UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: MARRIOT INTERNATIONAL, INC., D/B/A J.W. MARRIOTT LOS ANGELES AT L.A. LIVE, Respondent, and UNITE HERE LOCAL 11, Charging Party.	Case No. 21-CA-39556

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to Rule 102.46 of the Rules and Regulations of the National Labor Relations Board, Charging Party UNITE HERE Local 11 submits this Answering Brief to Marriott International Inc., d/b/a/ J.W. Marriott Los Angeles at L.A. Live ("Respondent")'s Exceptions and Brief in Support of Exceptions in the above-captioned unfair labor practice case.

I. INTRODUCTION AND STATEMENT OF THE CASE

On July 22, 2011, Administrative Law Judge Clifford H. Anderson ("the ALJ") issued the Decision and Proposed Order ("Decision") at issue.[1] The ALJ found that Respondent violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by maintaining rules governing off-duty employee access in two different employee handbooks. The ALJ ordered Respondent to rescind and give no effect to the unlawful rules. On September 9, 2011, Respondent filed 17 exceptions to the Decision and a brief in support of its exceptions. For the reasons hereafter set forth, the Respondent's arguments in favor of those exceptions are unpersuasive and its exceptions are without merit. The rules at issue are unlawful and the order to rescind them should be enforced.

II. STATEMENT OF FACTS

A. The Promulgation of the Work Rules at Issue

Respondent operates "L.A. Live," a hospitality complex in downtown Los Angeles that comprises the J.W. Marriott Hotel and Ritz Carlton Hotel.[2] The Charging Party has been the collective bargaining representative for a bargaining unit of employees at L.A. Live since April 2010.

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[1] Citations to the record are as follows: The ALJ's decision is cited as "Decision [page]"; the hearing transcript as "Tr. [page]; Respondent's exhibits as "Resp. Ex. [Number].

[2] For case of reference, the complex will be referenced to as the "Hotel" or "L.A. Live."

In early 2010, Respondent hired its initial complement of 400 to 500 employees. (Tr. 37.) During a series of orientation sessions, Respondent distributed a handbook that was then in use at Marriott properties in California (the "California Handbook"). (Resp. Ex. 1.) The California Handbook contained the following two rules at issue in this proceeding. At page six, the California Handbook states:

> Returning to Work Premises
> Associates are not permitted in the interior areas of the hotel more than fifteen minutes before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the hotel after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside non-working areas.

(Resp. Ex. 1, p. 6.) Also at page 6, the California Handbook states as follows:

> Use of Hotel Facilities
> The hotel and its facilities are designed for the enjoyment of our guests. If you wish to use the guest facilities during non-working hours, you need to obtain prior approval from your manager.

(*Id*.)

Subsequent to opening the Hotel, Respondent revised the California Handbook to render it more suitable to the L.A. Live "culture" (the "L.A. Live Handbook"). (Resp. Ex. 2.) It finalized the L.A. Live Handbook in November 2010 and distributed it to some 115 to 120 employees hired after that time. (Tr. 50.)

The L.A. Live Handbook states at page 43:

> Returning to Work Premises
> Employees are not permitted in the interior areas of the Property more than fifteen minutes (15) before or after their work shift. Occasionally, circumstances may arise when you are permitted to return to interior areas of the Property after your work shift is over or on your days off. On these occasions, you must obtain prior approval from your manager. Failure to obtain prior approval may be considered

> a violation of Company policy and may result in disciplinary action. This policy does not apply to parking areas or other outside non-working areas.

(Resp. Ex., 2, p. 43.) The L.A. Live Handbook states at page 44:

> Use of Property Facilities
> The Property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or resident floors, rooms, or elevators, in public restaurants, lounges, restrooms, or any other guest or resident facility unless on a specified work assignment or with prior approval from your manager. Permission must be obtained from your manager before utilizing any Property outlet, visiting family or friends staying at the Property, or using any of the above mentioned facilities. Please ensure that the manager of the area you intend to visit is aware of the approved arrangements.

(Resp. Ex. 2, p. 44.)

