

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

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

**and**

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

**UNITE HERE LOCAL 2850**

**ACTING GENERAL COUNSEL'S BRIEF IN  
REPLY TO RESPONDENT'S ANSWERING BRIEF**

**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 filed Cross-Exceptions to the Judge's decision and Respondent filed an Answering Brief. The following is Counsel for the Acting General Counsel's reply to Respondent's Answering Brief.

**Argument<sup>1</sup>**

**1. The Board Should Find that Respondent Violated the  
Act by Maintaining Certain Rules in its Employee Handbook**

In his Cross-Exceptions, Counsel for the Acting General Counsel argued that the Judge erred by failing to conclude that Respondent violated the Act by maintaining certain rules in its

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<sup>1</sup> References to the Judge's Decision are listed as "ALJD \_ : \_." "Tr." refers to cites in the official transcript. "GC" refers to the Exhibits of the Counsel for the Acting General Counsel.

employee handbook from about August 2010 through May 2011. In its Answering Brief, Respondent argued that no violation should be found because it voluntarily changed the rules in issue in 2011 and because the Judge made no factual finding that it had enforced any of the alleged rules. However, for the reasons discussed below, the Board should find that Respondent violated Section 8(a)(1) by maintaining the rules alleged in the complaint.

First, it is undisputed that the rules were in effect at the time that the original charge was filed. (ALJD 5; 31-32; GC 1(a)). Second, the rules were unlawful on their face so, accordingly no evidence of enforcement was necessary to find a violation. Third, Respondent's voluntary modification of its handbook rules does not meet the requirements for self-remedy set forth in *Passavant*.<sup>2</sup> In that regard, there is no evidence that Respondent informed its employees of the changes that it made to its hand book rules or that it gave any assurances to employees that in the future it would not interfere with the exercise of their Section 7 rights. *Id.* Therefore, the Board should find merit to the Acting General Counsel's Cross-Exceptions in this regard and modify the Judge's proposed Order accordingly.

**2. Neither the Judge's Findings Nor the Relevant Case Law Supports Respondent's Argument that It Lawfully Barred Jessica Medina from its Premises**

In his Cross-Exceptions, counsel for the Acting General Counsel argued that the Judge erred by failing to conclude that on January 31, 2012 Respondent violated Section 8(a)(5) of the Act by permanently barring Union representative Jessica Medina from its premises. In its Answering Brief, Respondent argues that Medina's conduct on December 7, 2011 justified this ban. In support of this argument, Respondent relies on the Board's decision in *Nynex Corp.*, 338 NLRB 659 (2002). However, neither the Judge's finding of fact regarding the December 7 incident nor the Board's decision in *Nynex Corp.* supports Respondent's argument.

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<sup>2</sup> *Passavant Memorial Area Hospital*, 237 NLRB 138, 139 (1978).

In this regard, he Judge found that at the end of a grievance meeting held on December 7, 2011 at the Employer's training center, which he found was separate and apart from the Casino, Jessica Medina and Union representative Max Alper were asked four or five times to leave before they finally left the meeting. However, the Judge did not find that either Medina or Alper engaged in any disruptive conduct before they left or that Medina engaged in any aggressive behavior before leaving or that Medina's failure to leave the facility when she was first asked disrupted Respondent's operations in anyway. Contrary to Respondent's contention, the Judge also did not find that the delay between when Alper and Medina first were asked to leave and when they left prevented Respondent from locking or setting the alarm in the building.

In *Nynex Corp.* the Board found that the Employer lawfully barred union representatives from its premises after they entered a secure area of the employer's facility without permission and disrupted operations of the facility for two hours while persistently refusing the employer's repeated requests that they leave. The Board found that in those circumstances, the action of the union representatives, which it likened to an occupation of the premises,<sup>3</sup> lost the protection of the Act. The facts in the instant case could hardly be more different. First, unlike the circumstances in *Nynex Corp.*, the Judge found that Medina was at the training center with permission to attend a grievance meeting. Further, unlike the situation in *Nynex Corp.*, the Judge did not find that Medina's refusal to leave the facility when first requested to do so caused a disruption to Respondent's business. In that regard, it is undisputed that there were no employees present at the time when Medina was asked to leave the facility.<sup>4</sup> Finally, unlike the situation in *Nynex*, the time between when Medina was first asked to leave and when she left was very short and nothing like the two hour time period in *Nynex Corp.* Although the Judge did not

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<sup>3</sup> *Nynex Corp.*, supra at 661 fn5.

<sup>4</sup> (Tr. 307, 492, 600)

make a specific finding as to the actual elapsed time between when Medina and Alper were first asked to leave and when they left the training center, Respondent's witness James Grant estimated that it was only about four minutes.<sup>5</sup> Thus, contrary to Respondent's contention, the Board's holding in *Nynex Corp.* is not applicable to the circumstances of this case.

In sum, based on the Judge's actual findings regarding what happened on December 7 as well on the basis of uncontested facts, the Employer did not have a sufficient basis for permanently barring Jessica Medina from its premises. Accordingly, the Board should modify the Judge's proposed Order by including an appropriate legal conclusion and remedy for this allegation.

