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Marriott International, Inc. d/b/a J.W. Marriott Los Angeles at L.A. Live and UNITE HERE! Local 11. Case 21–CA–039556

September 28, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND BLOCK

On July 22, 2011, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.¹

This case involves the legality of workplace rules promulgated, revised, and maintained by the Respondent at its J.W. Marriott hotel at L.A. Live, an entertainment destination in Los Angeles. The access rule and its revision prohibit off-duty employee access to interior areas of the hotel (the original rule) or to hotel property (the revised rule) without managerial approval. The use rule and its revision prohibit employee use of various guest and resident owner facilities without managerial approval. Because the original rules were never formally rescinded, we evaluate both the original and revised rules.

The judge found that each of the challenged rules was unlawful. We agree with the judge, but, in light of our colleague’s dissent and relevant precedent that issued after the judge’s decision, we explain our reasoning below.

A. The Respondent’s Access Rules

We evaluate the Respondent’s access rules under the well-established test of *Tri-County Medical Center*, 222 NLRB 1089 (1976). Under *Tri-County*, a rule restricting off-duty employee access is valid

¹ We shall modify the judge’s recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997), and to conform to the Board’s standard remedial language in employer unfair labor practice cases; and we shall substitute a new notice to conform to the modified Order.

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.

Id. at 1089. “[E]xcept 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.” Id.

1. The original access rule

The Respondent’s original rule restricting off-duty employee access states as follows:

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 nonworking areas.

Under *Tri-County*, as applied in our recent decisions in *Saint John’s Health Center*, 357 NLRB No. 170 (2011), and *Sodexo America LLC*, 358 NLRB No. 79 (2012), this rule is unlawful. In those decisions, we found that policies barring off-duty employees’ access to the employer’s facility except for employer-sponsored events (in *Saint John’s Health*) or for hospital-related business (in *Sodexo*) violated the Act under the third prong of the *Tri-County* test because the policies did not “uniformly prohibit access to off-duty employees seeking entry to the property *for any purpose*.” *Saint John’s Health Center*, supra, slip op. at 5 (emphasis added); *Sodexo America LLC*, supra, slip op. at 2 (emphasis added). Similarly, here, the Respondent’s rule is not a uniform prohibition of access; rather, it prohibits off-duty employee access *except* in certain unspecified circumstances subject to a manager’s “prior approval,” giving the Respondent broad — indeed, unlimited — discretion “to decide when and why employees may access the facility.” *Sodexo America LLC*, supra, slip op. at 2. See *Saint John’s Health Center*, supra, slip op. at 5 (“In effect, the [r]espondent is telling its employees, you may not enter the premises after your shift except when we say you can.”).

For essentially the same reason, the Respondent's rule also runs afoul of the general test applied by the Board to workplace rules under *Lutheran-Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). The original access rule “reasonably tends to chill employees in the exercise of their Section 7 rights” because—although the rule does not explicitly restrict activity protected by Section 7—“employees would reasonably construe the language [of the rule] to prohibit Section 7 activity.” *Id.* at 646, 647. As stated, the rule allows off-duty access where unspecified “circumstances . . . arise.” It does not define, describe, or limit in any way the “circumstances” under which access would or would not be granted. And the rule further requires employees to secure managerial approval, giving managers absolute discretion to grant or deny access for any reason, including to discriminate against or discourage Section 7 activity. The judge therefore found that the rule “invites reasonable employees to believe that Section 7 activity is prohibited without prior management permission.” Indeed, because all access is prohibited without permission, it does more than merely invite that belief: it compels it. In turn, employees would reasonably conclude that they were required to disclose to management the nature of the activity for which they sought access—a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights.²

The Respondent argues that this rule is necessary for it to maintain order and limit liability risk, that the rule does not restrict Section 7 activities in nonwork exterior areas, that the General Counsel has not shown that the Respondent possesses union animus or has ever enforced the rule against any Section 7 activity, and that the Respondent has an open door policy by which employees could obtain clarification of any alleged ambiguity in the rule. These contentions are simply irrelevant in light of our findings that the rule is invalid under *Tri-County* and that it would reasonably lead employees to believe that their Section 7 activity in the interior areas of the hotel is prohibited without prior managerial approval. In such

² Contrary to our dissenting colleague, our holding here does not conflict with the holding in *Lafayette Park Hotel*, 326 NLRB 824 (1998). The rule there imposed a limited restriction on employee use of the “restaurant or cocktail lounge” specifically for “entertaining friends or guests” without managerial approval. That “narrow, extremely specific” prohibition “could not be more different than the present exception, in which the Respondent confers upon itself broad, standardless discretion to suspend application of the rule,” *Saint John's Health Center*, supra, slip op. at 5 fn. 21, and would not “reasonably be read by employees to require them to secure permission from their employer as a precondition to engaging in protected concerted activity on their free time and in nonwork areas.” *Lafayette Park Hotel*, supra, 326 NLRB at 827.

circumstances, employees have no obligation to seek further explanation of the rule from the Respondent through its open door policy. Likewise, and contrary to the Respondent's argument, whether the rule treats all access seekers alike is equally irrelevant where the rule has the effect of requiring employees to request permission to engage in Section 7 activity. The Respondent also contends that it is a misinterpretation of *Tri-County* to read it to invalidate off-duty no-access rules that allow for exceptions. Our dissenting colleague argues likewise. The Board has expressly rejected this contention before, and we do so here.³ See *Saint John's Health Center*, supra, 357 NLRB No. 170, slip op. at 5 fn. 22.