B. The Hotel's Facilities

The Hotel features a number of exterior facilities. It has an outdoor seating area with tables, chairs and couches. This seating area is connected to a bar called the "Mixing Room" located inside the Hotel. The outdoor seating area is accessible from both a door at the bar and from the exterior "campus area" through a low gate. The bar is closed during the day until 4 p.m. During that time, the outdoor seating area is accessible only from the outside. After 4 p.m., bar patrons may access the outdoor seating area through a door leading from bar. (Tr. 59-60.)

The Hotel has a circular driveway that serves as the *porte cochere* and valet parking drop off. (Tr. 61-63.) It has an exterior parking area where cars are held for valet parking and an underground parking lot used for valet parking. On the level beneath the lobby is a valet waiting area with seating for guests. (Tr. 61-63.) There is a separate employee parking structure located a few blocks from the hotel. (Tr. 65.)

III. LEGAL ARGUMENT

A handbook rule is invalid if it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 845 (1998)). If the rule explicitly restricts activities protected by Section 7, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Rules that do not explicitly restrict Section 7 activity may also be unlawful:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing by one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Id. at 647. The issue in this case is whether employees will reasonably construe the rules at issue to trench upon their Section 7 right to engage in protected activities on the Respondent's premises in an off-duty status.

The ability of off-duty employees to communicate concerning their terms and conditions of employment is fundamental to the exercise of the Section 7 right to self-organization and collective bargaining. Owing to the strength of this interest, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *N.L.R.B. v. Babcock and Wilcox Co.*, 351 U.S. 105, 113 (1956) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803, n. 10 (1945). "Time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property.'" *Republic Aviation Corp*., 324 U.S. at n. 10 (quoting *Peyton Packing Co*., 49 NLRB 828, 843 (1943)).

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the NLRB formulated an

analysis for examining the lawfulness of a rule restricting off-duty employee access to an employer's property. The Board stated:

> such a rule 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. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

222 NLRB at 174.

The ALJ ruled that the "Returning to Work Premises" and the "Use of Facilities" rules as set forth in both handbooks violate Section 8(a)(1) of the Act. As to the "Returning to Work Premises" rule, the ALJ found that the rules violate the third requirement of *Tri-County Medical Center* because they do not "apply to off-duty employees seeking access to the plant for any purpose," but give management the power of veto over what purposes are permissible and what purposes are not. (Decision, pp. 5-8.) As to the "Use of Facilities" rules, the ALJ found that the rules likewise unlawfully condition the exercise of Section 7 activity on managerial approval and are overbroad in their scope. (Decision, pp. 8-10.)

For the reasons hereafter discussed, Respondent's exceptions to the ALJ's decision are without merit and should be denied.

A. The ALJ Properly Concluded that Respondent's "Returning to Premises" Rules Are Unlawful

The ALJ ruled that the Respondent's "Return to Premises" rules violate Section 8(a)(1) of the Act because they do not prohibit off-duty employee for any purpose, and thus contravenes the third requirement of *Tri-County Medical Center, supra*. (Decision, pp. 5-8.) Respondent objects to the ALJ's reasoning based on Board and ALJ decisions that upheld rules that were narrower in both scope and effect than Respondent's rules. Respondent effectively asks the

Board to discard *Tri-County Medical Center*'s non-discrimination requirement. It argues that an employer should be able to permit off-duty access for activities that the employer considers "reasonable," while retaining the prerogative to deny access for Section 7 activities. Respondent's arguments are unpersuasive. In fact, they support a conclusion opposite to the one Respondent seeks: if access to interior nonwork areas for such purposes as waiting for a ride or picking up a paycheck pose no substantial concern to management's ability to maintain production and discipline, there is no appropriate basis for restricting off-duty access to such areas for the exercise of Section 7-protected activities either. An examination of applicable NLRB authority shows that the rules are unlawful and the order rescinding them should be affirmed.

1. The ALJ Correctly Applied Board Authority and Correctly Rejected Respondent's Mischaracterization of that Authority

The "Returning to Work Premises" rules in both handbooks prohibit an employee from accessing "interior areas" of the hotel more than 15 minutes before or after a shift. But this restriction is not absolute. Management may grant "prior approval" for employees to access interior areas of the hotel in undefined "circumstances." Although the rules do not explicitly refer to Section 7 activity, employees will reasonably read them to pertain to such activities. In fact, that is the only way that the rules logically can be read.

