

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

**LYTTON RANCHERIA OF CALIFORNIA
d/b/a CASINO SAN PABLO**

and

UNITE HERE LOCAL 2850

**Cases 32-CA-025585
32-CA-025665
32-CA-064020
32-CA-086359**

**ACTING GENERAL COUNSEL'S BRIEF IN
SUPPORT OF CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

1. Preliminary Statement

On March 5, 2013, Administrative Law Judge Jay R. Pollack, herein called the Judge, issued his Decision in this matter, finding that Respondent violated Section 8(a)(1) and (5) of the Act by various acts and conduct. The Judge, however, failed to find that Respondent violated Section 8(a)(1) and (5) by certain other acts and conduct alleged in the Complaint despite his own factual findings that fully support these additional violations. Counsel for the Acting General Counsel has taken cross-exceptions to the Judge's Decision with respect to these matters, and this brief is submitted in support of these cross-exceptions.

2. The Judge's Findings of Fact¹

A. The Handbook Issues

In his findings of fact the Judge found that the complaint alleges and Respondent admits that Respondent maintained the following rules in its employee handbook from about August 2010 until May 2011, when the employee handbook was rewritten and redistributed:²

¹ References to the Judge's Decision are listed as "ALJD __: __." "Tr." refers to cites in the official transcript.
² ALJD 4:45-50; 5:1-33.

- (a) “Unacceptable Behavior
...
Gossiping about other Team Members (including supervisors, managers, directors, etc)”
- (b) “Team Member Conduct and Work Rules
...
The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:
...
Insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers).”
- (c) “Solicitation, Distribution and Bulletin Boards
...
Team Members may not solicit or distribute literature in the workplace at any time, for any purpose.”
- (d) “Team Member Conduct and Work Rules
...
The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:
...
Making false, fraudulent or malicious statements to or about a Team Member, a guest or San Pablo Lytton Casino.”
- (e) “Access
...
Team Members are not permitted in the back of the house areas more than thirty (30) minutes prior to the beginning of their shift or longer than thirty (30) minutes following the end of their shift, except under the following circumstances:
1. To conduct business with Human Resources;
2. Pre-arranged training sessions or orientations;
3. With the approval of a director, manager, or supervisor.”

B. The Access Issues

The Judge found that on March 10, 2011, Union representative Max Alper came to the Casino and that Alper had called in advance and then checked in at the security desk. After being escorted to the employee cafeteria, Alper requested that he be escorted to where the employees' schedules are posted. The security guard who was accompanying Alper stated that he had to check with management. Shortly thereafter human resources manager Chris Mavroudis came to the cafeteria and without explanation informed Alper that he could not go to where the schedules are posted.³

The Judge found that on March 21, 2011, Max Alper again came to the Casino. As was the case on March 10, he called in advance and was escorted to the employee cafeteria. When Alper asked to be escorted to the employee break room, security supervisor Buddy Jah said he would have to check with Mavroudis. Jah then left and when he returned a short time later he told Alper that he could not go to the employee break room. When Alper asked why he could not go, Jah said that was what he had been told.⁴

The Judge found that on January 31, 2012, Respondent's attorney Richard Curiale sent an email to Max Alper stating that Union representative Jessica Medina was barred from Respondent's property. The Judge found that Medina was barred based on an incident which occurred on December 7, 2011. On December 7, a grievance meeting was held at Respondent's training center, which is separate and apart from the Casino. Alper and Medina attended the meeting on behalf of the Union. Chris Mavroudis represented Respondent at the meeting although Respondent's head of security James Grant was also in the room. The Judge found that after the meeting was over, Alper attempted to talk to Mavroudis. At that point, Grant walked

³ ALJD 7:19-23.