2. The revised access rule

The revised rule prohibiting off-duty employee access is unchanged from the original version but for the substitution of “Property” for “hotel” and “Employees” for “Associates”:

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 may 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 (emphasis added).

For the reasons set forth above, the revised rule is invalid under the third prong of the *Tri-County* standard. In addition, the judge found the revised rule invalid for the same reason that the original rule is invalid: it permits access to the hotel for unspecified “circumstances” with managerial approval, and so it “would be understood by a reasonable employee as prohibiting activity protected under Section 7

³ Contrary to our dissenting colleague, our application of *Tri-County* would not prevent the Respondent from permitting access to the hotel's interior by creating a narrow exception for special circumstances. See *Saint John's Health Center*, supra, slip op. at 5 (describing employer's exception to no-access rule, which “applie[d] to any and all events sponsored by the” employer, as “not a narrow one that might arguably be viewed as justified by ‘special circumstances’”). Similarly, the exception created by the Respondent here is not a narrow one that can be justified by “special circumstances” consistent with *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the seminal Supreme Court decision that informs the *Tri-County* rule, as the *Saint John's Health Center* Board explained. *Supra*, slip op. at 4, 5. Rather, the Respondent's rule suffers from the same defect as the rule in *Saint John's Health Center*: it leaves the scope of the exception subject to the complete discretion of the employer.

of the Act *without* prior management approval” (emphasis supplied). The judge further noted that the term “Property” in the revised rule may be construed as more expansive than the term “hotel” in the original rule and could further confuse reasonable employees about the scope of the access restriction. For the reasons discussed above regarding the original rule, we agree with the judge’s findings regarding the revised rule.

Today’s decision enforces the Board’s longstanding *Tri-County* test governing no-access rules for off-duty employees. It does not, as the dissent claims, “dismantle” the balance between employer and employee rights. Rather, hewing to the settled *Tri-County* principles, it merely prohibits an employer from interfering with employees’ Section 7 rights by requiring employees who wish to engage in protected concerted activity from having to obtain permission to do so.⁴

B. Use Rules

1. The original use rule

The original use rule 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 nonworking hours, you need to obtain prior approval from your manager.

The judge found the term “guest facilities” “overly broad and undefined” and likely to confuse reasonable employees into believing that they needed to obtain prior management approval before engaging in protected activity, including in parking lots and other outside nonwork areas. Thus, he found the rule invalid under *Lutheran Heritage Village* and *Lafayette Park Hotel*, *supra*. He further found there were outside nonwork areas that could be encompassed by the broad term “guest facilities,” so the rule also violated *Tri-County* because it did not limit access solely with respect to the interior of the premises and other work areas. Except-

⁴ The dissent claims that no Sec. 7 right is at issue here because “there is no Section 7 right of off duty employees to access the interior of an employer’s facility.” That claim, however, misapprehends Board law and the principles that inform it. Under *Tri-County*, an employer may lawfully bar access to the interior of its facility – but only subject to certain conditions. When those conditions are not met, employees seeking to engage in protected, concerted activity are, indeed, entitled to access to the interior of the employer’s facility, pursuant to Sec. 7. Here, as in other areas, Board law balances the Sec. 7 rights of employees and the rights and interests of employers. As the Board has recently explained, the principles established in *Republic Aviation Corp.*, *supra*, and *Eastex, Inc. v. NLRB*, 427 U.S. 556 (1978), make central to Sec. 7 the ability of employees to communicate with their fellow employees in the workplace. *Saint John’s Health Center*, *supra*, 357 NLRB No. 170, slip op. at 4.

ing, the Respondent argues, and our dissenting colleague concurs, that the rule applies to off-duty employees who want to use the hotel’s facilities as *guests*, and guests have no Section 7 rights; that the use and access rules “go hand in hand” and the judge neglected to read them in conjunction with each other; and that, when read together, it would be apparent that the access rule’s exclusion of parking lots and outside nonwork areas equally applies to the use rule.

We are unpersuaded by these arguments. First, an employee who uses the hotel’s “guest facilities” during off-duty hours does not somehow shed his or her employee status and Section 7 rights.⁵ For example, an employee who stays after work to discuss union matters with co-workers over supper in a hotel restaurant clearly would be engaged in activity protected under Section 7. Like the access rules, this rule requires management’s permission for all activities without exception and therefore has a chilling effect on Section 7 activity for the reasons explained above. Second, we do not think that reasonable employees would necessarily read the use and access rules in conjunction with each other. Although “access” and “use” may be related concepts, the fact remains that the Respondent saw fit to adopt separate rules, and employees reasonably would conclude that they have separate and distinct purposes. Moreover, the Respondent clearly knows how to exclude parking lots and exterior nonwork areas from the scope of a rule, as it did so in its access rules; yet it chose not to incorporate that exclusion in its use rule. Thus, an employee would reasonably believe that choice was deliberate, and that the term “guest facilities” does not exclude parking lots and exterior nonwork areas. Accordingly, we agree with the judge that the use rule is unlawful under both *Tri-County* and *Lutheran Heritage Village*.

2. The revised use rule

The Respondent’s revised use rule is fundamentally different from the original rule. It goes beyond merely requiring prior approval to use the guest facilities during nonwork hours and now restricts employee access to numerous specific parts of the hotel without managerial approval:

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

⁵ *Jury’s Boston Hotel*, 356 NLRB No. 114 (2011), cited by the Respondent, is not to the contrary. The portion of the hearing officer’s report upon which the Respondent relies, discussing a “use of guest facilities” rule, was not adopted by the Board.

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 in 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.