The rules themselves shed no light on the reasons and locations that management will approve of for off-duty access. The only way for an employee to know is to declare his purpose and see what management says. Presumably, an employee who seeks off-duty access to the cafeteria or administrative offices to wait for a ride, collect a paycheck, or meet a coworker will have no qualms about announcing the purpose of his or her visit. But the opposite presumption applies with respect to an employee who desires access to the same locations in order to discuss

employment conditions, solicit union membership, or collect an authorization card. The employee will be forced variously to identify his or her union involvement in advance, stay away, or risk discipline by lying about the purpose of the visit. This is inherently coercive. *See, e.g., see Mercury Marine-Division of Brunswick Corp.*, 282 NLRB 794, 794-795 (1987) (ruling that "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nowork areas is unlawful"); *see also Oaktree Capital Management LLC, d/b/a Turtle Bay Resorts*, 353 NLRB 1242, 1271-1272 (2009); *Doane Pet Care, DPC*, 342 NLRB 1116, 1121-1123 (2004); *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001); *Enterprise Products Co.*, 265 NLRB 544, 554 (1982); *Intercommunity Hospital*, 255 NLRB 468, 474-475 (1981); *Peyton Packing Co.*, 49 NLRB 828 (1943); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

Respondent cites Board and ALJ decisions to argue that employees would not reasonably read the "Returning to Work Premises" rules as pertaining to section 7-protected activities. But Respondent glosses over the distinctions between those rules and the ones at issue here.

Respondent relies principally on the decision of the two-member panel in *Crowne Plaza Hotel*, 352 NLRB 382, 385 (2008) ("*Crowne Plaza*").[3] An examination of the panel's analysis of the rule shows the error of the Respondent's argument. The rule stated:

> You should only be at the hotel during scheduled work hours. When you have punched out at the end of your shift, please leave the building promptly. Any

[3] As an unconfirmed two-member panel opinion, *Crowne Plaza* decision lacks authoritative weight. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Moreover, Chairwoman Liebman and Member Schaumber did not actually agree with one another that the rule in *Crowne Plaza* was lawful. Chairwoman Liebman indicated that she joined the relevant portion of the decision for "institutional reasons" only based on *Lafayette Park Hotel*, a decision in which she dissented in relevant part. *Id.* at n. 20. Thus, *Crowne Plaza* is effectively no more than the advisory opinion of a single Board member.

> employee caring to visit the hotel during non-work hours must first obtain permission from the General Manager. If an employee would like to patronize any of the food and beverage outlets, they may do so only with the prior permission of the General Manager.

Id. at 385. The *Crowne Plaza* panel did not, as Respondent argues, construe this rule broadly to pertain to off-duty access anywhere in the interior of the hotel. Rather, the panel analyzed the rule as one that "requires permission to patronize the *food and beverage outlets*" and, citing *Lafayette Park Hotel*, 326 NLRB 824 at 828, stated that "there are legitimate business reasons for a rule requiring employees to obtain permission before patronizing *the food and beverage outlets*." *Id.* (emphasis added). Thus, Respondent mischaracterizes the decision when it states that the "Board" held that "there were legitimate business reasons for a rule requiring off duty employees to obtain permission before entering the ***premises***." (Respondent's Brief in Support of Exceptions, p. 8)(emphasis added). The panel did not address that question at all. [4]

The Board's decision in *Lafeyette Park Hotel* does not support the Respondent's argument either. The rule at issue there stated:

> Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

326 NLRB at 826. Noting that the rule pertained explicitly to narrowly defined activities ("entertaining friends or guests" in the "restaurant or cocktail lounge"), a Board majority ruled that "a reasonable employee would not interpret this rule as requiring prior approval for Section

[4] In rewriting the *Crowne Plaza* panel's analysis to serve its purposes, Respondent appears to have gone farther than it intended when it substituted the term "*premises*" for "food and beverage outlets." The term "premises" encompasses both the interior and exterior of the facility. *See Lafayette Park Hotel*, 326 NLRB at 828. What Respondent apparently meant was "the interior of the premises." But the *Crowne Plaza* panel did not address the rule as applying to the "premises" *or* to the "interior of the premises." It addressed the rule narrowly as applying to the "food and beverage outlets."

