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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRIOCT COUNCIL 15, LOCAL 159, AFL-CIO Union/Charging Party And CAESARS ENTERTAINMENT d/b/a RIO ALL SUITES HOTEL AND CASINO Employer/Respondent	Nos. 28-CA-60841 **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

We shall show that the ALJ was wrong as to all his rulings on these rules except the most obvious rule. The ALJ misapplied the basic test in determining whether an employer maintained rule interferes with Section 7 activity.

The appropriate test is whether the rule which is asserted to be unlawful would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). Here the question is whether the rules themselves are overbroad on their face. That is then the question is whether the employees "would reasonably construe the language to prohibit Section 7 activity…" *Lutheran Heritage*

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Village-Livonia, 343 NLRB 646 (2004). Where there is an ambiguity in the Rule, that ambiguity must be construed against the employer who promulgated and maintained the Rule. *Lafayette Park Hotel*, *supra*, at 828. Erroneously the ALJ failed to acknowledge the ambiguities in these rules and to construe those ambiguities against the Respondent.

The Board's reasoning in these cases is flawed. Workers work on the employer's premises under the employer's control at all times. Employment is at will. Jobs are hard to find. It is unreasonable to think employees will challenge a rule or do anything that will possible upset the boss. After all this was the reason the Board adopted its notice posting rule. So without the notice this employer can coerce employees by ambiguities and uncertainties. Employees will not do something if they have any doubt that the boss will disapprove of the conduct. Rules should not be written ambiguously, they should clearly not encompass any Section 7 protected activity. Ambiguities should be construed against the writer or maker of the rule and should be construed against the employer who wields the power of discharge. In order to effectuate this, rules should be found to be invalid unless they clearly do not encompasses any protected activity.

II. THE CHALLENGED RULES

We shall elaborate upon each of the rues which the Administrative Law Judge found did not violate the Act.

A. THE OFF DUTY EMPLOYEE ATTIRE RULE

The off-duty employee attire rule would prohibit employees from coming to work or leaving work with clothing "which displays . . . offensive words or pictures."

The term "offensive" is an especially broad term. When coming to the job site the employee is not wearing a uniform or any other indicia that the employer supports or authorizes whatever message is contained on the t-shirt or other article of clothing. Here offensive words include words that are offensive towards other employees as well as the employer. It is worth noting that what may be offensive to the employer may not be offensive to the customers. It may be offensive to 1 person only. The rule is overbroad because it applies to what a customer may find offensive. It could be offensive to the employer such as simply saying that the employer does not pay its employees correctly, or that the employer is refusing to bargain in good faith or

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otherwise offending any of the sensibilities for the employer. It could be a caricature of the employer. It is overbroad.

The context does not support a finding that the word "offensive" is limited. Here by adding the phrase "or offensive words." the employer has broadened the prohibition beyond profanity and vulgarity. And the rule itself sweeps beyond vulgarity and profanity for it restricts clothing in many other was such as prohibiting certain items of clothing, requiring the clothing be neat and so on. Thus the rule cannot as a matter of context be limited to vulgarity and profanity; it sweeps well beyond those concerns.

Here the appropriate way to read the string of works (profanity to offensive) is to give meaning to each word. Thus offensive means something different than profanity. Offensive could include a prisoner t-shirt. *Southern New England Telephone*, 356 NLRB No. 118 (2011).

The Administrative Law Judge's reliance upon *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001) is inappropriate. First, that is a decision of the court and is not binding on the Board. Second, there is nothing to suggest that the word "offensive" would allow someone to wear a t-shirt that was otherwise vulgar or profane. The problem here is that the word "offensive" is just too overbroad, particularly when it deals with what might be offensive to an employer in the context of workplace disputes. Cf *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005)(rule lawful which prohibited "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing or interfering with fellow Team Members or patrons.")

The challenged rule extends beyond profanity and vulgarity to limit the type of clothing an off-duty employee can wear. An employee would certainly the rule as very restrictive to include any offensive phrases or displays which would be offensive to the employer or the public which might not be sympathetic to a labor dispute. It illegally includes attire which might criticize working conditions.

