

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

MARRIOTT INTERNATIONAL, INC., D/B/A
J.W. MARRIOTT LOS ANGELES AT
L.A. LIVE

and

Case 21-CA-39556

UNITE HERE! LOCAL 11

**ANSWERING BRIEF OF
COUNSEL FOR THE ACTING GENERAL COUNSEL
TO RESPONDENT'S EXCEPTIONS**

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I. STATEMENT OF THE CASE

This case is before the Board because Respondent filed exceptions and a supporting brief seeking reversal of a decision issued by Administrative Law Judge Anderson on July 22, 2011.¹ Administrative Law Judge Clifford H. Anderson held that Respondent violated Section 8(a) (1) of the Act by maintaining rules restricting off-duty employee access to its premises. Although Respondent moved to dismiss the case at the hearing on the ground that the rules were first promulgated more than six months before the charge was filed, it did not take exception to the Administrative Law Judge's conclusion that the complaint was not time-barred. Counsel for the Acting General Counsel did not file exceptions and respectfully submits that Respondent's exceptions are without merit.

II. ISSUES PRESENTED

1. Whether the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act by maintaining the "Returning to Work Premises" rules contained in Respondent's California Associate handbook and in the L.A. Live Handbook; and
2. Whether the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act by maintaining the "Use of Property and Hotel Facilities" rules contained in Respondent's California Associate Handbook and in the L.A. Live Handbook.

¹ References to the ALJ's Decision will be referred to as "ALJD" followed by the appropriate page and line number. The transcript will be referred to as "Tr." followed by a reference to the page number. General Counsel's exhibits will be referred to as "G.C.X" followed by the appropriate exhibit number.

⁴All dates hereafter refer to 2010 unless otherwise indicated.

III. STATEMENT OF FACTS

1. Respondent's Operations

No exceptions were taken to the ALJ's findings of fact, which are summarized below.

Respondent has been operating two hotels in the same building at the L.A. Live property in Downtown Los Angeles since February 2010:⁴ the J.W. Marriott Los Angeles at L.A. Live,⁵ the only facility involved herein, and the Ritz-Carlton Hotel. Beginning in late January, when Respondent hired employees to open the Hotel, it distributed to them an employee handbook entitled "California Associate Handbook."⁷ That handbook contains the following rules:

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.

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.

These rules have been in effect since late January.

On April 10, pursuant to a recognition agreement, the Hotel agreed to recognize the Union as the collective-bargaining representative of the following Hotel employees:

⁵ Hereafter the J.W. Marriott at L.A. Live will be referred to as the Hotel.

⁷ ALJD 3:16.

⁹ ALJD 2:28.

All regular full-time and regular part-time hotel service, housekeeping, food and beverage employees (including room cleaners, housepersons, 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 Employer 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. (G.C.X 2, ¶¶ 5-6).⁹

On May 19, the Union requested a copy of the then current California Associate Handbook, and, on May 21, was provided a copy.¹⁰

Because of the unique location of the Hotel in the same building as the Ritz Carlton, Respondent prepared a new handbook specifically for the L.A. Live Property. Beginning in early November the Hotel began distributing copies of the L.A. Live Handbook to those hired after the L.A. Live Handbook's completion.¹¹ Although some employees hired before November requested, and received, copies of the L.A. Live Handbook, Respondent did not generally distribute it to employees hired before November.¹² That handbook contains the following rules:

RETURNING TO WORK PREMISES

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

USE OF PROPERTY FACILITIES

¹⁰ ALJD 3:25-27.

¹¹ ALJD 3:28.

¹² ALJD 3:35.

The Property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or residence 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. If you wish to use the guest facilities during non-working hours, you need to obtain prior approval from your manager.

Thus, after November 2010 employees who had received the California Handbook were aware of the earlier rules and the employees who received the L.A. Live Handbook were aware of the rules it contained.¹³

IV. ARGUMENT

A. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING THE “RETURNING TO WORK PREMISES” RULES CONTAINED IN THE CALIFORNIA ASSOCIATE HANDBOOK AND IN THE L.A. LIVE HANDBOOK.