7 activity." *Id.* at 827; *but see id* at 831 (Members Fox and Liebman dissenting). The majority's decision was premised on the fact that the rule applied to a specific location within the hotel (one where goods and services are sold) and for a defined purpose (consuming such goods and services.) But Respondent's rules are obviously not so narrow. Indeed, the Board's reasoning in upholding the validity of the narrow rule in *Lafayette Park* only serves to accentuate the overbreadth of Respondent's rules in this case. Neither *Lafayette Park Hotel* nor *Crowne Plaza* (which relied on *Lafayette Park Hotel*) supports Respondent's blanket prohibition against unapproved access to all interior areas of its property. *See Oaktree Capital Management LLC, d/b/a Turtle Bay Resorts,* 353 NLRB at 1272 ("The lawful rule in *Lafayette Park Hotel* limited the area of the hotel to which it applied (the restaurant and the cocktail lounge) and limited the employee activities to which it applied (entertaining friends or guests.) The present rule contains neither of these limitations").

Finally, Respondent relies on a Board case reviewing a hearing officer's report in *Jurys Boston Hotel*, 356 NLRB No. 114 (March 28, 2011).[5] Respondent erroneously refers to this as an "ALJ" decision and incorrectly states that the ALJ "adopted" the reasoning of *Crowne Plaza*. (*See* Respondent's Brief in Support of Exceptions, pp. 8-9; *compare* 356 NLRB at pp. 14-15.) In fact, the hearing officer did not mention *Crowne Plaza* at all. Furthermore, the Board did not address the hearing officer's analysis cited by the Respondent. Rather, the Board found that the employer committed objectionable conduct by maintaining rules that interfered with employees' abilities to engage in Section 7-protected activity. *Id.* at pp. 1-3. One of these objectionable rules was "[b]eing in an unauthorized area and/or loitering inside or around the Hotel without permission." *Id.* That rule interfered with employees' ability to discuss terms and conditions of

[5] This was a case involving objections to a decertification election, and was not an unfair labor practice proceeding.

employment at the workplace, which is "the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees." *Id.* at p.3. (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978)). While the hearing officer's "decision" does not help the Respondent even remotely, the Board's decision in *Jurys Boston Hotel* favors confirmation of the ALJ's analysis of the rules here at issue.

2. The ALJ Properly Rejected Respondent's Attack on the Validity of *Tri-County Medical Center*'s Non-Discrimination Requirement

Respondent challenges the ALJ's application of *Tri-County Medical Center*'s third requirement that a rule limiting off-duty access must apply to employees "seeking access to the plant for any purpose." (Decision, p. 5.) Respondent argues that an employer should be able to permit access for purposes that a manager may happen to find legitimate on a case-by-case basis, while restricting access for purposes that managers may consider inappropriate. As examples, Respondent cites "reasonable instances when use of the hotel may be necessary after an employee's shift (*i.e.*, the employee does not have a ride home, needs to pick up a paycheck, etc.)." (Brief in Support of Exceptions, p. 12.)

In support of its argument, Respondent cites two ALJ decisions: *Sedexo America, LLC*, 21-CA-39086, NLRB Div. of Judges (April 8, 2011), *available at* 2011 WL 1356754 and *Tenet Healthsystem Hospitals, Inc*., 21-CA-34307, NLRB Div. of Judges (Oct. 16. 2002), *available at* 2002 WL 31402769. Respondent's problem, once again, is that its own rules are far broader than the rules under scrutiny in those cases. The rule in *Sedexo America LLC* (which was essentially identical to the rule in *Tenet Healthsystem Hospitals*) permitted off-duty employees to access the hospital to engage in two specific activities: 1) to visit patients; and 2) to receive medical care as patients. *Sedexo America LLC*, at * 2. The rule prohibited access for any other

purpose or location, including to nonpublic, nonwork areas for purposes such as picking up paychecks. The rule did not provide for exceptions based on managerial approval.[6]

The Board need not render an advisory opinion as to the legitimacy of the rule in *Sodexo America LLC* because Respondent's rules are not remotely analogous to them.[7] Unlike the rules at issue here, Sodexo's access rule did not condition access based upon an employee declaring the purpose for his visit. It did not provide Sodexo management with unfettered discretion to approve or disapprove of the reason an employee seeks to gain entry. Sodexo management had no prerogative to draw arbitrary distinctions between an employee's accessing the cafeteria to wait for a ride versus an employee's accessing the cafeteria to discuss the union.