The purpose of the rule was to insulate the public from such issues including supporting

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the employee who might want to seek the public's support.[1]

B. THE RULES GOVERNING THE USE OF FACILITIES BY OFF-DUTY EMPLOYEES

The rule prohibiting use of facilities by off-duty employees is overbroad. Rule 9 allows employees to "use the Rio public facilities while off-duty" only with the manager's authorization.[2] The Board held in *Tri-County Medical Center*, 222 NLRB 1089 (1976) that employees may have access to parking lots and other outside non-working areas for protected, concerted and union activity. It is clear that as to a casino the parking facilities and other outside areas are "public facilities" to which access is only permitted with the manager's authorization. The rule is therefore in that regard overbroad.

Contrary to the ALJ the rule is not limited to social or gambling visits. It applies to any visit to the facility. There is no suggesting in the rule that there are any exceptions including an exception for concerted activity.

It is plain however that if an employee wishes to use a public facility she must seek permission. This process allows inquiries by the manager as to the purpose of the activity. Thus the employee would necessarily have to disclose that her purpose would be to distribute literature. The rule invites and effectively requires illegal interrogation. In any case "use" encompasses the concept of being physically present as well as the purpose for being physically present including whether it is solicitation, distribution of literature, or just talking about union and/or concerted activity.

The invalidity of the "Use of Facility" rule is further demonstrated by the inclusion of the words "public facilities." This phrase has to include "public areas" described in the remainder of

[1] Note that the rule discussed immediately below broadens the reach of this rule on clothing by stating that employees are "expected to maintain certain behavior and performance standards."

[2] This limit supports our view of the rule regarding clothing discussed above; the employees would read these rules together as part of the context reflecting the employers purpose of strictly limiting the message to the public including anything either the employer or a patron thought "offensive" about the employer.

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the rule. Here it is plain that access to public areas is only permitted with approval of management and it is overbroad and unlawful for that reason.

Employees under this rule have fewer rights than invitees to the property. *See New York, New York Hotel & Casino*, 356 NLRB No. 119 (2011). This requirement that employees seek permission is discriminatory when invitees do not have to seek such permission. Cf. *Roundy's* 356 NLRB No. 27 (2010), enforced, 2012 U.S. App LEXIS 5045 (7th Cir 2012).

C. THE CONFIDENTIALITY RULE IS OVERBROAD

Charging Party takes strong exception to the failure of the Administrative Law Judge to find that the Confidentiality Rule is overbroad.

One issue is whether employees have the right to disclose "organizational charts, salary structures, policy and procedure manuals to employees of the employer or to employees of other employees.

Organizational charts, salary structure and procedure manuals, including procedure manuals regarding working conditions are discloseable.

The Administrative Law Judge concedes in large part that these rules are overbroad. He recognizes that "Respondent's prohibition against the disclosure of information contained in organizational charts, salary structures, and policy and procedures manuals is arguably an explicit restriction on Section 7 activity and thus unlawful on its face" ALJ Decision, Page 6:42-44.

The ALJ upon a contextual analysis derived from *Mediaone*, 340 NLRB 277 (2003). There is no context in this case in which an employee would reasonably limit these rules. In fact the description of the confidentiality rule makes it plain that this rule applies to "any information about the Company which has not been shared by the Company with the general public." Thus an employee would reasonably understand the rules to make it plain that the company would not share with the general public the information which is to be maintained on a confidential basis. There is simply no suggestion that this is limited to proprietary confidential information. The context of the rule makes it plain that it applies to anything the company chooses not to disclose to the public and this would certainly include such information as organizational charts, salary

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structures and all the matters contained within the confidentiality rule. It would include wages, benefits and working conditions of employees.

Salary structures of management are likewise discloseable. The workers have a right to expose and criticize excessive pay to management to the extent they learn that information. Similarly policy and procedure manuals to the extent they contain information about wages, hours and working conditions are discloseable.

