Crowne Plaza Hotel *and* Rochester Regional Joint Board Unite HERE. Case 3–CA–25953

April 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel seeks summary judgment in this case on the ground that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(1) of the Act by maintaining seven unlawful rules in its employee handbook.[1]

Pursuant to a charge filed by Rochester Regional Joint Board UNITE HERE (Union) on July 27, 2006, as amended on August 22 and September 28, 2006, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on September 28, 2006, alleging that the Respondent, Crowne Plaza Hotel, has violated Section 8(a)(1) of the Act by maintaining rules in its employee handbook that interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. The General Counsel amended the complaint on November 9, 2006. The Respondent filed answers to the complaint and amended complaint, denying the commission of any unfair labor practices and raising an affirmative defense.

On December 27, 2006, the General Counsel filed a motion to transfer the case to the Board and for summary judgment, and a memorandum in support. On January 3, 2007, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the Motion for Summary Judgment should not be granted. On January 16, 2007, the Respondent filed a brief in opposition to the General Counsel's Motion for Summary Judgment and a cross-motion to dismiss the complaint. On February 7, 2007, the General Counsel filed a reply brief.[2]

Ruling on Motion for Summary Judgment[3]

The complaint alleges that since about July 1, 2006, the Respondent has maintained the following rules in its employee handbook:

> **<u>No Solicitation/No Distribution</u>**
>
> The conducting of non-company business, such as canvassing, collection of funds, pledges, circulation of petitions, solicitation of memberships, or any other similar types of activity is not permitted during the working time of either the employees to whom non-company literature is being distributed, or any time in working areas or in customer and public areas.[4]
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> . . . .
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> **EMPLOYEE USE OF HOTEL FACILITIES**
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> You should only be at the hotel during scheduled work hours. When you have punched out at the end of your shift, please leave the building promptly. Any employee caring to visit the hotel during non-work hours must first obtain permission from the General Manager. If an employee would like to patronize any of the food and beverage outlets, they may do so only with the prior permission of the General Manager.
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> . . . .
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> **PRESS RELEASE AND NEWS MEDIA**
>
> Should any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative by [sic] the General Manager. Under no circumstances will statements or information be supplied by any other employee.
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> . . . .

[1] The alleged unlawful rules address the following kinds of employee activity: solicitation and distribution, off-duty use of hotel facilities, supplying statements or information to the press, discussing company business or work difficulties in front of guests, leaving work area without authorization, walking off the job, and "insightful" [i.e., inciteful] actions.

[2] By letter dated January 17, 2007, counsel for the Charging Party informed the Board that the Charging Party supports the General Counsel's Motion for Summary Judgment.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[4] In a letter to employees dated August 3, 2006, the Respondent sought to "clarify" its no-solicitation/no-distribution rule, stating that it prohibits noncompany business "'during the *working time*' of either of the employees involved 'or any time in *working areas* or in customer and public areas.'" (Emphasis in original.) Therein, the Respondent informed employees that "[y]ou should . . . refrain from discussing Hotel matters in public areas or in the presence of guests."

DISCUSSING COMPANY BUSINESS

Whenever you are on duty in or around the hotel, it is important not to discuss company business or work difficulties in front of guests. Your primary concern at all times is guest satisfaction. Problems or concerns should be addressed by following the steps outlined in the Fair Treatment section of this handbook.[5]

. . . .

EMPLOYMENT CONDUCT POLICY

The Crowne Plaza–Rochester expects that its employees always conduct themselves in a manner that is in the best interest of the company, our guests, the community and co-workers. Any violation of the rules and regulations, policies and procedures of this company may result in disciplinary action or termination.

Examples of conduct that are not permitted

2. Leaving your work area without authorization before the completion of your shift[.]

. . . .

33. Walking off the job.

. . . .