The judge found that the terms “Property,” “Property and its facilities,” and “Property outlet” were “generalized and ambiguous,” could reasonably be construed by employees as including the entire premises, and thus “could be construed by a reasonable employee as unlawfully restricting off-duty employee access” to outside nonwork areas. The judge also found the rule invalid “because reasonable employees would construe the rule as prohibiting activity that is protected by the Act without prior managerial approval” both inside the hotel as well as outside in nonwork areas.

In addition to contending that the revised use rule must be read in conjunction with the access rule, the Respondent argues that the revised rule specifically restricts access to guest facilities that are inside the property (guest or resident floors, rooms, lounges, etc.), and therefore employees would not reasonably believe they could not conduct Section 7 activity in parking areas and other exterior nonwork areas. It also argues that the rule is intended to limit employee use of facilities that are designated for the “enjoyment” of the Respondent’s guests, and this obviously would not include parking areas.

We agree with the judge’s findings. The terms “Property,” “Property and its facilities,” and “Property outlet” would reasonably be read by employees to include the entire property. These terms are even broader than the language used in the original use rule, which we have found invalid. We again reject the Respondent’s and the dissent’s arguments that the use and access rules would not reasonably be read separately by employees, but rather that they would necessarily be read in conjunction. The ambiguity here must be construed against the Respondent, as the drafter of the rules. See *Sodexo*, supra, 358 NLRB No. 79, slip op. at 2. Accordingly, we agree with the judge that the revised use rule would reasonably be interpreted by employees to restrict off-duty employee access to exterior nonwork areas. We also agree that employees would construe the revised rule to prohibit Section 7 activity without prior managerial approval.

We also find the revised use rule invalid because it does not specify that it applies only to off-duty employees. Indeed, language in the revised rule prohibiting employees from being in certain locations “unless on a specified work assignment” clearly contemplates other-

wise. Accordingly, employees would reasonably interpret the rule to restrict their right to engage in Section 7 activity at times when they are properly on the Respondent’s property, such as during breaks.

For the foregoing reasons, we find that the Respondent violated Section 8(a)(1) by maintaining all four challenged rules, and we shall order appropriate remedies.

ORDER

The Respondent, Marriott International, Inc., d/b/a J.W. Marriott Los Angeles at L.A. Live, Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the provision in its California Associate Handbook headed “Returning to Work Premises.”

(b) Maintaining the provision in its California Associate Handbook headed “Use of Hotel Facilities.”

(c) Maintaining the provision in its L.A. Live Employee Handbook headed “RETURNING TO WORK PREMISES.”

(d) Maintaining the provision in its L.A. Live Employee Handbook headed “USE OF PROPERTY FACILITIES.”

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the above-mentioned employee handbook provisions.

(b) Either furnish all current employees with inserts for its California Associate Handbook and L.A. Live Employee Handbook that advise that the unlawful provisions have been rescinded or provide lawfully worded provisions, or publish and distribute revised employee handbooks that do not contain the unlawful provisions or substitute lawfully worded provisions.

(c) Within 14 days after service by the Region, post at its L.A. Live facility in Los Angeles, California, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physi-

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

cal posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce, Chairman

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

Contrary to my colleagues, I find that Marriott's off-duty access and facility use rules comply with *Tri-County Medical Center*, 222 NLRB 1089 (1976). The rules lawfully restrict off-duty employees from accessing the interior of the hotel or using the guest facilities. Because the rules pass muster under *Tri-County*, the analysis ends there. But even assuming otherwise, the rules are also valid under *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). They make no reference to Section 7 activity; they were not created in response to union activity or ever enforced against union activity; and reasonable employees would not understand them to prohibit Section 7 activity. With its ruling today, the majority reaffirms its misreading of *Tri-County* to prohibit employers from allowing commonsense exceptions to off-duty no-access rules.¹ The majority also reads Marriott's "use" rules in isolation from its "access" rules, contrary to Board and court precedent. Because the ma-

¹ See *Saint John's Health Center*, 357 NLRB No. 170 (2011); *Sodexo America LLC*, 358 NLRB No. 79 (2012).

jority's decision continues this Board's dismantling of the careful balance between an employer's right to control its property and an employee's right to engage in Section 7 activity, I respectfully dissent.

Access Rules

The majority finds that the Respondent's access rules violate the Act under the third prong of the *Tri-County* test because they permit access in certain circumstances with managerial approval. My colleagues continue to insist that *Tri-County* requires a uniform access prohibition on all off-duty employees seeking access for any reason. As I have previously explained in my dissents in *Saint John's Health Center*, supra, and *Sodexo America LLC*, supra, the third prong of the *Tri-County* test prohibits discrimination against union activity and does not require a blanket prohibition on all off-duty access. Requiring employers to prohibit all access in order to prohibit any makes it virtually impossible for an employer to draft an enforceable rule restricting off-duty employee access. For example, what if an employee forgets her medication at the workplace and faces a medical emergency if she cannot retrieve it? The Act cannot reasonably be interpreted to force employers to choose between inhuman rigidity and giving off-duty employees free rein to the interior of their facilities. Here, because union activity is treated no differently from any other activity under the Respondent's access rules, I would find these rules lawful.

