does not recall the manager citing any Hotel Rule.

We conclude, in agreement with the Region, that both the Employer's House Rule on off-duty employee access, and its application to Diaz in these circumstances, were unlawful.

In Tri-County Medical Center, Inc., 222 NLRB 1089, 1090 (1976) the Board held that a no-access rules for off-duty employees is valid only if it: "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." Absent substantial business justification, a rule may not deny off-duty employees access to parking lots, gates and other outside nonworking areas.

House Rule 19(m) is clearly unlawful as it fails to meet all three prongs of the Tri-County test. Concerning the first prong, the Rule initially refers narrowly to "guest rooms or guest facilities", but then broadly bans meeting with guests, associates or visitors "on property." To the extent that Hotel "property" includes interior and/or exterior non-work areas, the Rule is unlawfully

overbroad.[1] Regarding the second prong, it seems clear that the Employer did not previously disseminate this Rule to Diaz. Lastly, since the rule permits access only if "authorized, it is unlawful under the third prong because it does not apply "to off-duty employees seeking access to the plant for any purpose."[2]

Although Diaz does not recall the manager citing the instant Hotel Rule, the manager specifically advised Diaz that she was being warned for being on Hotel property after her shift had ended, and that in the future Diaz had to ask permission to stay on Hotel property. To the extent that the Employer was applying the unlawfully overbroad rule to Diaz, its application was also unlawful.

Finally, the Employer may argue that the Rule was not unlawfully applied to Diaz under Tri-County, because that case only involves employee access to communicate with fellow employees and not to the public. When off-duty employees seek access for appeals to the public, the Board applies a different test relying upon Babcock & Wilcox.[3]

Applying that test here, the SEIU group, lawfully on the Employer's property as paying hotel guests, invited

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[1] See Hudson Oxygen Therapy Sales Co., 264 NLRB 61 (1982)(ban on interior plant access unlawfully overbroad as applicable to non-work area employee lunch room).

[2] See Mariner Post-Acute Network, Case 11-CA-18096, Advice Memorandum dated February 10, 1999, finding a rule barring access unless "authorized by Administration" to be unlawful under third prong of Tri-County, citing Baptist Memorial Hospital, 229 NLRB 45, 49-50 (1977) (access rule invalid under Tri-County because, inter alia, off-duty employees' access not restricted for all purposes; employer permitted employees to visit patients and pick up paychecks during their nonduty hours).

[3] NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). See Providence Hospital, 285 NLRB 320 (1987) (off-duty employees' right to appeal to the public on employer private property governed by Babcock & Wilcox). See also A-1 Schmidlin, 312 NLRB at 201, fn. 3; Little & Co., 296 NLRB 691 (1989); W.S. Butterfield Theatres, 292 NLRB 30 (1988); 40-41 Realty Associates, 288 NLRB 200 (1988), affd. mem. sub nom. Amalgamated Dental Union Local 38-A v. NLRB, 867 F.2d 1423 (2d Cir. 1988);

Diaz into their meeting room as their guest. Diaz therefore fully shared in this SEIU guest privilege and was lawfully on Hotel property. Thus, the Employer did not have a valid property right to assert against Diaz, i.e., it had already accepted payment from the SEIU group to allow their use of the Hotel's property. The Employer has not shown that the SEIU group abused its guest rights or otherwise invalidly exercised them by inviting Diaz as their guest. Thus, the Employer did not have the right of exclusive use necessary to exclude the SEIU group and Diaz as its guest. Accordingly, the Employer unlawfully disciplined Diaz even under the rationale of Providence Hospital/A-1 Schmidlin as those cases applied Babcock & Wilcox.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's House Rule and its application to Diaz were both unlawful.

B.J.K.