⁴ ALJD 7:25-28.

over and Mavroudis walked away. Grant told Alper and Medina that they needed to leave but he asked again four or five times more before they left.⁵

3. Argument

A. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(1) by Maintaining a Rule Prohibiting Gossip

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). If the rule explicitly restricts Section 7 rights it is unlawful. *Luthern Heritage Village-Livonia*, 343 NLRB 646, (2004). If it does not, “the violation is dependent upon a showing of one of the following: (1) the employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. Each of the five cited rules is unlawful under this test.

Here, although the Judge listed this rule in his findings of fact, he failed to mention it at all in his Analysis and Conclusion section of his decision. In fact, there is no mention of any of the handbook issues in the Judge’s Analysis and Conclusion section, or in his Conclusion of Law, his Remedy Section, in his Order or in his proposed Notice. Nevertheless, since the Judge found in his findings of fact that the rules alleged in the complaint were in effect from about August 2010 until about May 2011, it is appropriate for the Board to remedy the deficiencies in the Judge’s decision by making its own conclusions and recommendations regarding these handbook issues.

Paragraph 7(a) of the complaint alleges that the rule in Respondent’s 2008 Employee Handbook prohibiting “gossiping about other Team Members (including supervisors, managers,

⁵ ALJD 8:15-22.

directors, etc.)” violates Section 8(a)(1) of the Act. In *Claremont Resort & Spa*, 344 NLRB 832 (2005), the Board found that a rule prohibiting “negative conversations about associates and managers” violated Section 8(a)(1). The Board found that employees would reasonably construe the prohibition to bar them from discussing concerns about their managers that affect working conditions, which would thereby cause them to refrain from engaging in protected concerted activity. *Id.* Here, the rule prohibits gossip, which is arguably a form of negative conversation about supervisors, managers and directors, and therefore is unlawful. See also, *Hyundai America Shipping Agency Inc.*, 357 No. 80 at 2 (2011).

B. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(1) by Maintaining a Rule Prohibiting Insubordination and Disrespectful Conduct

Paragraph 7(b) of the Complaint alleges that the Respondent’s rule prohibiting “insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)” violates Section 8(a)(1) of the Act. In *University Medical Center*, 335 NLRB 1318, 1321 (2001), the Board found a very similar rule to be unlawful. In that case, the rule prohibited “Insubordination, ... or other disrespectful conduct towards a service integrator, service coordinator or other individual,” and the Board found that employees could reasonably believe that the rule prohibited protest of supervisory activity and employee solicitation of union support from other employees and therefore the rule violated Section 8(a)(1) of the Act. *Id.* at 1322. In the instant case, for the same reasons, Respondent’s rule is unlawful.

C. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(1) by Maintaining a Rule Prohibiting Solicitation and Distribution of Literature in the Work Place

Paragraph 7(c) of the Complaint alleges that Respondent’s rule prohibiting solicitation or distribution in the workplace at any time, for any purpose to be in violation of its employees’

Section 7 rights. This rule is unlawful because it is over broad and prohibits activities protected by Section 7 of the Act. Thus, under well established Board law, an employee is entitled to solicit when on non-work time even in work areas. *Pacific Beach Hotel*, 342 NLRB 372, 373-374 (2004); *Republican Aviation Corp. v. NLRB*, 324 U.S. 793(1945) It is equally well established that employees are entitled to distribute literature in non-work areas on non-work time. *Pacific Beach Hotel, Id.: Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) Thus, Respondent's rule is overbroad and in violation of Section 8(a)(1) of the Act.

D. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(1) by Maintaining a Rule Prohibiting Making False, Fraudulent or Malicious Statements

Paragraph 7(d) of the Complaint alleges that Respondent's rule prohibiting "Making false, fraudulent or malicious statements to or about a Team Member, a guest or San Pablo Lytton Casino," violates the Act. In *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), the Board found a nearly identical rule to be unlawful because it punished merely false statements as opposed to maliciously false statements. Respondent's rule similarly violates the Act.

E. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(1) by Maintaining a Rule Prohibiting Employees From Being in the back of the House More than 30 Minutes Before or After Their Shifts

Paragraph 7(e) of the Complaint alleges that Respondent's rule not permitting employees in the back of the house more than 30 minutes prior to the beginning of their shift or longer than 30 minutes following the end of their shift violated Section 8(a)(1) of the Act. The Board analyzes rules governing the access rights of off-duty employees to an employer's facility under the three-part test articulated in *Tri-County Medical Center*, 222 NLRB 1089 (1976). *Marriott International, Inc.*, 359 NLRB No. 8 at 1 (2012) There, the Board held that a rule prohibiting access to off-duty employees would be 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 those engaging in union activity. Respondent's rule is limited to the back of the house and, thus is valid under the first prong of *Tri-County*. Respondent's rule apparently was disseminated to all employees so it is valid under the second prong of *Tri-County*. However, Respondent's rule does not limit off-duty employee access for "any purpose" and is, therefore, invalid under the third prong of *Tri-County*. Thus, Respondent's rule allows for off-duty access for the conducting of business with Human Resources, for pre-arranged training session or orientations, and with the approval of a director, manager, or supervisor. Because the rule does not prohibit off-duty access for "any purpose," it is invalid under the third prong of the *Tri-County* test, and thus violates Section 8(a)(1) of the Act. *Marriott, Id., Sodexo America LLC*, 358 NLRB No. 79 at 2 (2012); *St. John's Health Center*, 357 NLRB No. 170 at 3-5 (2011).

F. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(5) by Implementing A Rule Barring Union Representatives Access to Areas of the Casino Where Employee Schedules are Posted

Although he discussed this allegation in his findings of fact, the Judge failed to draw any conclusion regarding this allegation. Nevertheless, there is sufficient evidence in the record for the Board to draw a conclusion regarding this allegation. The Judge found that on March 10, 2011, Alper called in advance of his visit to the Casino and then checked in at the security desk when he arrived. After being escorted to the employee cafeteria, Alper requested that he be escorted to where the employees' schedules are posted. The security guard who was accompanying Alper stated that he had to check with management. Shortly thereafter human resources manager Chris Mavroudis came to the cafeteria and informed Alper that he could not go to where the schedules are posted but he did not give any reason. Prior to this time, Union

representatives had been regularly allowed access to areas where the schedules are posted. (Tr. 252-260) It is undisputed that prior to prohibiting Alper from going to see the employees' schedules, Respondent did not provide the Union notice or an opportunity to bargain over this change. (Tr. 279) Thus, Respondent violated Section 8(a)(5) by unilaterally implementing this new rule.

G. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(5) by Implementing A Rule Prohibiting Union Representatives from Going to the Employee Break Room

Although he discussed this allegation in his findings of fact, the Judge failed to draw any conclusion regarding this allegation. Nevertheless, there is sufficient evidence in the record for the Board to draw a conclusion regarding this allegation. The Judge found that on March 21, 2011, Max Alper again came to the Casino and as was the case on March 10, he called in advance and was escorted to the employee cafeteria. When Alper asked to be escorted to the employee break room, security supervisor Buddy Jah said he would have to check with human resources director Chris Mavroudis. Jah then left and when he returned a short time later he told Alper that he could not go to the employee break room. When Alper asked why he could not go, Jah said that was what he had been told. In addition, it is undisputed that up until March 21, 2011, Union representatives had been allowed to go to the employee break room. (Tr. 240, 258, 279) Before limiting the Union representative to the employee cafeteria and refusing to allow him to be escorted to the employee break room, Respondent did not notify the Union or afford it the opportunity to bargain over these changes. (Tr. 279)

Here, even though Alper complied with the terms of the newly-agreed-upon access rules by calling in advance and obtaining an escort to go to and to move around the back of the house, Respondent still barred Alper from going into areas in the back of the house where Union

representatives had traditionally gone. This incident appears as just one of a series of incidents aimed at restricting Union access to the back of the house. Since this new rule was never raised during bargaining over access with Respondent and Respondent did not provide the Union notice of the rule or afford it an opportunity to bargain over the new rule before implementing it, Respondent violated Section 8(a)(5) of the Act.