The majority also adopts the judge's finding that the access rules' requirement that off-duty employees obtain permission prior to entering the interior of the property tends to chill employees in exercising their Section 7 rights under *Lutheran Heritage Village*. That finding rests on inapposite precedent. The judge relied on cases addressing rules requiring employees to seek permission prior to engaging in solicitation or distribution.² Union-related solicitation during nonwork time, and distribution during nonwork time in nonwork areas, are protected by Section 7. Employer restrictions on such activities are presumptively unlawful. In contrast, the Board in *Tri-County* recognized an employer's right to restrict off-duty employee access to the interior of its facility. The judge's determination that the Respondent's rules chilled employees' Section 7 rights failed to identify any Section 7 right being chilled: unlike solicitation or distribution, there is no Section 7 right of off-duty employees to ac-

² The judge cited *Brunswick Corp.*, 282 NLRB 794 (1987), and *Teletech Holdings, Inc.*, 333 NLRB 402 (2001), which dealt with solicitation and distribution issues respectively.

cess the interior of an employer's facility.³ And, again, the Respondent validly restricted that access under *Tri-County*.

The majority claims that its decision here “hew[s] to settled *Tri-County* principles” by “merely prohibit[ing] an employer from interfering with employees’ Section 7 rights by requiring employees who wish to engage in protected concerted activity from having to obtain permission to do so.” I believe it does more than that. Based on the majority rationale here, in *St. John’s Health Center*, supra, and *Sodexo*, supra, the only no-access rule they would surely find valid under the third prong of *Tri-County* is one that would prohibit access uniformly. Thus, it is irrelevant that possible exceptions to the Respondent’s access rules are unspecified and subject to management’s permission. Even a rule that detailed specific exceptions for off-duty access to the facility and permitted no employer discretion whatsoever would be unlawful. My colleagues do posit that exceptions might be valid under narrow “special circumstances,” but absent concrete examples of an exception they would find legitimate, the concept remains illusory and of no practical benefit to employers seeking guidance in this area.

Moreover, the majority’s position is inconsistent with the Board’s decision in *Lafayette Park Hotel*, 326 NLRB 824 (1998), in which, as the judge noted here, “an employer, in limited circumstances, is able to include exceptions to an access restriction that encompasses off-duty employees.”⁴ If *Tri-County* is read to categorically prohibit any exceptions to off-duty access restrictions, then *Lafayette Park* cannot stand. Put differently, neither this case, *St. John’s Health Center*, nor *Sodexo* can be squared with *Lafayette Park Hotel*. The majority purports to distinguish that case on the ground that the rule there would not be read to require employees to secure management permission. But the majority’s misreading and misapplication of *Tri-County*’s third prong renders that distinction immaterial.

Use Rules

The original and revised use rules require employees to obtain managerial permission prior to using the Respondent’s guest and resident owner facilities. The judge found, and my colleagues agree, that these rules are invalid because, unlike the access rules, they do not explicitly exclude from their prohibition exterior nonwork areas

³ The majority takes issue with this statement, but *Tri-County* itself proves it. If Sec. 7 created a right of access to employer property for off-duty employees, employers would not be permitted to prohibit that access to the degree permitted by that case.

⁴ In *Lafayette Park*, the Board approved a rule that allowed off-duty employees, with manager’s approval, to use the restaurant or cocktail lounge “for entertaining friends or guests.”

and parking lots. Accordingly, the majority reasons that employees could reasonably interpret the rules to prohibit off-duty access to those exterior nonwork areas, which is presumptively impermissible. Thus, the majority finds, the use rules interfere with the employees’ Section 7 rights.

The majority’s view is in direct opposition to the facts of this case. The rules do not mention Section 7 activity, were not promulgated in response to Section 7 activity, and have never been applied to restrict Section 7 activity. The use rules here address an employee’s using the facility as a guest—a specific subset of off-duty access to the hotel. In spite of this, the majority analyzes the use rules independently from the access rules, which explicitly exclude parking lots and exterior nonwork areas from their prohibition. However, no employee would reasonably think that the use rules are to be read and understood in isolation from the access rules. After all, an employee cannot use a facility without gaining access to it. Moreover, as the Respondent points out, the use rules limit employees’ use of locations within the hotel that are “designed for the enjoyment of [Marriott’s] guests” (emphasis added), and no one would think of a parking lot as a place to be enjoyed. Thus, it is clear that outside nonwork areas such as parking lots are not covered by the use rules’ prohibitions. The majority’s conclusion to the contrary goes against Board and court precedent requiring employer rules to be read reasonably and in context. See *Lutheran Heritage Village*, supra, 343 NLRB at 646 (“The Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”); *Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19, 20 (D.C. Cir. 2001) (reversing Board’s decision because “there is no consideration of the context of Adtranz’s rule, or its impact on employees”).

In the revised use rule, the Respondent attempts to define more specifically what constitutes a guest or resident owner area by referencing guest or resident floors, rooms, or elevators, and public restaurants, lounges, and restrooms. Although this makes parsing the rule for compliance with the Act slightly more complicated, the revision does not change the underlying purpose of the rule to restrict employee use of guest facilities as a guest. Even if a hotel restaurant might conceivably be used for a union-related employee meeting, as the majority says, no reasonable employee would read this rule as imposing a restriction on such activity, particularly considering the Respondent’s amicable relationship with the Union.⁵

⁵ The Respondent hired the majority of its employees at the L.A. Live site early in 2010. At that time, it invited representatives from the

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Employees would understand the rule in accordance with its evident purpose: to ensure an enjoyable stay for Marriott's paying guests, not to interfere with its employees' union activities. And for reasons already stated, neither would they understand it to apply to parking lots or exterior nonwork areas.

The majority further parses the language of the use rules to find them invalid for the additional reason that the rules could be read to restrict employee access to the interior of the facility when employees are on duty, thereby unlawfully restricting the employees' right to engage in Section 7 activity while rightfully on the property, such as during breaks. This again ignores the rule's purpose—to restrict employee use of the guest facilities *as a guest*, a restriction inapplicable to Section 7 activity at any time.