38. Insightful[6] [inciteful] actions against fellow employees, supervisors or department heads.

The complaint further alleges that by maintaining these rules in its employee handbook the Respondent has violated Section 8(a)(1). In its answer, the Respondent admits that it maintained the alleged unlawful rules, but denies the allegation that it violated the Act.

We find that there are no material issues of fact warranting a hearing because the Respondent admits that it has maintained the alleged unlawful rules in its employee handbook since at least July 1, 2006, and that the handbook is given to every employee at the time of hire. For the reasons set forth below, we grant the General Counsel's motion as to the following rules: "No Solicitation/No Distribution," "Press Release and News Media," "Leaving your work area without authorization before the completion of your shift," "Walking off the job," and "[Inciteful] actions against fellow employees, supervisors, or department heads."[7] As to the other alleged unlawful rules—"Employee Use of Hotel Facilities" and "Discussing Company Business"—we deny the General Counsel's motion and dismiss the complaint.

The analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) was 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.
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> 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.[8]

The General Counsel argues that the alleged unlawful rules explicitly restrict Section 7 activity or employees would reasonably construe them to prohibit Section 7 activity. The General Counsel does *not* contend that the rules were initiated in response to any union and/or protected concerted activity or that any employee has been disciplined under the rules for engaging in union and/or protected concerted activity.

A. No-Solicitation/No-Distribution

This rule provides, in pertinent part:

> The conducting of non-company business, such as canvassing, collection of funds, pledges, circulation of petitions, solicitation of memberships, or any other similar types of activity is not permitted during the working

[5] The "Fair Treatment Policy" states, in pertinent part:

If you have a suggestion or complaint to share, please follow these steps:

1. Discuss your problem or idea with your immediate supervisor.
2. If your discussion with your supervisor does not have a satisfactory conclusion, you should then speak to your department head.
3. If you are still unsatisfied, see you[r] Human Resources representative or the General Manager. He/she will review the facts and circumstances and confer with you to solve the problem.

An employee using this procedure will not be penalized for bringing a complaint or problem to the attention of management. We encourage you to communicate and resolve any problems or misunderstandings you may have.

[6] In its memorandum in opposition to the Motion for Summary Judgment, the Respondent states that it "intended the word 'inciteful.'"

[7] In joining his colleague in finding these violations, Chairman Schaumber notes that more narrowly tailored rules could lawfully protect the Respondent's business interests.

[8] 343 NLRB at 646–647 (emphasis in original and footnote omitted).

> time of either the employees to whom non-company literature is being distributed, or any time in working areas or in customer and public areas.

The General Counsel contends that the no-solicitation/no-distribution rule is unlawfully overbroad because it prohibits off-duty employee solicitation and distribution not only in the "working areas" of the hotel, but also at "any time" in its "customer and public areas."

In *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006), the Board found a comparable rule unlawfully overbroad. In that case, the respondent hotel-casino maintained a "Customer Service" rule that included the following guideline for interacting with customers:

> Never discuss Company issues, other employees, and personal problems to or around our guests. Be aware that having a conversation in public areas with another employee will in all probability be overheard.[9]

The Board viewed this rule, which prohibited employees from discussing working conditions, as analogous to a no-solicitation rule and evaluated its lawfulness by applying the framework utilized by the Board to assess the legality of employee no-solicitation rules in the retail industry:

> Over the years, the Board has carved out, for certain industries, special rules for assessing the legality of employee no-solicitation rules. In the retail industry, for example, the Board has held that because active solicitation in a sales area may disrupt a retail store's business, an employer legally may prohibit solicitation by employees on the selling floor even during the nonworktime of the employees. *J. C. Penney Co.*, 266 NLRB 1223 (1983); *Marshall Field & Co.*, 98 NLRB 88 (1952). But as stated in *McBride's of Naylor Road,* [229 NLRB 795 (1977),] in applying this precedent, the Board "has not allowed the restrictions on solicitation . . . to be extended beyond that portion of the store which is used for selling purposes," such as public restrooms and restaurants.[[10]]
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> Gambling casinos, such as the one that the Respondent operates, have long been considered akin to retail stores for purposes of assessing the legality of employee no-solicitation rules. *Dunes Hotel*, 284 NLRB 871, 875 (1987); *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000). Thus, as with a retail store's selling floor, the Respondent lawfully could prohibit employees from soliciting each other and discussing their working conditions in the casino's gambling areas, and adjacent aisles and corridors frequented by customers, but it could not lawfully maintain a general ban on that activity beyond that area.[11]