The rule is invalid.

The Board must decide whether employees have the right to disclose customer lists or "plans and strategies" for purposes of engaging in boycotts, or refraining from concerted activity.[3] Peaceful boycotting is protected concerted activity. Therefore disclosure of information to aid in such boycotting is protected concerted activity. The employees could for example disclose when a big trade show or convention is scheduled. The union could then lawfully contact the vendor and ask them not to do business with the employer. This confidentiality rule prohibits this fundamental activity.

Similarly to know when the hotel will be busy (a business plan or strategy) will afford the union maximum leverage in lawful economic activity. Or to know that a customer who is union friendly is having a show on the property would help the union to avoid such activity. The employer has this knowledge and the use of such information against union activity; there is no reason why employees to the extent they have that knowledge should not be able to communicate that knowledge to the union for use in lawful protected concerted activity.

Finally the rule is unlawful because employees are told that "[t]h e property or Corporate Law department should be consulted whenever there is a question about whether the information is considered confidential." The rule continues on that the "[a]ny failure to uphold this policy should be communicated to the Law department and may result in immediate Separation of Employment[firing]." This is a form of compelled interrogation about potential union or protected activity.

[3] Although the ALJ discusses only the aspect of the rule mentioned above, the complaint alleged the entire rule was invalid. See ALJ Decision p 6:15-26.

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Furthermore it requires that employees snitch or rat on other employees engaged in protected concerted or union activity.

D. THE RULE REGARDING COMPUTER USAGE

The rule regarding computer usage is invalid. The computer usage rule prohibits computers from being used to "share confidential information with the general public, including discussing the Company . . ." It is plain that employees have the right to discuss the Company with other employees of other employers and therefore the rule is overbroad. Since the rule described above encompasses confidential information and is overbroad, this rule which uses the same term is also overbroad.

The rule also describes other matters which cannot be discussed publicly none of which limit the broad reference to "discussing the Company." The rule is overbroad.

The rule is also overbroad because it prohibits use of Company resources to "display anything . . . offensive . . ." The word offensive is again overbroad.

The rule is overbroad because it prohibits solicitation "of personal views."

Finally the Board should overrule *Register Guard*, 351 NLRB 1110 (2007). See, *Republic Aviation v NLRB* , 324 U.S. 793 (1945).

E. THE RULE REGARDING CAMERA AND VIDEO AND AUDIO-VISUAL DEVICES

The rule regarding use of camera and video and audio-visual devices is overbroad.

This rule maintained by the employer prohibits camera phones from being used on property without permission.

There is no basis to distinguish an employee looking at something which relates to working conditions such as an unsafe condition and taking a picture of that same condition, so long as the employee does that on his or her own work time. An employee can look at the conditions on work time, taking a picture is analogous to solicitation since it does suggest some potential and minimal interruption of work. There is no disruption of work, for example, if an employee takes a picture of paycheck, a work rule, a posted employee notice, an unsafe condition,

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or something else that affects work, so long as it is done on his or her own time. If the employee sees it, he should be able to take a picture of it. *Republic Aviation v NLRB*, 324 U.S. 793 (1945)

Employers use all sorts of video recording; employees should have the same right to engage in protected concerted activity to take pictures on their own time.

III. CONCLUSION

For the reasons suggested above these exceptions should be granted and the rules which are subject to the complaint should be held illegal. The Board should furthermore find that rules are invalid unless they clearly and unmistakably exclude protected concerted activity from their ambit.

Dated: April 17, 2012

Respectfully submitted

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 17, 2012, I served the following documents in the manner described below:

BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

On the following part(ies) in this action:

☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jaranda@unioncounsel.net to the email addresses set forth below.

☒ (BY E-Gov SYSTEM) I electronically served the above-described document on the following parties by electronically filing the foregoing with the NLRB on April 17, 2012.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 17, 2012, at Alameda, California.

/s/Katrina Shaw
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