Dissemination

Contrary to the judge's decision, I would also find that both the access and use rules were clearly disseminated to employees as required under *Tri-County's* second prong. Every employee received one or the other version of both rules; the original and revised access rules were virtually identical; and the revised use rule merely spelled out what was meant by "guest facilities" in the original use rule without changing the original rule's purpose or scope. Thus, the Respondent's distribution to all employees of handbooks containing the rules met the underlying purposes of the second prong of *Tri-County*.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join or assist a union

Union on-site to speak with newly hired employees as part of their orientation. Subsequently, it voluntarily recognized the Union.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain the provision in our California Associate Handbook headed "Returning to Work Premises."

WE WILL NOT maintain the provision in our California Associate Handbook headed "Use of Hotel Facilities."

WE WILL NOT maintain the provision in our L.A. Live Employee Handbook headed "RETURNING TO WORK PREMISES."

WE WILL NOT maintain the provision in our L.A. Live Employee Handbook headed "USE OF PROPERTY FACILITIES."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the above-mentioned employee handbook provisions.

WE WILL either furnish you with inserts for your employee handbooks that advise that the unlawful provisions have been rescinded or provide lawfully worded provisions, or publish and distribute revised employee handbooks that do not contain the unlawful provisions or substitute lawfully worded provisions.

J.W. MARRIOTT LOS ANGELES AT L.A. LIVE

Jean Libby, Esq., for the General Counsel.
Kamran Mirrafati, Esq. (Seyfarth Shaw LLP), of Los Angeles, California, for the Respondent.
Kirill Penteshin, Esq., Staff Attorney, of Los Angeles, California, and *Eric B. Meyers, Esq. (Davis, Cowell & Bowe LLP)*, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This case was tried in Los Angeles, California, on April 18, 2011. Unite Here! Local 11 (the Charging Party or the Union) filed the charge on October 28, 2010,¹ against Marriott International, Inc., d/b/a J. W. Marriott Los Angeles at L.A. Live (the Respondent) and the General Counsel issued the complaint on January 27, 2011. Posthearing briefs by the General Counsel, the Charging Party, and the Respondent were timely submitted on June 13, 2011.

The complaint as amended at the hearing alleges and the answer denies that the Respondent has maintained certain rules of employee conduct which interfere with, restrain, and coerce

¹ All dates are in 2010, unless otherwise indicated.

employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relation's Act (the Act) and, therefore, violate Section 8(a)(1) of the Act.

FINDINGS OF FACT

Upon the entire record including helpful briefs from each of the parties, I make the following findings of fact²

I. JURISDICTION

At all material times, the Respondent, a State of Delaware corporation, with principal offices in Bethesda, Maryland, and a hotel facility located at 900 West Olympic Boulevard, Los Angeles, California (the Hotel), has been engaged in providing hotel and lodging services.

During the 12-month period ending November 22, 2010, a representative period, the Respondent, in conducting its business operations derived gross revenues in excess of \$500,000 from the operation of the Hotel and purchased and received at the Hotel goods valued in excess of \$5000 directly from points outside the State of California.

Based on these uncontested facts, I find the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The pleadings establish, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE COLLECTIVE-BARGAINING RELATIONSHIP

The following employees of the Respondent at the Hotel facility (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All regular full-time and regular part-time hotel service, housekeeping, food and beverage employees (including room cleaners, house persons, bell persons, telephone operators, kitchen employees, servers, bussers, bartenders, cashiers, hosts, front desk employees, and concierges (at the J.W. Marriott only) employed by the Respondent at the Hotel, but excluding the following employees: all secretarial, office clerical, accounting, guest recognition and residential coordinators (at the Ritz-Carlton Hotel and Residences only), event management coordinators, gift shop, lifeguard, pool-chemical cleaning, Spa (except that employees cleaning the spa facility will be in the unit), sales, maintenance and engineering employees and all managers, supervisors, and guards as defined in the National Labor Relations Act.

At all material times since April 10, 2010, the Respondent has recognized and, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

² As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

The Employee Rules in Contest

Over the course of 4 days in late January and early February 2010, the Respondent held four new employee orientation sessions for the roughly 500 employees that had been hired to staff the opening of the Respondent's new L.A. Live property. During these orientation sessions the Respondent promulgated and distributed an employee handbook entitled "California Associate Handbook" (the California handbook) to each new hire. The Respondent had earlier promulgated the California handbook, which was last revised in June 2009, to all of its California employees.

Commencing on or about late January 2010 with the issuance of the California handbook, the Respondent maintained the following "Return to Work Premises" rule at the Hotel:

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 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.

Commencing on or about late January 2010 with the issuance of the California handbook, the Respondent maintained the following "Use of Hotel Facilities" rule at the Hotel:

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.

These rules were both set forth in the California handbook initially distributed by the Respondent to employees in late January 2010 and were in effect thereafter as described in detail below. Following its becoming the unit employees' representative on April 10, 2010, the Union on May 19, 2010, submitted a request to the Respondent for its then-current California handbook which the Respondent provided the Union on May 21, 2010.

However, because of the unique situation in which the Ritz-Carlton Hotel and the Respondent's Hotel shared the same building and needed a unified operating procedure, the Respondent drafted a new handbook specifically for the L.A. Live property (the L.A. Live handbook). The final draft of the L.A. Live handbook was not completed until early November 2010, after which the Respondent began distributing the L.A. Live handbook to newly hired employees during subsequent orientation sessions in lieu of the California handbook. The Respondent admits that the only employees that received the L.A. Live handbook were those hired after the handbook's finalization in November 2010 and any incumbent employees that proactively asked for a copy. That handbook contained the following modifications to the above-quoted rules:

RETURNING TO WORK PREMISES:

J. W. MARRIOTT LOS ANGELES AT L.A. LIVE

Employees are not permitted in the interior areas of the Property more than fifteen (15) minutes before and 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.