**3. The Board Should Find that Respondent Violated Section 8(a)(5) of the Act By Unilaterally Implementing a Rule Barring Union Representatives From Areas of the Casino Where Employee Schedules are Kept**

In his Cross-Exceptions, Counsel for the Acting General Counsel argued that the Judge erred by failing to conclude that Respondent violated the Act by unilaterally implementing a rule barring Union representatives from areas of the Casino where employee schedules are kept. In its Answering Brief, Respondent argues that because the Judge did not make a specific factual finding about what the past practice had been prior to March 10, 2011, the Board should find that the Judge did not err by failing to draw a legal conclusion regarding this allegation. Respondent also argues that the Judge's failure to make a specific factual finding and his failure to draw any legal conclusion whatsoever regarding this allegation means that he credited Respondent's witnesses over those of the Acting General Counsel and implicitly found for Respondent. However, neither the Judge's failure to make a specific factual finding nor his failure to draw any legal conclusion supports Respondent's arguments.

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<sup>5</sup> (Tr. 492)

The Judge's failure to address the issue of past practice as to Union representatives going into areas where employee schedules are kept appears, in the context of his whole decision, inadvertent and cannot be seen as an implicit resolution of the access issue. In that regard, in his decision, the Judge failed to make findings regarding other allegations and issues that were clearly alleged in the complaint. For example, the Judge failed to draw any conclusion whatsoever regarding the various handbook allegations. Furthermore, given the centrality of the issue of past practice to the resolution of this allegation, it seems improbable that the Judge would intentionally fail to address it. Thus, it seems apparent that the Judge's failure to draw any legal conclusion regarding this allegation must have been inadvertent. Therefore, contrary to Respondent's contentions, there is no basis to conclude that this failure means that the Judge credited Respondent's witnesses over those of the Acting General Counsel. In fact, as argued in his post-hearing Brief and in his Cross-Exceptions brief, there is strong evidentiary support for a finding that prior to March 10, 2011 Union representatives regularly visited areas in the back of the house where schedules are kept and managers in those areas were aware of these visits. On March 10, 2011, Respondent imposed a new rule prohibiting Union access to areas where employee schedules are kept. Since it is undisputed that Respondent did not provide prior notification of this change or provide the Union an opportunity to bargain over the change before implementing it, Respondent violated 8(a)(5) by implementing this new rule.

**4. The Board Should Find that Respondent Violated Section 8(a)(5) of the Act By Unilaterally Implementing a Rule Barring Union Representatives From Employee Break Rooms.**

In his Cross-Exceptions, Counsel for the Acting General Counsel argued that the Judge erred by failing to conclude that Respondent violated the Act by unilaterally implementing a rule prohibiting Union representatives from visiting employee break rooms. In its Answering Brief,

Respondent argues, among other things, that the barring of Union representative Max Alper from the employee break rooms on March 21, 2011 was the result of short staffing that day and that the Judge implicitly so found based on his crediting Respondent's witnesses. However, nothing in the Judge's finding of facts regarding this incident supports this argument. Thus, contrary to Respondent's witnesses, the Judge found that Union representative Max Alper called in advance of his visit that day. When he arrived he was escorted to the employee cafeteria. However, when he asked to be escorted to the employee break room, the Judge found that security supervisor Buddy Jah, after checking with Chris Mavroudis, told Alper that he could not go to the employee break room. The Judge found that when Alper asked Jah why he could not go to the break room, Jah said "that was what he was told." Thus, the Judge did not credit Respondent's witnesses about being short staffed that day. Since it is undisputed that Respondent made this change without first providing the Union notice or an opportunity to bargain over the change, the change violated Section 8(a)(5) of the Act. In these Circumstances, the Judge's failure to make such a finding and conclusion can be nothing other than an inadvertent error.

### **Conclusion**

For the reasons set forth above, it is respectfully requested that the Board reject Respondent's arguments in its Answering Brief, find merit to the Acting General Counsel's Cross-Exceptions, and find that Respondent violated Section 8(a)(5) and (1) by maintaining the alleged handbook rules, by barring Jessica Medina from its premises, by unilaterally

implementing new access rules regarding both the viewing of employee schedules and Union access to employee break rooms, and order the appropriate remedies.

**DATED AT** Oakland, California this 13th day of May 2013.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary M. Connaughton", written over a horizontal line.

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**Case(s) 32-CA-025585  
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**Date: May 13, 2013**

**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S BRIEF IN REPLY TO  
RESPONDENT'S ANSWERING BRIEF**

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.

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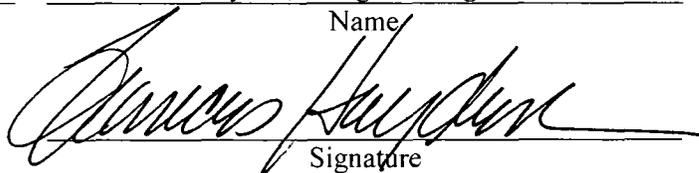
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