The Board likened the casino's gambling areas to the selling floor of a retail store and found that the respondent's customer service rule "prohibited discussions in 'public areas,'" including parking lots and restrooms.[12] So read, the Board concluded that the rule violated the Act "at least to the extent that it bars discussion in places outside the gaming area, such as, . . . restrooms, public bars and restaurants, sidewalks and parking lots."[13]

The Respondent argues that a hotel—unlike a casino, restaurant, or retail store—lacks specific, identifiable customer service areas and therefore the maintenance of a rule prohibiting solicitation and distribution in all areas open to customers is necessary "to curtail employees from interrupting customer satisfaction." While we recognize that a hotel has some service areas that are not easily identifiable, the Respondent's interest in customer service does not entitle it to designate all public areas of its facility—including parking areas, sidewalks, and public restrooms—to be "guest service areas" in which off-duty employees cannot exercise their Section 7 rights under any circumstances (i.e., even when no guests are present).

For instance, in *Santa Fe Hotel & Casino*, supra, the Board held that the respondent hotel-casino violated Section 8(a)(1) by enforcing its no-distribution/no-solicitation rule to prohibit its off-duty employees from distributing literature at the main entrances to its facility. In its reasoning, the Board commented that "the occurrence of nonproduction work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property to be a 'working area' for the purpose of excluding employee solicitation activ-

[9] 341 NLRB at 112–113.

[10] As indicated in *McBride's of Naylor Road*, the same principles are applied to determine the lawfulness of employee no-distribution rules in the retail industry. 229 NLRB at 795.

[11] Id. at 113.

[12] Id.

[13] Id. (citations omitted). In enforcing the Board's order, the United States Court of Appeals for the Tenth Circuit found the rule unlawful even if it was read more narrowly to merely prohibit employees from discussing working conditions in the presence of guests:

> The rule's first sentence, which prohibits discussion of company issues, contains nothing to limit the scope of its application. Under this rule, the presence of a single guest can transform an area in which employees have a right to discuss work conditions, such as the parking lot or break room, into a place where discussion is prohibited. While existing case law permits a casino to limit employees' discussions on the gaming floor, no court has interpreted the NLRA to permit an employer to adopt a no-discussion rule that follows each of its customers.

414 F.3d at 1254 (citation omitted).

ity."[14] Similarly, in *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999), the Board adopted the judge's finding that a hotel violated Section 8(a)(1) by maintaining a rule that prohibited off-duty employees from soliciting or distributing in "public areas" of its facility other than gaming areas. The Respondent's no-solicitation/no-distribution rule, to the extent that it prohibits off-duty employee solicitation and distribution at "any time" in "customer and public areas," suffers from the same infirmities identified in these prior Board decisions, and is unlawfully overbroad.

B. Employee use of Hotel Facilities

This rule provides:

> You should only be at the hotel during scheduled work hours. When you have punched out at the end of your shift, please leave the building promptly. Any employee caring to visit the hotel during non-work hours must first obtain permission from the General Manager. If an employee would like to patronize any of the food and beverage outlets, they may do so only with the prior permission of the General Manager.

The General Counsel contends that the employee use of hotel facilities rule is unlawful because, without justification, it denies off-duty employees entry to the outside nonworking areas of the Respondent's property.[15] Additionally, the General Counsel contends that this rule is unlawful because it allows the general manager to select which off-duty employees may use the facilities and thus "it is not uniformly applied to all off-duty employees seeking access to Respondent's hotel."