With respect to the “Returning to Work Premises” rule, the L.A. Live handbook substituted “Employees” for the term “Associates” and “Property” for the term “hotel”.

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 in 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.

Thus in and after November 2010 the employees who had received the earlier employee handbook were aware of the earlier rules quoted above and the employees receiving the new employee handbook were aware of the subsequent rules.

V. ANALYSIS AND CONCLUSIONS

A. *Threshold Issue: the 10(b) Time-bar*

The Respondent in a motion to dismiss filed at the hearing and advanced in its posthearing brief argues that the alleged violations referencing the rules in the original employee handbook are time-barred under Section 10(b) because they were first promulgated more than 6 months before the charge was filed. However, an employer commits a continuing violation of the Act throughout the period that an unlawful rule is maintained. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Also with respect to an alleged time-bar under Section 10(b), the maintenance of unlawful rules within 6 months of the filing of charges will render the action timely. *Turtle Bay Resorts*, 353 NLRB 1242 (2009). Accordingly, because there is no indication that the employees that received the original handbook were notified at any time that those rules were superseded or discontinued, I find that the two original rules at issue located in the California handbook have been maintained throughout the relevant period leading up to filing of the unfair labor practice charges on October 28, 2010. As such the Respondent’s time-bar argument fails under the cases cited.

B. *The Handbook Rules as Interference with, Restraint, and Coercion of Employees’ Exercise of Section 7 Rights—Complaint Paragraph 9*

1. Overview of the law

Before examining each individual rule and the parties’ respective contentions, a brief examination of Board decisions dealing with the maintenance of employer work rules that restrict off-duty employees’ access to the employer’s premises is useful. In general, the analytical framework for determining whether an employer’s maintenance of a work rule violates Section 8(a)(1) is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004):

[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful.

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of 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.³

More specifically, the Board analyzes rules restricting off-duty employee access to an employer’s facility under a three-prong test first articulated in *Tri-County Medical Center*, 222 NLRB 1089 (1976). In that case, the Board stated:

We conclude, in order to effectuate the policies of the Act, that 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 1089 at 1089.]

As noted, the General Counsel’s complaint attacks various portions of the Respondent’s handbook rules. The individual rules under challenge are best discussed separately. For clarity’s sake, each rule is quoted at the beginning of the analysis respecting it.

2. The original “Returning to Work Premises” rule—complaint subparagraph 9(a)

The original Returning to Work Premises rule states:

³ 343 NLRB at 646–647 (emphasis in original and footnote omitted).

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 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.

The General Counsel and Union's theory of a violation respecting the above-quoted rule is that, by allowing occasional access to the premises with a manager's permission, the rule does not prohibit off-duty employee access for any purpose and thus contravenes the third requirement of the *Tri-County Medical Center* test. In its posthearing brief at 10–14, the Respondent argues that, because the Board has previously validated no-access rules that included clauses granting manager permission to allow off-duty employees access to the premises in certain circumstances, the rule at issue should not be held unlawful.

The Board in *Lafayette Park Hotel*, 326 NLRB 824, 827 (1998) found the following "Hotel rule 6" valid:

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

The General Counsel and Union in *Lafayette Park Hotel* argued that the rule was unlawful "because it allows management to select which off-duty employees may use the premises, and can therefore be used to inhibit Section 7 activity." *Id.* at 827. The Board nevertheless found the rule valid, responding to the General Counsel and Union's contention that the rule may cause employees to "reasonably believe that they must seek employer permission to engage in Section 7 activity in the restaurant or cocktail lounge, and that this belief would chill the employees in the exercise of their Section 7 rights," by explaining at 827:

[W]e do not believe that this rule reasonably would be read by employees to require them to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in non-work areas. . . .

Here, the rule does not mention or in any way implicate Section 7 activity. Rather, it merely requires permission for "entertaining friends or guests." In our view, a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity. There are legitimate business reasons for such a rule, and we believe that employees would recognize the rule for its legitimate purpose, and would not ascribe to it far-fetched meanings such as interference with Section 7 activity. We therefore find that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, this allegation is dismissed.

The General Counsel in the present matter cites two cases to support his claim that any exceptions to an off-duty employee access restriction rule will render it invalid under *Tri-County*

Medical Center.⁴ The language in those cases does, in fact, indicate that the third requirement of the *Tri-County Medical Center* test necessitates the invalidation of any off-duty employee access rule that provides for exceptions. However, I find that the more recent Board decision in *Lafayette Park Hotel*, *supra*, must also be read in analyzing the question.

Lafayette Park Hotel's "Hotel rule 6" as discussed above, is not distinguishable from an off-duty employee access restriction rule that would normally be analyzed under *Tri-County Medical Center* because, as the rule reads and as both the Board reasoning and the General Counsel and Union's quoted argument note, the rule encompasses employees who may want to use the restaurant or cocktail lounge for entertaining friends or guests while off-duty.

While the Board does not explicitly state in *Lafayette Park Hotel* that the language of the third requirement of the test outlined in *Tri-County Medical Center* was not meant to be read literally, the decision suggests, *sub silentio*, that an employer, in limited circumstances, is able to include exceptions to an access restriction rule that encompasses off-duty employees.⁵

The rule at issue, however, is not analogous to the "Hotel rule 6" validated in *Lafayette Park Hotel*. The "Hotel rule 6", despite its exceptions, limited its reach to the entertainment of friends or guests, and it limited its application to the hotel restaurant and cocktail lounge. The key issue that was addressed was not whether an access restriction rule excluded off-duty employees for any and all reasons. Rather the key issue was whether, if such a rule contains a clause granting manager or supervisor discretion to approve exceptions to access restriction, it would cause a reasonable employee to interpret the rule as requiring prior approval for Section 7 activity and would thus chill employees' exercise of that activity.