H. The Judge Erred by Failing to Conclude that Respondent Violated Section 8(a)(5) by Barring Union Representative Jessica Medina from Its Property Indefinitely

Although he discussed this allegation in his findings of fact, the Judge failed to draw any conclusion regarding this allegation. Nevertheless, there is sufficient evidence in the record for the Board to draw a conclusion regarding this allegation. The Judge found that on January 31, 2012, Respondent's attorney Richard Curiale sent an email to Max Alper stating that Union representative Jessica Medina was barred from Respondent's property. The Judge found that Medina was barred based on an incident which occurred on December 7, 2011. On December 7, a grievance meeting was held at Respondent's training center, which is separate and apart from the Casino. Alper and Medina attended the meeting on behalf of the Union. Chris Mavroudis represented Respondent at the meeting although Respondent's head of security James Grant was also in the room. The Judge found that after the meeting was over, Alper attempted to talk to Mavroudis. At that point, Grant walked over and Mavroudis walked away. Grant told Alper and Medina that they needed to leave but he asked again four or five times more before they left.

The evidence is clear that Medina did not do anything at this meeting that justified Respondent's barring her from its property indefinitely. (Tr. 308-310, 389-391, 480) At most she refused to leave a meeting, where no employees were present, until asked to do so four or five times. There was no confrontation or altercation, just an attempt to continue the meeting

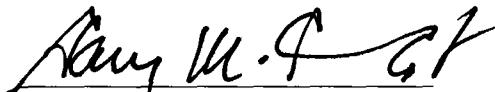
discussion a little longer than Respondent's representatives wanted. By expelling Medina from its property, Respondent was unlawfully refusing to deal with the chosen representative of the Union. Moreover, even if Respondent believed that Medina had engaged in misconduct warranting denial or restrictions on her access rights, Respondent had an obligation to notify and bargain with the Union over that before it eliminated Medina's access rights. Because the Union was not given any prior notice of this action or afforded the opportunity to bargain over the action before the action was implemented, Respondent violated Section 8(a)(5) of the Act.

4. Conclusion

For the reasons set forth above, it is respectfully requested that the Board find merit to the Acting General Counsel's exceptions and find that Respondent additionally violated Section 8(a)(1) and (5) as discussed herein, and that it modify the Judge's conclusions of law, order and notice to conform with these additional matters.

DATED AT Oakland, California this 16th day of April 2013.

Respectfully submitted,



Gary M. Connaughton
Counsel for the Acting General Counsel
National Labor Relations Board
Region 32
Federal Building
1301 Clay Street, Suite 300N
Oakland, CA 94612-5224

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32

LYTTON RANCHERIA OF CALIFORNIA
d/b/a CASINO SAN PABLO

and

UNITE HERE LOCAL 2850

Case(s) 32-CA-025585
32-CA-025665
32-CA-064020
32-CA-086359

Date: April 16, 2013

**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF
CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Richard J. Curiale
Curiale Wilson LLP
One Maritime Plaza, Suite 1600
San Francisco CA 94111
VIA EMAIL: rcuriale@curialewilson.com

Joseph Wilson
Curiale Wilson LLP
One Maritime Plaza, Suite 1600
San Francisco CA 94111
VIA EMAIL: jwilson@curialewilson.com

Elizabeth Q. Hinckle, Counsel
Davis, Cowell & Bowe, LLP
595 Market St., Ste. 1400
San Francisco, CA 94105-2821
VIA EMAIL: eqh@dcbsf.com

Office of the Executive Secretary
1099 14th Street, N.W.
Washington, DC 20005
VIA E-FILE

April 16, 2013
Date

Frances Hayden, Designated Agent of NLRB
Name


Signature