In our view, employees would not reasonably construe the Respondent's employee use of hotel facilities rule as denying off-duty employees access to the Respondent's parking areas and other outside nonworking areas. The rule's second sentence requires that employees leave only "the building" at the end of their shift. Reading the remainder of the rule in this context, the rule limits off-duty employees' access to the hotel "building," not the entire premises, including parking areas and other outside nonworking areas.[16]

The final sentence of the rule, which requires permission to patronize the food and beverage outlets, is similar to a rule which the Board found lawful in *Lafayette Park Hotel*, supra. In that case, the handbook provided: "Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager."[17] The Board found that "a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity." The Board noted that the rule "does not mention or in any way implicate Section 7 activity" and there are "legitimate business reasons" for a rule requiring employees to obtain permission before entertaining friends or guests at the hotel.[18] Here, too, the rule does not mention Section 7 activity and there are legitimate business reasons for a rule requiring employees to obtain permission before patronizing the food and beverage outlets.[19] Accordingly, the Respondent did not violate Section 8(a)(1) by maintaining such a rule.[20]

C. Press Release and News Media

This rule provides:

> Should any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative by [sic] the General Manager. Under no circumstances will statements or information be supplied by any other employee.

The General Counsel contends that the Press Release and News Media rule is unlawful because it prohibits employees from communicating with the media concerning their terms and conditions of employment. The Respondent argues that reasonable employees would not interpret the rule so broadly and that the intent of this rule is to inform employees that "only the General Manager may disseminate Crowne Plaza's official comments

[14] 331 NLRB at 723.

[15] See *Tri-County Medical Center,* 222 NLRB 1089 (1976) ("[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.").

[16] Compare *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) mem. (finding, absent explicit exclusion of parking areas and other outside areas, employees would reasonably read rule requiring them to leave "the premises" immediately after completion of their shift as covering those areas and, therefore, rule violated Sec. 8(a)(1)). In dismissing this allegation, we note that the complaint does not allege that rule 3 of the handbook's Employment Conduct Policy—which provides that "Remaining on or returning to the premises after work without permission" is "not permitted"—is unlawful. In the absence of such an allegation, we do not pass on whether rule 3 is unlawful. Also, no party argues that rule 3 would lead an employee to reasonably construe the employee use of hotel facilities rule as covering the entire "premises."

[17] 326 NLRB at 827.

[18] Id.

[19] In an affidavit attached to the Respondent's opposition to the Motion for Summary Judgment, the Respondent's general manager states that requiring employees to obtain permission before using hotel services enables managers and staff to know which employees are not on duty and prevents staff from monopolizing services meant for guests.

[20] Member Liebman dissented in relevant part in *Lafayette Park Hotel*. See 326 NLRB at 833. Nevertheless, Member Liebman recognizes that the majority view in *Lafayette Park* represents extant Board law and she applies it here for institutional reasons.

regarding newsworthy events when inquiries are directed at the Hotel by the media." The scope of the rule, however, is not commensurate with that limited intent.

The rule applies to "any incident" generating "significant public interest or press inquiries." The term "significant public interest" is broad enough to encompass a labor dispute, such as a walk-out or strike. A rule that prohibits employees from exercising their Section 7 right to communicate with the media regarding a labor dispute is unlawful.[21] The determinative question, then, is whether the rule prohibits employees from communicating with the news media about such matters or merely states that employees cannot speak *on behalf of the Respondent* in response to media inquiries about such matters. The rule does not expressly state, and in our view it does not necessarily imply, that the prohibition on providing statements or information to the media applies only when the media seeks the Respondent's "official comments." On the contrary, the rule's second sentence would reasonably be construed as prohibiting all employee communications with the media regarding a labor dispute: "*Under no circumstances* will statements or information be supplied [to the media] by [anyone other than the General Manager or his designated representative]." At the very least, the second sentence renders the rule ambiguous, and as such it is susceptible to the reasonable interpretation that it bars Section 7 activity. Because it is facially overbroad, the Respondent's maintenance of the press release and news media rule violates Section 8(a)(1).