Here, despite the fact that the instant rule does not mention or implicate Section 7 activity, the rule flatly requires manager approval for any off-duty access to the interior of the hotel. The Respondent's rule and its manager approval clause is not limited in scope, and any potentially legitimate business reasons for broadly barring off-duty employees from the interior of the hotel without manager approval would not be clear to employees based on a facial reading of the rule.⁶ Therefore I find that, based on the rationale discussed above, the Respondent's original "Returning to Work Premises" rule is invalid under both

⁴ *Baptist Memorial Hospital*, 229 NLRB 45 (1977), *enfd.* 568 F.2d 1 (6th Cir. 1977); *Intercommunity Hospital*, 255 NLRB 468 (1981).

⁵ The Board in *Lafayette Park Hotel* reasons that because the access restriction rule "does not mention or in any way implicate Section 7 activity" and is drafted in a narrow manner and only restricts access for a limited purpose, it cannot be interpreted by a reasonable employee as requiring prior approval for Sec. 7 activity. Moreover, the access restriction was deemed to be based on "legitimate business reasons," and that "employees would recognize the rule for its legitimate purpose." 326 NLRB at 827.

⁶ Respondent's inclusion of the clause limiting the "Returning to Work Premises" rule to the interior of the hotel and excluding "parking areas or other outside non-working areas" does not eliminate the possibility that a reasonable employee would construe the rule as requiring prior approval for Sec. 7 activity in nonwork areas in the interior of the hotel.

Lafayette Park Hotel and *Lutheran Heritage Village-Livonia* because the access restriction is not sufficiently limited and invites reasonable employees to believe that Section 7 activity is prohibited without prior managerial permission.⁷ The rule also fails under the second requirement of the *Tri-County Medical Center* test because the Respondent ceased distributing the original California handbook to newly hired employees in and after November 2010 and thus the rule has not been clearly disseminated to all employees.

For all the above reasons, I find the rule invalid and that the General Counsel has sustained this element of the complaint.

3. The revised “Returning to Work Premises” rule⁸

RETURNING TO WORK PREMISES:

Employees are not permitted in the interior areas of the Property more than fifteen (15) minutes before and 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.

The revised “Returning to Work Premises” rule was included in the Respondent’s L.A. Live handbook, which was distributed to all new employees in and after November 2010 and only given to existing employees that proactively asked for a copy of the new handbook. The material changes to the rule in the L.A. Live handbook substituted “Employees” for the term “Associates” and “Property” for the term “hotel.” “Property” may be construed as a more expansive term than “hotel”, which I find could further confuse reasonable employees about the scope of the access restriction rule. As such, because the revised “Returning to Work Premises” rule found in the L.A. Live handbook would be understood by a reasonable employee as prohibiting activity protected under Section 7 of the Act without prior managerial approval, I find that, based on the same rationale outlined in the above analysis for the original “Returning to Work Premises” rule, the instant rule is invalid under both *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*.

⁷ The present rule in contest is also similar to the rules invalidated in *Brunswick Corp.*, 282 NLRB 794, 795 (1987), and *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001), in that, even though union solicitation or other Sec. 7 activity is not directly implicated in this case, the broad manager approval clause theoretically covers such activity and therefore requires off-duty employees to obtain the employer’s permission before engaging in union solicitation in nonwork areas during non-working time. See also the Board’s distinction between the valid rule in *Lafayette Park Hotel* and the invalid rule in *Brunswick Corp.*, where the limited and specific nature of the valid rule’s manager approval clause foreclosed a reasonable employee’s interpretation of the rule as requiring prior approval for Sec. 7 activity. 326 NLRB 824, 827 (1998). There are no such limitations here.

⁸ The parties amended their pleadings at the hearing to include the more recent rules in the complaint and answer and specifically and skillfully litigated the validity of all four rules—older and newer—both at the hearing and on brief.

Lafayette Park Hotel and *Lutheran Heritage Village-Livonia*. The rule also fails under the second requirement of the *Tri-County Medical Center* test because the Respondent failed to distribute the L.A. Live handbook to all of the employees that had been hired prior to November 2010, who had not asked for a copy of the new handbook, and thus the rule has not been clearly disseminated to all employees.

For all the above reasons, I find the rule invalid and that the General Counsel has sustained this element of the complaint.

4. The “Use of Hotel Facilities” rule—Complaint subparagraph 9(b)

The use of Hotel Facilities rule states:

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.

The General Counsel and the Charging Party both argue that the “Use of Hotel Facilities” rule found in the California handbook violates *Tri-County Medical Center* because it may be reasonably read to include exterior facilities of the hotel to which off-duty employees have a Section 7 right of access. The Respondent counters with various novel arguments, but fails to address the fact that the term “guest facilities” is overly broad and undefined and could confuse reasonable employees into believing that they need to obtain prior managerial approval before engaging in activity protected under the Act, including lawfully entering parking lots, gates, or other outside nonwork areas. As such, this rule is invalid under both *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia* because it invites reasonable employees to believe that Section 7 activity is prohibited without prior managerial approval.

