

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN BAKERIES, LLC

and

Case 15-CA-174022

BAKERY, CONFECTIONARY, TOBACCO
WORKERS, AND GRAIN MILLERS UNION

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION ON REMAND
AND ARGUMENT IN SUPPORT OF EXCEPTIONS**

COMES NOW Counsel for the General Counsel and, pursuant to Section 102.46 of the Board's Rules and Regulations, excepts to the Decision on Remand of Administrative Law Judge Arthur J. Amchan, dated February 11, 2019, in the following particulars:

1.

First Exception: **The Judge erred in finding Respondent's rule prohibiting unauthorized entry into the facility by employees to be lawful (ALJD 4:6-32).**¹

2.

Second Exception: **The Judge erred in finding that Respondent's rule prohibiting "unauthorized" plant entry by employees does not permit plant entry by employees under any circumstances (ALJD 4:27-32).**

¹ References to "ALJD" are to the pages and lines of the decision of the Administrative Law Judge (ALJ) as follows: ALJD page(s):line(s).

Argument in Support of Exceptions

Respondent's handbook contains the following rule: "Bringing or allowing any non-employee inside the facility (including the break room) without prior permission from management. Unauthorized plant entry by employee." (JX 2 at 19, Rule 7).²

General Manager Ledbetter testified that this rule is justified by Respondent's legitimate interest in maintaining control of who enters the facility in order to protect product safety and the safety of on-duty employees. (Tr. 296-97, 306-08). Ledbetter provided no examples as to circumstances in which off-duty employees would be permitted to enter the facility and when they would not.

Under Board law, employees who work at Respondent's Hope, Arkansas facility, and who are off-duty, may not be denied access to the interior of the facility to engage in protected concerted activities absent a lawful rule barring entry to those areas by off-duty employees.³ Under *Tri-County Medical Center*, such a no-access rule is lawful only if it "(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in

² "GCX" and "RX" references are to the numbered exhibits of the General Counsel, or Respondent, respectively. "JX" references are to the numbered Joint Exhibits. Transcript references will be denoted by "Tr." followed by the page number(s).

³ See *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB 144, 146 n.4 (2012) (applying *Tri-County* and finding that "[w]hen [the *Tri-County*] conditions are not met, employees seeking to engage in protected, concerted activity are, indeed, entitled to access to the interior of the employer's facility, pursuant to Sec. 7"). *J.W. Marriott* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *J.W. Marriott* decision as its own. See also *Baptist Memorial Hosp.*, 229 NLRB 45, 45 n.4, 49-50 (1977) (in case involving employees distributing handbills in hospital lobby and on sidewalk, Board majority concluded "off-duty employees have a right to remain on or to enter the [e]mployer's premises for solicitation or distribution of union literature subject only to the [e]mployer's need to maintain production, discipline, or security"); *Piedmont Gardens*, 360 NLRB 813, 813-14 (2014) (employer maintenance of rule restricting off-duty employees access to interior areas held facially unlawful because rule was invalid under *Tri-County* by not barring access for any purpose).

union activity.”⁴ Thus, if an employer’s rule fails to satisfy each of these three conditions, employees who are off-duty are entitled access to the interior areas of the facility where they work for Section 7 purposes.⁵

Applying these principles here, the Judge’s reasoning and conclusion cannot be sustained. First, the Judge misread the rule when he determined that it effectively barred off-duty employees from accessing the premises “under any circumstances” when in fact the rule prohibits only “unauthorized” access by current employees. Thus, the Judge erroneously construed this rule to completely prohibit off-duty employee access when it clearly does not (ALJD 4:27-32). This critical error is the basis for the Judge’s determination that Respondent’s maintenance of its no-access rule was lawful when in fact, the rule fails to satisfy the third element of the *Tri-County* test since there is no blanket prohibition of such access for off-duty employees for *any purpose*.⁶

Respondent presented no evidence as to the circumstances in which off-duty employees are authorized to enter the facility and when such permission is denied.⁷ As the Board stated in *Casino San Pablo*, allowing access only with management’s approval “effectively vests management with unlimited discretion to expand or deny off-duty employees’ access for any reason it chooses.” *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6 (2014); *Saint John’s Health Center*, 357 NLRB at 2080-83 (finding rule

4 *Tri-County Medical Center*, 222 NLRB at 1090.

5 See *J.W. Marriott Los Angeles at L.A. Live*, 359 NLRB at 146 n.4; *Baptist Memorial Hosp.*, 229 NLRB at 45 n.4, 49-50; *Piedmont Gardens*, 360 NLRB at 814.

6 See e.g., *Sodexo America, LLC*, 358 NLRB 668, 669 (2012) (off-duty access policy “violates Section 8(a)(1) because it does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose”), citing *Saint John’s Health Center*, 357 NLRB 2078, 2082-83 (2011). *Sodexo America* was issued by a panel that under *Noel Canning* was not properly constituted. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). The Board should adopt the sound reasoning and rationale of the *Sodexo America* decision as its own.

7 See *Piedmont Gardens*, 360 NLRB at 814 (finding employer’s no-access rule for off-duty employees unlawful despite employer’s claim it permitted access only in three limited circumstances because evidence did not establish these were only circumstances under which employer had granted interior access).

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2019, a copy of Counsel for the General Counsel's Exceptions and Argument in Support was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on April 1, 2019, a copy of Counsel for the General Counsel's Exceptions and Argument in Support was served by e-mail on the following:

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I further certify that on April 1, 2019, a copy of Counsel for the General Counsel's Exceptions and Argument in Support was served by regular mail upon the following:

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/s/
Linda M. Mohns
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