Respondent's effort to overturn *Tri-County Medical Center's* non-discrimination requirement should be rejected. This requirement plays an important purpose. It prevents management from permitting one group of employees to enter for a purpose that management finds appropriate, while denying access to another group of employees whose purpose management finds inappropriate. Such distinctions are not justified by the outward conduct of the employee: an employee waiting in the cafeteria for a ride will act no differently than an employee sitting in the cafeteria to discuss the union. Rather, they are based on the subjective view of management towards whether an employee "ought" to be engaged in one kind of conduct or another. Requiring employees to submit their requests for such approval is inherently coercive.

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[6] The rule contained a third exception for employees "conduct[ing] hospital related business." *Id.* at *2. But the ALJ determined that this third exception was "not really an exception at all" in light of company testimony that employees who are "conduct[ing] hospital related business" are actually *on-duty* because they are paid and under company supervision. *Id.*

[7] *Sodexo America* is pending exceptions before the Board.

3. Respondent's Acknowledgment that Access to Certain Interior Nonwork Areas Does Not Interfere with Its Ability to Manage Shows that there is No Basis for Restricting Access for Analogous Section 7 Activity

The proper conclusion that the Board should draw from Respondent's acknowledgement that off-duty access is appropriate for "reasonable" purposes is that off-duty access is equally appropriate for the "reasonable" exercise of Section 7-protected activities, whether or not management grants access for other reasons. This is particularly true with respect to nonpublic "back-of-the-house" areas such as cafeterias and break rooms. If it causes no undue interference with an employer's ability to maintain production and discipline to grant off-duty access to an employee to pick up a paycheck or wait in the cafeteria, one cannot imagine what legitimate managerial interest an employer has in restricting off-duty access to the same areas for the exercise of Section 7 activity. *See Intercommunity Hospital*, 255 NLRB 468, 474-475 (1981); *Baptist Memorial Hospital*, 229 NLRB 45, n. 3 (1977). Discussing the union in the cafeteria causes no more interference with managerial interests than waiting for a ride in the cafeteria. Picking up an authorization card causes no more interference than picking up a paycheck. Reasonable sign-in/sign-out procedures and conduct restrictions could address any operational concerns in both instances. No work is performed on the clock and the public will not ask an employee sitting in the employee cafeteria to perform a service. There is no legitimate basis in the hotel setting for restricting off-duty employee access to interior nonwork, nonpublic areas such as the cafeteria for the purpose of engaging in section 7-protected activity.[8]

[8] While the ALJ's decision rested on *Tri-County Medical Center*'s nondiscrimination requirement, Respondent's argument supports a broader alternative basis for confirming the Decision: there is no defensible basis for suppressing access to interior, nonwork areas of a hotel (and in particular cafeterias or break rooms) for Section 7-protected activity. The Board has so ruled in various instances where, as here, there is no business justification for restricting access. It should rule the same here. In addition to *Intercommunity Hospital*, *supra*, and *Baptist*

B. The ALJ Properly Concluded that Respondent's "Use of Hotel/Property Facilities" Rules Are Unlawful.

The ALJ property determined that the Respondent's "Use of Hotel Facilities" and "Use of Property Facilities" rules are overbroad. He reasonably read them to require advance approval for the exercise of Section 7-protected activity, and also to pertain to outside, nonwork areas to which Respondent concedes employees enjoy a right of access. (Decision, pp. 8-9.) Respondent argues that the Judge was "nitpicking" and did not read the rules as Respondent believes an employee reasonably would. Respondent's arguments are unpersuasive.

The Respondent first argues based on the hearing officer's decision in *Jury Boston Hotel*, *supra*, that an employee would understand that the present rules pertain to his activities as a "guest" of the Hotel, and not as an employee. In fact, the Respondent's rules are considerably broader than the rule in *Lafayette Park Hotel*—the only Board case that has adopted something like the principle that Respondent argues for. *See* 326 NLRB at 826. Contrary to Respondent's