Further, the undisputed record evidence shows that there are outside nonwork areas, such as the outside patio connected to the mixing-room bar area, which could be encompassed by the broad term “guest facilities.” Accordingly, I find that this rule violates *Tri-County Medical Center* because it does not limit access solely with respect to the interior of the premises and other working areas. Further, I find the rule has not been clearly disseminated to all employees because the Respondent ceased distributing the California handbook to newly hired employees sometime in November 2010.

For all the above reasons, I find the rule invalid and that the General Counsel has sustained this element of the complaint.

5. The updated “Use of Property Facilities” rule

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 in 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.

The Respondent argues that, because the updated “Use of Property Facilities” rule specifically restricts access to guest facilities that are inside the property, the rule would not be construed by a reasonable employee as prohibiting Section 7 activity. General Counsel notes, however, that the rule itself is ambiguous and unclear and thus should be interpreted as unlawfully restricting employee access to outside facilities. Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees, who are required to obey it. *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

The Respondent responds with the Board’s holding that:

[i]n determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.⁹

Based on this, the Respondent argues on brief at 15 that employer rules must not be “nitpicked” in order to find a violation.

Without nitpicking, I conclude, when given a reasonable reading, the rule’s generalized and ambiguous terms and phrases referring to the Property (“Property,” “Property and its facilities,” “Property outlet”) may nevertheless be reasonably construed from an employee’s perspective, as encompassing the entire premises and could be construed by a reasonable employee as unlawfully restricting off-duty employee access to outside nonwork areas. Also, the phrase listing the various areas that are explicitly included in the restriction may not be read in isolation, but must be read in context as simply giving specific examples of areas that are restricted within the broader umbrella of the “Property,” the “Property and its facilities,” or “any Property outlet.” Again, as noted supra, the Board teaches that the ambiguities in rules of this type must be resolved against the Respondent, who promulgated the rule, and not against the employees, who are required to obey them. Under such an analysis the instant rule broadly restricts access to the Property and thus is invalid under *Lafayette Park Hotel and Lutheran Heritage Village-Livonia* because reasonable employees would construe the rule as prohibiting activity that is protected by Section 7 of the Act without prior managerial approval. The rule also fails under *Tri-County Medical Center* because the Respondent failed to distribute the L.A. Live handbook to all employees hired prior to November 2010, and thus the rule hasn’t been clearly disseminated to all employees.

For all the above reasons, I find the rule invalid and that the General Counsel has sustained this element of the complaint.

6. Summary and Conclusions

As set forth above, I have found that the General Counsel has sustained his burden of proving each of the four rules is invalid, because they chill employee exercise of Section 7

rights, therefore constituting a violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

Given all the above, including the above findings of fact, and based on the record as a whole, including the posthearing briefs of the parties, I make the following conclusions of law:

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent by distributing to its employees and continually maintaining the following rules at its L.A. Live facility in Los Angeles, California, as set forth on page 6 of its California handbook, has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act:

(a) 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 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.

(b) 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.

4. The Respondent by distributing to its employees and continually maintaining the following rules at its L.A. Live facility in Los Angeles, California, as set forth on pages 43 and 44 of its L.A. Live handbook has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act:

(a) RETURNING TO WORK PREMISES:

Employees are not permitted in the interior areas of the Property more than fifteen (15) minutes before and 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.

(b) 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

⁹ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

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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 in 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.

5. The unfair labor practices found above have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall recommend that it be ordered to cease and desist from engaging in the conduct found unlawful, and from engaging in any like or related conduct. I shall also recommend that the Respondent rescind the rules quoted above, remove them from the appropriate handbooks, and advise the employees in writing that the rules have been withdrawn and are no longer being maintained. *Lafayette Park Hotel*, 326 NLRB 824, 834 (1998).

The Respondent shall post the attached remedial Board notice, in English and Spanish languages, and, in addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). The posting of the paper notices by the Respondent shall occur at all places where notices to employees are customarily posted at the facility.

On the basis of the above findings of fact and conclusions of law and on the entire record herein, I issue the following recommended

ORDER¹⁰

The Respondent Employer, J.W. Marriott Los Angeles at L.A. Live, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining or enforcing provisions in its California handbook under the heading "Returning to Work Premises."

(b) Maintaining or enforcing provisions in its California handbook under the heading "Use of Hotel Facilities."

(c) Maintaining or enforcing provisions in its L.A. Live handbook under the heading "RETURNING TO WORK PREMISES."

(d) Maintaining or enforcing provisions in its L.A. Live handbook under the heading "USE OF PROPERTY FACILITIES."

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the rules quoted above, amend or remove them from the human resource policy and procedure manual, and advise the employees in writing that the rules have been withdrawn and are no longer being maintained.

(b) Within 14 days after service by the Region, post at its L.A. Live facility at which the quoted handbook rules were maintained and distributed, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director, in English, Spanish and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility any time after May 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., July 22, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and

other terms and conditions of employment, including complaints regarding various forms of harassment.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT maintain or enforce provisions in our California Associate Handbook under the heading "Returning to Work Premises."

WE WILL NOT maintain or enforce provisions in our California Associate Handbook under the heading "Use of Hotel Facilities."

WE WILL NOT maintain or enforce provisions in our L.A. Live Handbook under the heading "RETURNING TO WORK PREMISES."

WE WILL NOT maintain or enforce provisions in our L.A. Live Handbook under the heading "USE OF PROPERTY FACILITIES."

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you in Section 7 of the Act.

WE WILL rescind or revise the rules noted above, amend or remove them from our California handbook and our L.A. Live handbook, and advise you in writing that the rules are no longer being maintained.

J.W. MARRIOTT LOS ANGELES AT L.A. LIVE