D. Discussing Company Business

This rule provides:

> Whenever you are on duty in or around the hotel, it is important not to discuss company business or work difficulties in front of guests. Your primary concern at all times is guest satisfaction. Problems or concerns should be addressed by following the steps outlined in the Fair Treatment section of this handbook.

The General Counsel argues that the discussing company business rule violates the Act because it "requires employees to use the Employer's Fair Treatment procedure to address work problems" and "employees may reasonably conclude that they may not discuss problems with coworkers or other outside entities, such as a union or the media." We disagree with the General Counsel and find that this rule does not violate Section 8(a)(1).

This rule does not require employees to first bring any work-related complaints to the company; it merely states that problems or concerns "should" be addressed through the fair treatment procedure. Although the rule encourages employees to use the fair treatment procedure to address their problems or concerns, it neither forecloses them from using other avenues (e.g., fellow employees, a union, or the NLRB), nor requires them to go to management before using other avenues. The General Counsel does not allege that the provision ever has been applied to foreclose such access. Therefore, employees would not reasonably understand this rule to forbid them from bringing their work-related problems or concerns to persons or entities other than the Respondent.[22]

Nor would employees reasonably conclude that they may not discuss problems with coworkers or outside entities, such as a union or the media. Although the rule's first sentence provides that "it is important" not to discuss "company business or work difficulties in front of guests," this guideline pertains only to the employees' working time ("Whenever you are *on duty*").[23]

E. Employment Conduct Policy

This section of the employee handbook includes the following rules:

> The Crowne Plaza–Rochester expects that its employees always conduct themselves in a manner that is in the best interest of the company, our guests, the community and co-workers. Any violation of the rules and regulations, policies and procedures of this company may result in disciplinary action or termination.
>
> Examples of conduct that are not permitted
>
> 2. Leaving your work area without authorization before the completion of your shift[.]
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> . . . .
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> 33. Walking off the job.
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> . . . .

[21] See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) ("Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. This includes communications about labor disputes to newspaper reporters.") (citations omitted).

[22] See *U-Haul Co. of California*, 347 NLRB 375, 378–379 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007). Member Liebman dissented in relevant part in *U-Haul Co. of California*. Id. at 383–384. Nevertheless, Member Liebman recognizes that the majority view in *U-Haul Co. of California* represents extant Board law and she applies it here for institutional reasons.

[23] Compare *Guardsmark, LLC*, 344 NLRB 809, 809–810 (2005) (rule prohibiting employees "dissatisfied with any . . . aspect of [their] employment" from "register[ing] complaints with any representative of the client" unlawful because the prohibition was not limited to working time only), enf. granted in part and denied in part 475 F.3d 369 (D.C. Cir. 2007).

38. Insightful [sic] actions against fellow employees, supervisors or department heads.

The General Counsel contends that rules 2 and 33 are unlawful because employees would reasonably construe them as prohibiting a "mid-shift strike." The Respondent argues that "[g]iven the number of employees working throughout the Hotel in various capacities and with varying degrees of oversight, these rules are critical to [its] ability to ascertain that its employees are dutifully performing their assigned tasks."

Under Board law, "[i]t is well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions, including unsafe or unhealthy working conditions, are engaged in 'concerted activities' for 'mutual aid or protection' within the meaning of Section 7 of the Act."[24] Rules 2 and 33 are unlawfully overbroad because an employee would reasonably read these rules as, respectively, requiring management's permission before engaging in such protected concerted activity, thereby allowing management to abrogate the Section 7 right to engage in such activity,[25] or altogether prohibiting employees from exercising their Section 7 right to engage in such protected concerted activities.[26]