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Memorial Hospital, *supra*, *see also Aladdin Gaming*, 345 NLRB 585, 620 (2005) ("The Board has held that a rule, which denies access to certain nonwork areas inside an employer's property, such as a cafeteria, to off-duty employees engaged in union activity is unlawful"); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, 1290, *aff'd on remand*, 343 NLRB 1281, 1283-84 (2004) (holding unlawful a rule limiting the time that off-duty employees may remain on property, and specifically referring to nonwork areas such as "locker rooms" and "restaurants"); *Panavision, Inc.*, 264 NLRB 1284, 1286 (1982) ("The Board has even refined [*Tri-County*] to prohibit denial of access to off-duty employees for union organizational activities in certain non-work areas *inside* the plant (e.g., the cafeteria")) (emphasis in original); *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61, 72 (1982) (finding unlawful a rule which forbade employees from "enter[ing] the plant during your off-hours unless you have been called in to perform a job assignment" because "since the rule here denies off-duty employees' access to any of the plant's facilities, including the plant lunch room, it is invalid. No business reasons are advanced to justify no-access to parking lots, gates, the lunchrooms and other nonworking areas."); *Maywood, Inc.*, 251 NLRB 979, 981 (1980) (restriction on off-duty access to employee cafeteria was unlawful); *Continental Bus Systems Inc.*, 229 NLRB 1262, 1262 (1977) (dropping the term "outside" from "nonworking areas" in reciting *Tri-County Medical Center*.)

understanding, employees would reasonably read these rules as applying to them as employees (even if also as "guests"). Furthermore, the rules grant management a discretionary power of veto over protected concerted activities in a far broader array of "guest areas" than *Lafayette Park Hotel*'s access restrictions to the restaurant and cocktail lounge. They are unlawful for that reason alone.

Respondent next argues that a reasonable employee would not read the rules to restrict off-duty access to areas where it concedes that an employee may rightfully engage in Section 7 activity. It accuses the ALJ of applying a "strained" reading to find "picayune" violations of the Act. Respondent's analysis does justify its rhetoric. The Administrative Law Judge's analysis was well reasoned and should be sustained.

The California Handbook requires prior approval for employees to access the "hotel *and its facilities*." Employees would reasonably read these terms to include the seating area outside the Mixing Room, which is a "guest facility" but which is also an exterior nonwork area for most if not all of the day. Similarly, the valet service area and the *porte cochere* are parts of the Hotel's "facilities," and yet exterior to the building itself. The Board has recognized that these areas are suitable for off-duty Section 7 activity despite incidental work that might be performed there. *Santa Fe Hotel, Inc.*, 331 NLRB 723 (2000) (enforcing employees' right to leaflet at the *porte cochere* and in the driveway outside hotel and casino); *Benteler Industries, Inc.*, 323 NLRB 712 (1997) (holding unlawful restriction against protected activity in outside bench seating area).

The revised rule in the L.A. Live Handbook—referring to the "Property and its facilities" —is no improvement. The term "Property" means what it says: the entire hotel property. "At the very least, employees reasonably could be confused by the rule[']s use of the term[]

'property.'. . . The word 'property' in 'hotel-industry parlance' generally refers to the entire hotel, casino, outside grounds, and parking lot complex." *Ark Las Vegas*, 343 NLRB at 1282-83; *see also Flamingo Hilton*, 330 NLRB, 287, 289 (1999). The additional term "facilities" (*i.e.*, "the Property *and its facilities*") shows that the rule applies expansively, not restrictively. As discussed above, Employees will reasonably read it to encompass exterior facilities where employees undisputedly have a prerogative to engage in Section 7-protected activities. The fact that a different rule on a different page of the handbook allows employees to "return" to "parking areas or other outside non-working areas" does not clarify anything. The present rule prohibits the unapproved "use" of the "facilities," not just the "return" to the parking lot generally. The rule is confusing at best and "any ambiguity in the rule must be construed against the Respondent as promulgator." *Lafayette Park Hotel,* 326 NLRB at 828.

C. The ALJ Properly Concluded that Respondent's Purported Business Justifications For Its Rules Are Not Sufficient.

Respondent finally challenges the ALJ's decision on assorted general grounds. These arguments are of no moment. First, Respondent notes that there is no evidence that the rules at issue have been applied to restrict the exercise of Section 7 rights, or that employees subjectively believed the rules to apply to the exercise of Section 7 rights, or that Respondent has ever disciplined any employee for conducting Section 7 activity pursuant to them. Respondent calls these "key facts." (Respondent's Brief in Support of Exceptions, p. 17.) Of course, they are not "key facts" because the General Counsel has made a facial challenge to the validity of the rules. The question is whether in the Board's view an employee would reasonably read the rules to trench upon his exercise of Section 7-protected activities. *Lutheran Heritage Village*, 343 NLRB at 646. The mere maintenance of an unlawful rule would reasonably tend to chill employees in the exercise of their right to discuss their wages and working conditions regardless of

enforcement. *Lafayette Park Hotel*, 326 NLRB at 825.