Rules governing the access rights of off-duty employees to an employer’s facility are analyzed under the three-part test first articulated in Tri-County Medical Center, 222 NLRB 1089 (1976). In that case, a rule prohibiting access to off-duty employees was found to 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 employees engaging in union activity.

¹³ ALJD 4:10.

In the second prong of the Tri-County test, the Board requires that off-duty employee access rules be clearly disseminated to all employees. In this regard, Respondent admitted that, with a limited exception,¹⁴ the California Handbook was distributed to employees hired before November. whereas the L.A. Live Handbook was distributed only to employees hired after it was issued. Accordingly, the ALJ correctly concluded that both the return-to-work premises rules and the use-of-facilities rules violate the second prong of the Tri-County test.

The third prong of the Tri-County test requires that an employer's no-access rule apply to off-duty employees seeking access to the employer's facility for "any purpose and not just those employees engaging in union activity." In Baptist Memorial Hospital, 229 NLRB 45 (1977), en'f'd. Baptist Memorial Hospital v. NLRB, 568 F.2d 1 (6th Cir. 1977), the employer maintained a prohibition on the distribution of literature during non-duty hours on or near the hospital premises. The Board there relied on the Tri-County test and reiterated the fact that the employer permitted access to employees for certain purposes, including picking up paychecks and visiting patients. Baptist Memorial Hospital, supra at 45 n. 4.

And, in Intercommunity Hospital, 255 NLRB 468 (1981), an employer's no-access rule was invalidated under Tri-County because it prohibited off-duty employee access except when employees were visiting friends or relatives who were patients or on official business with the hospital. The rule on its face was found to violate Section 8 (a)(1) of the Act because it did **not** prohibit off-duty employee access for **all** purposes. Intercommunity Hospital, supra at 474. According to the Board in that

¹⁴ The only exception is that Respondent's witness testified that some employees hired before November asked for, and received, a copy of the L.A. Live Handbook (ALJD 3:35).

case, when exceptions to access are made, even for business-related reasons including picking up a paycheck or attending a department meeting, the rule violates Section 8(a)(1). Similarly, in Oaktree Capital Management, 353 NLRB 1148 (2009)¹⁵ an ALJ invalidated an employer rule that prohibited off-duty employees from accessing the resort “with family or friends” only with a manager’s or Planning Committee Member’s prior approval. The ALJ in that case held that “a reasonable employee could interpret the rule as requiring prior approval for Section 7 activity.” Citing Teletch Holdings, Inc., 333 NLRB 402, 403 (2001), the ALJ in that case held that the rule’s requirement that employees obtain prior employer approval before engaging in Section 7 activity on an employee’s free time and in nonworking areas, is unlawful.

A literal interpretation of the third-prong of the Tri-County test might invalidate any rule that does not ban all off-duty access because rules that allow some access could reasonably be viewed by employees as restricting their right to engage in Section 7 activity. However, as ALJ Anderson correctly notes,¹⁶ the Board has not invalidated every rule that allows some off-duty employee access. Rather, in certain circumstances the Board has upheld rules that, instead of prohibiting all access, allow for limited access to specific portions of a respondent’s facility for specific purposes. Accordingly, as ALJ Anderson noted, in Lafayette Park Hotel, 326 NLRB 824, 827 (1998), the Board upheld a rule restricting off-duty employee access that allowed employees access with a manager’s prior approval when seeking to entertain friends or guests in the hotel’s restaurant or cocktail lounge.

¹⁵ Exceptions were not taken to this particular portion of the ALJ’s decision.

¹⁶ ALJD 6:36-7:24.

Here, contrary to the third prong of the Tri-County test, the return-to-premises rules, the original one in the California Associate Handbook as well as the one in the L.A. Live Handbook, do not prohibit off-duty employees from ever entering the Hotel property. Although the two handbooks contain slightly different rules governing employees' use of its facilities before November 2010 and after, both rules expressly allow off-duty employees access to any part of the interior of Respondent's property for any purpose as long as a manager's approval is obtained in advance. They both contain the following very broad exception: "circumstances may arise when you are permitted to return" to the Hotel with a manager's prior approval. The only differences between the two versions are minor: one refers to employees and the other to associates; and one refers to the Employer as Hotel and the other as the Property.