The Board's decision in *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated in part 345 NLRB 1050 (2005), reversed and remanded sub. nom. *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007), upon which the Respondent relies, is distinguishable. In *Wilshire at Lakewood*, the Board found that the employer did not violate Section 8(a)(1) by maintaining a handbook rule prohibiting employees from "abandoning your job by walking off the shift without permission of your supervisor or administrator."[27] The employer operated a nursing home with many sick or infirm elderly patients; its "mission" was "to ensure adequate care for its patients."[28] The Board held that considering the rule in this context, "employees would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday," which the Board characterized as "imminent danger," and, therefore, the rule was not unlawful.[29] In the instant case, arising in the hotel industry, the Respondent's managerial interest in "ascertain[ing] that its employees are dutifully performing their assigned tasks" is not comparable to the risk of "imminent danger" to patients who are incapable of caring for themselves that warrants a broader no walk-off rule in the nursing home industry. Accordingly, rules 2 and 33 are unlawfully overbroad.

Turning to rule 38, the General Counsel contends that this rule unlawfully prohibits employees from inciting any protected concerted activity. The Respondent argues that its prohibition of "[inciteful] actions against fellow employees, supervisors or department heads" is intended to ensure a pleasant environment for its guests and that reasonable employees would recognize the rule's objective as solely "to ensure a 'civil and decent' workplace, not to restrict Section 7 activity."

In *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005), the Board found lawful a rule that prohibited "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow Team Members or patrons." In so finding, the Board reasoned, in part, that the rule is not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id. at 1368.

We believe the holding in *Palms Hotel & Casino* is dispositive. Rule 38's prohibition of "[inciteful] actions" against supervisors and department heads is vague. To "incite" means "to move to a course of action: stir up: spur on: urge on."[30] Rule 38 does not merely prohibit employees from inciting violent, threatening, or uncivil behavior but extends more broadly to bar them from inciting "actions." Although rule 38 forbids incitement against individuals, not the Respondent itself, the rule's prohibition of such conduct against supervisors and department heads would, in our view, be reasonably construed as prohibiting employees from exercising their Section 7 right to initiate or induce group action.[31] Accordingly, rule 38 is unlawfully overbroad.[32]

[24] *Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002) (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962)). Chairman Schaumber notes that it is equally well established that the protections of Sec. 7 are not absolute. See, e.g., *NLRB v. Washington Aluminum Co.*, 370 U.S. at 17, and cases cited fns. 14–17.

[25] *NLRB v. Washington Aluminum Co.*, 370 U.S. at 16–17 (holding that company's discharge of employees for engaging in unauthorized walkout to force company to improve their working conditions violated the Act notwithstanding that company rule "forbade employees to leave their work without permission of the foreman," as a contrary holding would "prohibit even the most plainly protected kinds of concerted work stoppages" without the foreman's permission).

[26] See *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000) (invalidating, as overbroad, a rule stating that, "Employees who walk off the job will be discharged").

[27] 343 NLRB at 144 (brackets omitted).

[28] Id.

[29] Id.

[30] *Webster's Third New International Dictionary*, 1142 (1981).

[31] See *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390, 392 (2006); *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[32] In finding rules 2 and 33 unlawful, Chairman Schaumber relies on extant Board law, which he applies for institutional reasons. He does

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Rochester, New York, has been engaged in the operation of a hotel providing food and lodging. In conducting its business operations described above, the Respondent annually derives gross revenues in excess of $500,000 and purchases and receives at its Rochester, New York facility goods and materials valued in excess of $5000 directly from points outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about July 1, 2006, the Respondent, by its employee handbook issued to all employees, has maintained the following rules:

