UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MARRIOTT INTERNATIONAL, INC., D/B/A
J.W. MARRIOTT LOS ANGELES AT L.A. LIVE

and Case No. 21-CA-39556

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RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Respondent Marriott International Inc., d/b/a J.W. Marriott Los Angeles at L.A. Live ("Marriott") submits the following Reply Brief in further support of its Exceptions to the Decision of Administrative Law Judge Clifford H. Anderson ("the ALJ") and in response to the Answering Briefs of the Charging Party and the General Counsel.[1]

I. INTRODUCTION

In the absence of any evidence of union animus, without any context, and in a situation devoid of any protected concerted activity, let alone any attempts to restrict such activity, and at a hotel where the union was recognized through a card check and neutrality agreement, the Charging Party and General Counsel follow the ALJ's lead to argue that Marriott violated the Act because some of its workplace rules were allegedly imprecisely written.

Like the ALJ, the Charging Party and the General Counsel disregard the plain language of the challenged provisions and ignore the rest of the employee handbooks. They also ignore the significant precedent prohibiting the Board from declaring work rules facially invalid without supporting evidence or union animus. *See e.g., Adtranz ABB Damlier-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001). Here, Marriott has done everything required under current Board precedent by actually adopting language in its employee handbooks in order to comply with *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). [See Resp. Ex. 1, p. 6; Resp. Ex. 2, p. 43 ("This policy does not apply to parking areas or other outside non-working areas.")] Nevertheless, based on a wholly impractical interpretation of the rules at issue, the ALJ, General Counsel, and Charging Party contend that Marriott has not gone far enough because it did not repeat this language in both of the similar rules at issue. They also ignore the

[1] This Reply Brief only addresses new issues or arguments raised by the General Counsel and Charging Party. Marriott rests on its initial brief regarding all other issues not address here.

practical reality that work rules are created for lay individuals and suggest that Marriott must consider every potential possibility for employee confusion in drafting its handbooks. Under such a standard, employees undoubtedly would be forced to wade through hundreds of pages of legalistic language, likely resulting in actual confusion. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 648 (2004) ("Work rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law.").

Marriott simply implemented ordinary and practical work rules to help ensure a safe, efficient workplace, and an enjoyable experience for guests. The Hotel was careful to carve out areas where Section 7 activity could be conducted (*i.e.*, outside non-working areas) consistent with current Board precedent. And, there is no evidence that any of the Hotel's union-represented employees have been confused by these rules or hindered in any way from conducting Section 7 activity. No reasonable employee at the Hotel could possibly read the challenged rules and believe that they somehow restricted his/her rights to conduct union activity. The ALJ's ruling should be reversed.

II. THE ANSWERING BRIEFS SUPPORT THE PREMISE THAT THE ALJ IMPROPERLY INVALIDATED THE "RETURNING TO WORK PREMISES" RULES.

As explained in Marriott's initial brief, the rules found to be valid in *Crowne Plaza Hotel* and *Lafayette Park Hotel* are no different than Marriott's work rules. If anything, Marriott's rules are more obviously protective of Section 7 rights because they specifically exclude outside non-working areas (in compliance with *Tri-County*). The ALJ, however, either ignored or misinterpreted these cases, and neither the General Counsel nor the Charging Party were able to present valid arguments in support of the ALJ's decision.

In *Crowne Plaza Hotel*, the Board upheld a rule that required off-duty employees to "leave the building promptly" and required them to "obtain permission" before "visit[ing] the

hotel." *Crowne Plaza Hotel*, 352 NLRB 382, 385 (2008). While the General Counsel and the Charging Party argue that *Crowne Plaza*'s holding should be limited to rules that restrict access to food and beverage outlets, nothing in the opinion suggests that it should be limited in such a manner. Food and beverage outlets were just one of the many areas that Crowne Plaza Hotel restricted employees from patronizing. In fact, the rule actually required employees to "leave the [entire] *building* promptly" after their shift and to obtain permission before "visit[ing] the [entire] *hotel*." *Id*. Therefore, the rule in *Crowne Plaza* is nearly identical to the one maintained by Marriott, with the caveat that Marriott's rule provides better protection for Section 7 rights because it specifically excludes outside non-working areas from its restrictions. While *Crowne Plaza Hotel* was based on a 2 member majority, neither the General Counsel nor the Charging Party argue that the reasoning of the decision, or the current state of the law was wrongly stated.