Unlike the rule in the Lafayette Park Hotel case where an exception could be made only to entertain friends or guests, here, as ALJ Anderson correctly concluded, Respondent's rules contain broad exceptions to its prohibition on off-duty employee access and, thus, could reasonably be interpreted by employees to require prior approval for Section 7 activity.¹⁷ Both rules do not impose any limitation on the purpose for the exception. In addition, unlike the rule in the Lafayette Park Hotel case which allowed access only to the hotel's restaurant or cocktail lounge, the exception here applies to the entire interior of the Hotel, and, thus, virtually any portion of Respondent's property. Accordingly, because both rules on their face do not prohibit off-duty employee access for all purposes, and contain broad exceptions, the ALJ correctly concluded that they are invalid under the third prong of the Tri-County test.

¹⁷ ALJD 7:9-24.

Respondent argues that the ALJ interpreted the holding in the Lafayette Park Hotel case too narrowly as only upholding rules that allow exceptions for a hotel's food and beverage outlets. However, ALJ Anderson expressly, and correctly, stated that the Board in the Lafayette Park Hotel case upheld the hotel's rule because it applied in "limited circumstances."¹⁸ ALJ Anderson noted that Board in the Lafayette Park Hotel case held that the rule could not reasonably be interpreted to require prior approval to engage in Section 7 activity. Because it was "drafted in a narrow manner and only restricts access for a limited purpose,"¹⁹ according to ALJ Anderson, the Board held that the rule could not reasonably be interpreted to require prior approval to engage in Section 7 activity.

Respondent also relies on a two-member Board decision in Crowne Plaza Hotel, 352 NLRB 382 (2008) for the same proposition. However, the rule at issue in the Crowne Plaza Hotel case, like the one in the Lafayette Park Hotel case, limited its exception to the ban on off-duty employee access to employees who wanted to patronize "food and beverage outlets." Unlike the rule in either of those cases, because Respondent's rules are not narrowly drafted and do not restrict access for a limited purpose, employees could reasonably interpret them to require prior approval to engage in Section 7 activity.

B. THE ALJ CORRECTLY CONCLUDED THAT RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY MAINTAINING THE "USE OF HOTEL/PROPERTY FACILITIES" RULES CONTAINED IN THE CALIFORNIA ASSOCIATE HANDBOOK AND IN THE L.A. LIVE HANDBOOK.

¹⁸ ALJD 6:37.

¹⁹ ALJD 6: n. 5:46-47.

The legality of rules regulating the use of an employer's facilities by off-duty employees, like rules regulating access rights of off-duty employees, are analyzed under the three-prong Tri-County test. Thus, the Hotel's "Use of Hotel/Property Facilities" rules are lawful only if they (1) limit access solely with respect to the interior of the plant and other working areas; (2) are clearly disseminated to all employees; and, (3) apply to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. As explained in Part A, the use-of-facilities rules violate the second prong of the Tri-County test because after November neither version of the rule was disseminated to all the employees.

The first prong of the Tri-County test requires that an off-duty access rule may limit access solely with respect to the "interior of the plant and other working areas." In the Tri-County case itself, the Board found that the employer violated Section 8(a)(1) of the Act by preventing an off-duty employee from distributing union literature outside of the hospital at the front entrance and in the rear parking lot. Tri-County, supra at 1089-1090.

In Flamingo Hilton, 330 NLRB 287, 289-290 (1999), the Board evaluated a rule prohibiting employees from patronizing the property during the eight hours before an employee's shift under the first prong of the Tri-County test. The Board invalidated the rule because "it can as readily apply to outside portions of the Respondent's property as to interior portions and to use by noncustomers." The Board also noted that the respondent in that case had not established a legitimate business reason for the rule.

Likewise, many of the cases applying the first-prong of the Tri-County have involved rules that restrict—or could be construed to restrict—access to outside, non-

working areas where Section 7 activity could lawfully take place. Thus, rules that restrict access to parking lots, gates, and other outside non-working areas have been found invalid unless sufficiently justified by business reasons. For example, in Teletech Holdings, supra at 404, the Board held that a rule prohibiting “unauthorized presence on the premises while off duty” was unlawful because it denied employees access to parking lots, gates and other outside, non-working areas. The term “premises” was found to be overbroad.