> **No Solicitation/No Distribution**
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> The conducting of non-company business, such as canvassing, collection of funds, pledges, circulation of petitions, solicitation of memberships, or any other similar types of activity is not permitted during the working time of either the employees to whom non-company literature is being distributed, or any time in working areas or in customer and public areas.
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> **PRESS RELEASE AND NEWS MEDIA**
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> Should any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative by [sic] the General Manager. Under no circumstances will statements or information be supplied by any other employee.
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> **EMPLOYMENT CONDUCT POLICY**
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> The Crowne Plaza–Rochester expects that its employees always conduct themselves in a manner that is in the best interest of the company, our guests, the community and co-workers. Any violation of the rules and regulations, policies and procedures of this company may result in disciplinary action or termination.
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> Examples of conduct that are not permitted
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> 2. Leaving your work area without authorization before the completion of your shift[.]
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> . . . .
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> 33. Walking off the job.
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> . . . .
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> 38. Insightful [sic] actions against fellow employees, supervisors or department heads.

CONCLUSION OF LAW

By engaging in the conduct described above, the Respondent has interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist, to rescind its unlawful rules and remove them from its employee handbook, and to advise employees in writing that its unlawful rules are no longer being maintained.[33]

ORDER

The National Labor Relations Board orders that the Respondent, Crowne Plaza Hotel, Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following no-solicitation/no-distribution rule in its employee handbook:

> The conducting of non-company business, such as canvassing, collection of funds, pledges, circulation of pe-

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not pass, however, on whether rule 2, standing alone, would be facially unlawful. Instead, he believes that employees would reasonably construe rule 2 as being coextensive with rule 33, which is facially unlawful under *Labor Ready, Inc.*, supra. He further agrees that *Wilshire at Lakewood*, supra, can be distinguished, though, in his view, the considerations animating the holding in that case may extend beyond the health care industry.

[33] Consistent with *Cintas Corp.*, 344 NLRB 943 (2005), enfd. *Cintas v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007), and other recent cases, the "Respondent may comply with this Order by rescinding the unlawful provisions and republishing its handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old unlawfully broad rules, until it republishes the handbook without the unlawful provisions." *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005).

titions, solicitation of memberships, or any other similar types of activity is not permitted during the working time of either the employees to whom non-company literature is being distributed, or any time in working areas or in customer and public areas.

(b) Maintaining the following press release and news media rule in its employee handbook:

> Should any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative by [sic] the General Manager. Under no circumstances will statements or information be supplied by any other employee.

(c) Maintaining the following employment conduct rules in its employee handbook:

> Examples of conduct that are not permitted
>
> 2. Leaving your work area without authorization before the completion of your shift[.]
>
> . . . .
>
> 33. Walking off the job.
>
> . . . .
>
> 38. Insightful actions against fellow employees, supervisors or department heads.

(d) 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 the employee handbook's no-solicitation/no-distribution rule, the press release and news media rule, and employment conduct rules 2, 33, and 38.

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

(c) Within 14 days after service by the Region, post at its facilities in Rochester, New York, copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 July 1, 2006.

(d) 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.

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.

WE WILL NOT maintain the following no-solicitation/no-distribution rule in our employee handbook:

> The conducting of non-company business, such as canvassing, collection of funds, pledges, circulation of petitions, solicitation of memberships, or any other similar types of activity is not permitted during the working time of either the employees to whom non-company literature is being distributed, or any time in working areas or in customer and public areas.

WE WILL NOT maintain the following press release and news media rule in our employee handbook:

> Should any incident occur that generates significant public interest or press inquiries, all press releases and other statements of information will be handled by the General Manager, or designated representative by [sic]

[34] 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."

the General Manager. Under no circumstances will statements or information be supplied by any other employee.

WE WILL NOT maintain the following employment conduct rules in our employee handbook:

Examples of conduct that are not permitted

2. Leaving your work area without authorization before the completion of your shift[.]

. . . .

33. Walking off the job.

. . . .

38. Insightful [sic] actions against fellow employees, supervisors or department heads.

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

WE WILL rescind the rules set forth above from the employee handbook.

WE WILL furnish all of you with inserts for the current employee handbook that (1) advise you that the unlawful rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide the language of lawful rules.

CROWNE PLAZA HOTEL