Likewise, in *Lafayette Park Hotel*, the Board upheld a rule that required employees to obtain permission before using the food and beverage outlets to entertain friends or guests. *Lafayette Park Hotel*, 326 NLRB 824, 827-828 (1998). Once again, the General Counsel and the Charging Party argue that *Lafayette Park Hotel* should be limited to only allow rules that restrict use of hotel food and beverage outlets, even though nothing in the opinion suggests that the holding should be so limited. The *Lafayette Park Hotel* Board stated that because the rule "merely requires permission for 'entertaining friends or guests' . . . reasonable employee[s] would not interpret this rule as requiring prior approval for Section 7 activity." *Lafayette Park Hotel*, 326 NLRB at 827. Since food and beverage outlets are just one of the many places in which off-duty employees could "entertain friends or guests," limiting the holding in such a manner is incorrect. Similarly, any argument that Marriott's rule was not drafted as narrowly as the rule in *Lafayette Park Hotel* should also be disregarded because Marriott's rule specifically

excludes parking areas and other outside non-working areas, whereas the rule in *Lafayette Park* could still arguably include certain exterior food and beverage outlets that are not used by guests. As such, *Lafayette Park Hotel* would require the Board to reverse the ALJ's decision.

The Charging Party further tries to argue that Marriott's rules requiring off-duty employees to obtain permission before returning to the Hotel is inherently coercive. [Charging Party's Answering Brief at pp. 6-7.] More specifically, the Charging Party states that if it does not cause Marriott "undue interference . . . 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 [Marriott] has in restricting off-duty access to the same areas for the exercise of Section 7 activity." [*Id*. at p.12.] However, the Charging Party fails to acknowledge that there is no evidence that Marriott restricted any off-duty employees from engaging in Section 7 activity based on the rules at issue. Nor was there any evidence presented that Marriott employees have ever construed the rules to believe that they are prohibited from conducting Section 7 activity.

Similarly, each of the cases relied upon by the Charging Party to support its argument that Marriott's rule is inherently coercive are neither persuasive nor controlling. For instance, its reliance upon *Oaktree Capital Management LLC, d/b/a Turtle Bay Resorts,* 353 NLRB No. 127 (2009), is misplaced because the Board invalidated a rule that restricted off-duty employees from returning to the "resort" because it did not exclude outside non-working areas. *See Id.* at *57. Here, as previously explained, Marriott's rules do contain such an exclusion. Furthermore, the Board's holding in *Oaktree* supports upholding Marriott's rules because the Board found that a similar rule requiring employees to obtain permission before using guest facilities was valid. *Id*. at *55-56. Each of the other cases cited in support of Charging Party's argument can similarly be disregarded because they either involved

solicitation and distribution rules or overbroad no access rules that did not exempt outside non-working areas — none of which are applicable here. [Charging Party's Answering Brief at p. 7.] *See Mercury Marine-Division of Brunswick Corp.*, 282 NLRB 794, 794-795 (1987) (unlawful solicitation and distribution rule that was not limited to non-work time and areas); *Doane Pet Care, DPC*, 342 NLRB 1116, 1121-1122 (2004) (unlawful no access rule that restricted access to parking lot); *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (unlawful no access rule that did not exclude outside non-working areas); *Enterprise Products Co.*, 265 NLRB 544, 553 (1982) (unlawful solicitation and distribution rule that was not limited to non-work time and areas); *Intercommunity Hospital*, 255 NLRB 468, 474-475 (1981) (unlawful enforcement of no access rule to prevent union solicitation and distribution); *Peyton Packing Co.*, 49 NLRB 828 (1943) (unlawful solicitation and distribution rule that was overbroad and discriminatorily enforced).

Since no evidence was presented that Marriott applied the rules in a manner that restricted Section 7 activity, there is no reason why the Board should uphold the ALJ's decision which overturns Board precedent and interprets *Tri-County* in a manner which was not intended. *See Sodexo America, LLC*, 2011 WL 1356754, at p.3 (ALJ Kocal, 2011) ("I conclude that the Board did not intend that a [hotel] could bar access only if it also barred its employees from becoming [guests] or visiting [guests].")[2]

[2] The Charging Party attempts to distinguish *Sodexo America* on the ground that the rule which was upheld allowed access to certain individuals without the need for management approval. [Charging Party's Answering Brief at pp. 10-11.] However, there is no indication that ALJ Kocal based his opinion on this particular fact — he merely stated, in general terms, that *Tri-County* should not be interpreted in the manner in which the General Counsel and the Charging Party are requesting. *Sodexo America*, 2011 WL 1356754, at p.3.

III. THE ANSWERING BRIEFS SUPPORT THE PREMISE THAT THE ALJ IMPROPERLY INVALIDATED THE "USE OF HOTEL/PROPERTY FACILITIES" RULES.