Respondent next criticizes the ALJ for purportedly failing to consider its "legitimate business reasons" for maintaining the rules at issue. (Respondent's Brief in Support of Exceptions, p. 17.) Human Resources Director Spade advanced a number of purported justifications for the work rules at issue in this case. He asserted that the restrictions on employee access were promulgated 1) to ensure that Hotel facilities were preserved for guest use, 2) to avoid workplace injury while off the clock, 3) to prevent customers confusing off-duty employees with on-duty employees, and 4) to prevent off-duty employees from distracting on-duty employees from their work. (Tr. 44-46.)

The justifications cited are exaggerated and speculative. The Respondent did not present any concrete examples of actual incidents to validate its generalized concerns. In *Ark Las Vegas*, the Board rejected similar theoretical reasons advanced by the employer in order to justify off-duty access restrictions, including the possibility of workplace injury and interference by off-duty employees with on-duty employees:

> Respondent does not really present a valid business justification for the rule. It cites potential workmens' compensation concerns and a fear that an off-duty employee might interfere with one who is on duty. Both fears are overstated. If the off-duty employee is in a nonwork area such as a locker room or restaurant with other off-duty employees, the likelihood of communicating with an on-duty employee is low. If that occurs it can be dealt with on an ad hoc basis. And, its concern with an on-the-job injury workmens' compensation claim is of some concern, but not enough to warrant interference with the Section 7 rights of employees to communicate with one another. Lawyers can always visualize some incident in which an off-duty employee suffers an injury giving rise to a workmens' compensation claim, yet in reality the risk of such an injury is quite low in nonwork spaces such as dressing rooms and the seating area of restaurants. Certainly it is much lower than in the working areas.

Ark Las Vegas, 335 NLRB at 1290. Moreover, the fact that Respondent grants access to the

interior of the hotel (including guest service areas) when it approves of the purpose of the visit severely undermines the legitimacy of these concerns. Certainly, the purported danger of an employee injuring himself or herself, or being confused by a guest for an employee who on-duty, is no less simply because approval for the access has been sought and obtained in advance.

There are any number of less pervasive rules that Respondent might have adopted that would address its purported managerial concerns while maximizing the ability of employees to engage in Section 7 activity to the fullest possible extent. For example, a rule prohibiting employees from wearing their uniform in guest service areas in an off-duty status would eliminate any concern about guests asking them to perform duties while off-the-clock. A rule requiring employees to sign in and sign out at a security desk would allow management to know who is on the property and at what times, without conditioning such access on explicit managerial approval for the purpose of the access. That is particularly true with respect to access to such nonpublic, nonwork areas as cafeterias and break rooms where the Respondent acknowledges that off-duty access is "reasonable" for an array of purposes. Respondent offered no evidence that justifies any limitation on any amount of access to such areas.

IV. CONCLUSION

For the foregoing reasons, the Respondent has violated Section 8(a)(1) of the Act by maintaining its "Returning to Work Premises" rules and its "Use of Hotel Property Facilities" rules in both its California Handbook and its L.A. Live Handbook. Either because the rules do not restrict access for all purposes, or because the rules restrict access to areas that are suitable for Section 7 activities, or both, the rules can be reasonably understood by employees to interfere with the exercise of their Section 7 rights in an off-duty status. Their maintenance is unlawful.

Dated: October 14, 2011

Respectfully submitted,

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PROOF OF SERVICE
STATE OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO

I am employed in the city and country of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 595 Market Street, Suite 1400, San Francisco, CA 94105.

I hereby certify that a true and correct copy of the foregoing document entitled **CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was filed using the National Labor Relations Board on-line E-filing system on the Agency's website and copies of the aforementioned were therefore served upon the following parties via electronic mail on this 14th day of October, 2011 as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

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