In Ark Las Vegas Restaurant, 343 NLRB 1281, 1282-3 (2004), the Board invalidated a rule that prohibited employees from using the hotel’s “premises” except as a guest. Although the employee handbook in that case used the term “property” in some places and “premises” in others, sometimes with descriptors and sometimes without, the Board held that it would be difficult for employees to determine whether the term “premises” referred just to the interior of the hotel or to the entire hotel complex. Because ambiguities must be resolved against the rule’s promulgator, the Board found the rule to be unlawful.

Respondent’s “Use of Facilities/Property” rules do not distinguish between interior and exterior areas of the Hotel. The original rule flatly prohibits off-duty employees from using “guest facilities” without a manager’s prior approval. Similarly, the rule in the L.A. Live Handbook elaborates on the theme that off-duty employees are not to use “guest facilities.” It states:

The Property and its facilities are designed for the enjoyment of our guests and residence owners. You are not permitted on guest or residence 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. If you wish to use the guest facilities during non-working hours, you need to obtain prior approval from your manager.

While the rule in the L.A. Live Handbook is considerably more specific, it begins with the broad statement that the “Property and its facilities” are only for the guests’ use and concludes with a statement identical to the original rule that off-duty employees are not to use the “guest facilities.” As ALJ Anderson correctly noted, employees would reasonably construe the terms “guest facilities” and “property” as encompassing the entire premises, not just the interior.²⁰ Moreover, ambiguities are resolved against the promulgator.²¹

While the Hotel does not have extensive outside facilities, it does have some areas where Section 7 activity could take place. Spade admitted that the Hotel has a porte cochere where guests using valet parking drop off their cars and where several cars can be parked temporarily,²² as well as an underground parking lot with a waiting area where guests pick up their cars, and a patio next to the mixing room bar that is not used by guests until 4:00 p.m. Respondent argues that the patio is not an outside area because it is an extension of the mixing room bar. However, the uncontradicted testimony was that the door connecting the bar to the patio remained locked until 4:00 p.m. daily. Accordingly, like the rules in the above-referenced cases, the ALJ correctly concluded that both use-of-facilities rules prohibiting off-duty employees from using the

²⁰ ALJD 9:34-47.

²¹ ALJD 9:42.

²² Porte cocheres are considered outside working areas. See New York New York Hotel & Casino, 334 NLRB 762, 770 (2001), 334 NLRB 772, 778 (2001), enf. denied, 313 F.3d 585 (D.C. Cir. 2002), on remand, 354 NLRB No. 119, slip op. at 13 n.50 (March 25, 2011).

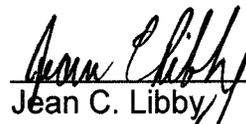
Hotel's "property and facilities" without a manager's approval are unlawful because they prohibit use of exterior nonworking areas.

Respondent has not proffered a sufficient business justification for its use-of-facilities rules. The only evidence of a business justification for the rule was Human Resources Director's Spade's testimony, based on his "theoretical understanding," that hotel facilities are for the exclusive use of paying guests (tr. 45-46, 50). Aside from the absence of evidence to support his assertion, Spade's testimony does not justify the Hotel's rules because it is general and would apply to any rule, however narrow or broad, and does not address the need for a rule prohibiting use of all interior and exterior, working and non-working areas of the Hotel.

V. CONCLUSION

For all the foregoing reasons, Respondent's exceptions should be rejected in their entirety and the ALJ's recommended Decision and Order should be adopted

Respectfully submitted,



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DATED at Los Angeles, California, this 14th day of October, 2011.

STATEMENT OF SERVICE

I hereby certify that a copy of the Answering Brief of Counsel for the Acting General Counsel to Respondent's Exceptions in Case 21-CA-39556 was submitted by E-filing to the National Labor Relations Board, Washington, D.C., on October 14, 2011. The following parties were served with a copy of the same Brief by electronic mail:

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