A. The General Counsel And Charging Party Fail To Dispute That Rules Regarding Use Of The Hotel As Guests Do Not Lead To Confusion Over Section 7 Rights.

Neither the General Counsel nor the Charging Party dispute the fact that Marriott's "Use of Property Facilities" rule pertains to off-duty employees who want to use Hotel facilities like other ***guests*** of the Hotel. Under such circumstances, the off-duty employees would be treated like ***guests*** — not employees — and there would be no confusion regarding Section 7 rights because guests do not have such rights.

In *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), the Board upheld the hearing officer's finding that a rule restricting patronization of a hotel's guest areas — nearly identical to the one maintained by Marriott — did not violate the Act. The hearing officer found that it was not "likely that employees would read these rules as limiting their Section 7 rights" because they only "prohibit[] patronizing the hotel as a ***customer***." *Id*. at *26 (emphasis added). The Charging Party tries to distinguish this case by arguing that the Board found violations in the employer's other rules involving solicitation, loitering, and wearing of union insignia — none of which are at issue here. [Charging Party's Answering Brief at p. 9.] The Charging Party, fails to recognize, however, that the Board upheld the hearing officer's decision and upheld the rule restricting employees from patronizing guest areas (a rule that is nearly identical to the one maintained by Marriott). Since neither the ALJ, the General Counsel, nor the Charging Party considered the critical fact that employees would not be confused about Section 7 rights in a rule applicable to use of the hotel as a guest, the ALJ's decision should be reversed on this ground alone.

B. The General Counsel And Charging Party Fail To Consider Marriott's Work Rules In Their Entirety.

The General Counsel and the Charging Party, like the ALJ, fail to address the fact that the two workplace rules at issue should be read together under the principles of contract interpretation. Any off-duty employee who *uses* a Hotel facility would also be *returning* to the Hotel either before or after his/her shift and both the "Use of Hotel/Property Facilities" rule and the "Returning to Work Premises" rule would apply. Therefore, an off-duty employee who is on Hotel property would have to read the two rules at issue together and find that the exemption for parking and other non-working areas in the "Returning to Work Premises" rule would apply equally to the "Use of Property Facilities" rule. Any other interpretation would be impracticable because the rules go hand in hand. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646 (the Board must "give the rule a reasonable reading," "refrain from reading particular phrases in isolation," and "not presume improper interference with employee rights").[3]

As such, the General Counsel and the Charging Party fail to address the fact that "Use of Hotel/Property Facilities" rule contains an express exemption that restricts enforcement of the rule against off-duty employees who visit the "parking areas or other outside non-working areas."[4] In fact, each of the cases they cite in support of their argument are inapplicable because none of them involve rules that contain such an exemption for outside non-working areas. [Charging Party's Answering Brief at p. 12, fn. 8, and p. 15; General Counsel's Answering Brief

[3] Marriott's open door policy also encourages employees to ask managers about interpretation or clarification of any of the rules. [Resp. Ex. 1, p. 4; Resp. Ex. 2, p. 3.]

[4] Even under a literal and non-working world interpretation, Marriott's "Use of Hotel/Property Facilities" rule contains, at a minimum, an implied exemption that restricts application of the rule to outside non-working areas given its inclusion within the related "Returning To Work Premises" Rule.

at pp. 9-10.] *See Flamingo Hilton*, 330 NLRB 287, 289-290 (1999) (invalidating rule prohibiting patronization of hotel because it restricted access to the entire property including exterior non-working areas); *Ark Las Vegas Restaurant Corp*. 343 NLRB 1281, 1283 (2004) (invalidating rule that prohibited employees from using the premises because it did not contain an exclusion for outside non-working areas); *Hudson Oxygen Therapy Sales Co.,* 264 NLRB 61, 72 (1982) (same); *Continental Bus Systems Inc.*, 229 NLRB 1262, 1262 (1977) (same).

The Charging Party further argues that Marriott cannot prohibit off-duty employees from accessing the non-working areas of the Hotel for purposes of Section 7 activity. [Charging Party's Answering Brief at p. 12, fn. 8.] Once again, each of the cases they cite for this proposition are inapplicable. The cases involve either restrictions on solicitation or distribution or allegations of discriminatory enforcement against union activity — none of which are at issue here. *See Baptist Memorial Hospital*, 229 NLRB 45 (1977) (unlawful enforcement of solicitation and distribution rule to prevent union distribution); *Intercommunity Hospital*, 255 NLRB 468 (1981) (unlawful enforcement of no access rule to prevent union solicitation and distribution); *Aladdin Gaming*, 345 NLRB 585, 620 (2005) (unlawful enforcement of rule against union activity); *Panavision, Inc*., 264 NLRB 1284, 1286 (1982) (unlawful enforcement of no access rule to prevent union organizational activities); *Maywood, Inc.*, 251 NLRB 979, 981 (1980) (unlawful enforcement of no access rule to prevent union solicitation).

Here, there are no allegations that Marriott enforced the rules to prevent Section 7 activity or issued them with the intent of limiting such activity. As such, the General Counsel and Charging Party's arguments fail and the ALJ's decision must be reversed. *See Adtranz ABB Damlier-Benz*, 253 F.3d at 28 (the Board "may not cavalierly declare policies to be facially invalid without supporting evidence, particularly where, as here, . . . there is no suggestion that

anti-union animus motivated the policy"); *Lutheran Heritage Village-Livonia*, 343 NLRB at 647 ("[W]e will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way."); *Fiesta Hotel Corporation*, 344 NLRB 1363, 1368 (2005) ("[W]here, as here, the rule does not address Section 7 activity, the mere fact that it could be read in that fashion will not establish its illegality.").[5]

C. Although The ALJ Erroneously Concluded That Marriott Has Outside Non-Working Areas, Whether Such Areas Exist Are Irrelevant Because Marriott's Rules Do Not Restrict Access To Such Areas.

As explained above, the "Use of Hotel/Property Facilities" rule contains an exemption that restricts enforcement of the rule against off-duty employees who visit the "parking areas or other outside non-working areas." Therefore, whether the Hotel in fact has parking areas or other outside non-working areas should be irrelevant to the Board's analysis since these areas would be exempt from the rule. Nevertheless, the ALJ wrongfully concluded that the Hotel actually has such areas, and the General Counsel and Charging Party continue to parrot this improper conclusion without record support.

The testimony from Marriott's Human Resources Director revealed that the Hotel's patio is part of the interior space because it is an extension of the Hotel's mixing room bar. [Tr. 63-64.] The primary entrance to the patio is through the hotel itself [Tr. 60], however, even if a guest uses the external gate to enter this patio, they would be considered a guest of the hotel and would be served by any available servers. [Tr. 64.] Therefore, the evidence established that the

[5] Both the General Counsel and the Charging Party repeatedly argue that Marriott has not presented sufficient justification to maintain rules that prohibit off-duty employees from using the entire Hotel. However, this argument fails to consider the fact that Marriott's rules actually exempt "parking areas or other outside non-working areas." The Board has not required justification beyond what was already presented when such areas are clearly exempted. In any event, it is the General Counsel's burden to show that Marriott's justifications were insufficient, which it has not met because it did not present any such evidence.

patio is an internal area but, even if it is considered to be an exterior space, it is an exterior working area because Marriott treats anyone sitting in the area as a guest.[6] The evidence also established that outside non-working areas are inherently excluded from the scope of the restrictions in Marriott's "Use of Hotel/Property Facilities" rule because Marriott intended the rule to limit use of facilities "which are designed for the enjoyment of [Marriott] guests." [Resp. Ex. 1, p.6; Resp. Ex. 2, p.44; Tr. 44-45.] Accordingly, even the Board finds that the rule does not contain an express exemption, the "Use of Property Facilities" rule complies with *Tri-County* because parking areas and other outside non-working areas are not designed for the enjoyment of guests and inherently excluded.[7]

IV. CONCLUSION

Marriott respectfully requests that the ALJ's Decision be reversed and the Amended Complaint be dismissed in its entirety.

Respectfully Submitted,
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[6] Although the General Counsel claims that the door to the mixing room bar is locked before 4:00 p.m., no such evidence was presented. The testimony revealed that anyone sitting in the patio would be considered a guest even before the area was technically open.

[7] Although the Charging Party and General Counsel argue that the porte-cochere is a non-working area, they did not present any evidence to prove this argument.

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2011, a copy of **Respondent's Reply Brief In Support Of Exceptions To The Administrative Law Judge's Decision** was submitted by e-filing to the National Labor Relations Board. I further certify that I emailed the foregoing document to the following in accordance with Board Rules & Regulations Rule 102.114(i):

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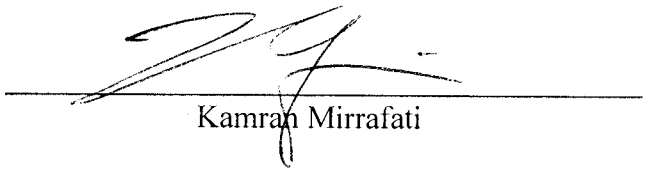

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