UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges

CASINO PAUMA

and Case 21-CA-161832

UNITE HERE INTERNATIONAL UNION

GENERAL COUNSEL'S RESPONSE TO NOTICE TO SHOW CAUSE REGARDING APPROVAL OF WITHDRAWAL OF CHARGE

Counsel for the General Counsel files this Response to the Order to Show Cause that issued on January 31, 2020, soliciting the parties' positions on whether the administrative law judge should approve, in whole or in part, the Charging Party Union's request of January 30, 2020 to withdraw the charge. For the reasons set forth below, the General Counsel does not oppose the approval of the Union's request to withdraw two of the four rules earlier found to be unlawful by the Administrative Law Judge, and requests that the Administrative Law Judge reaffirm his initial decision as to the two remaining rules.

I. BACKGROUND

On October 13, 2015, Charging Party Union filed the charge in this case alleging that Casino Pauma violated Section 8(a)(1) of the Act by maintaining in effect an employee handbook that contained rules that restrained, coerced, and interfered with employee's Section 7 rights. The Region subsequently issued a Complaint alleging that the following rules were unlawful:

> **2.19 Conducting Personal Business**. You are expected to use Casino Pauma's property only for business purposes. Personal use is generally prohibited of Casino Pauma's supplies or equipment, such as telephone, fax machines, copy machines, computers or

repair equipment and supplies. Generally, any Team Member found using Casino Pauma equipment or supplies for personal use will be subject to discipline, up to and including immediate termination. As part of this policy, Team Members are reminded they should only be on Casino Pauma property while conducting Casino Pauma business. Visitation by friends and family members should be kept to a minimum. All visitors should use main entrances to gain visitor passes if necessary. Team members are to conduct only Casino Pauma business while at work. Team members may not conduct personal business or business for another employer during their scheduled working hours.

2.22 Solicitation and Distribution. Any and all solicitation or distributions must cease immediately if the intended recipient expresses any discomfort or unreceptiveness whatsoever.

2.23 Social Media. Casino Pauma recognizes the importance and prevalence of electronic media in our work and personal lives. To assist in addressing employment related concerns that may arise from use of electronic media, casino Pauma sets forth the following Social Media Policy to guide your actions. Casino Pauma's Team Members are responsible for the content they publish on social networking websites, blogs or any other form of user-generated media. Keep in mind that everything you publish will be online for a long time, perhaps a lifetime! If you must publish content to any blog or website and it has to do with work, use a disclaimer such as "The postings on this site are my own and do not represent my employer's positions, strategies or opinions." If you do publish content regarding Pauma Casino, always identify yourself – State your name and (when relevant) your position at Casino Pauma. When discussing Casino Pauma or employment related matters you must write in the first person (i.e., "I am commenting about"), and make it clear that you are <u>speaking for yourself and not on behalf of Casino Pauma</u>. Don't cite or reference guests, vendors, clients or Team Members without their permission. If you do have approval, link back to the source when possible. Cite references when possible. When posting photos, always obtain approval and never use photos gathered throughout the course of your career at Casino Pauma. Photos taken or obtained at Casino Pauma are the sole property of the casino and are not permitted to be used for personal use. **Don't provide confidential, proprietary information and/or trade secrets**. Failure to safeguard confidential information may result in disciplinary action up to and including termination.

5.2 Conflict of Interest, number 4. Soliciting Casino Pauma's Team Members, suppliers, or guests to purchase goods or services of any kind, or to make contribution to any organizations or in support of any causes, unless the General Manager has granted written approval in advance.

On July 18, 2016, Administrative Law Judge Robert A. Giannasi (ALJ), applying the principles enunciated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), issued his decision finding that Casino Pauma violated Section 8(8)(a)(1) of the Act by maintaining the

above rules. *Lutheran Heritage* was overturned by the Board in *The Boeing Co.*, 365 NLRB No. 154 (2017), and the case, which was then before the Board on Casino Pauma's exceptions, was consequently remanded by the Board to the ALJ on February 12, 2019 to prepare a supplemental decision addressing those rules affected by *Boeing, supra*.

Thereafter, the ALJ issued an Order to Show Cause on February 13, 2019, soliciting the parties' view on whether further evidence was required or whether the remand could be decided on the present record with additional briefing: the General Counsel and Charging Party Union favored the latter. Protracted settlement discussions ensued, aided in part by the appointment of a settlement judge, and on November 25, 2019, Casino Pauma filed a Motion to defer the remanded issues to arbitration under the Tribal Labor Relations Ordinance (TLRO). A briefing schedule was set, but then suspended pending further settlement discussions, including consideration of submitting the matter to the TLRO.

On January 30, 2020, Charging Party Union filed a Motion with the ALJ to withdraw the underlying charge, inasmuch as it was no longer engaged in an active organizing campaign at Casino Pauma and did not wish to invest further resources in the matter.

The following day, the ALJ issued his Order to Show Cause (OSC) as to why he should not approve only that part of the proposed withdrawal that does not deal with the two rules involving solicitation and distribution that were previously found unlawful and reaffirm his decision as to those two rules. The General Counsel concurs with this approach for the following reasons.

II. ARGUMENT

A. General Counsel Requests that the ALJ Partially Approve Charging Party Union's Motion to Withdraw the Two Rules Affected by *Boeing*

As the ALJ correctly noted in his OSC, two of the foregoing rules that he found to violate Section 8(a)(1) of the Act are directly affected by *Boeing's* new requirement that the Section 7 rights allegedly restricted by these rules must be balanced against legitimate employer business interests underlying those rules.

Specifically, the two rules that would now be analyzed under *Boeing, supra*, are **2.19 Conducting Personal Business** and **2.23 Social Media**. With regard to the former, the ALJ concluded in his decision that Conducting Personal Business rule, although poorly written and difficult to parse, dealt with multiple prohibitions on employee conduct – some arguably lawful and some not. This rule would appear to now fall under the Category 2 analysis of *Boeing*, and would warrant individualized scrutiny as to whether the rule, where reasonably interpreted, would interfere with Section 7 rights and, if so, whether any adverse impact on protected conduct would be outweighed by legitimate justifications. *Boeing, supra*, slip op. at 15. This scrutiny might well require additional evidence or reopening of the record. As the ALJ noted in his OSC, *Boeing* changed the law sufficiently on this part of the case to "arguably warrant withdrawing the relevant part of the charge and dismissing the related part of the complaint, based on the vicissitudes of further litigation on those specific rules." General Counsel requests that the ALJ partially approve the Charging Party Union's request to withdraw the allegation of the charge related to Rule 2.19.

Likewise, Rule 2.23 involving the use of social media in the workplace would be amendable to a Category 2 analysis under *Boeing* requiring individual scrutiny as to whether this rule would interfere with employees' Section 7 rights and whether any adverse impact would be

outweighed by the employer's legitimate business justifications. Inasmuch as a new analysis and additional evidence may be required to resolve whether this rule would violate the Act under the Boeing test, it is reasonable to allow the Union to withdraw this portion of the charge. Thus, General Counsel requests that the ALJ partially approve the Charging Party Union's request to withdraw the allegation of the charge related to Rule 2.23.

B. General Counsel Requests that the ALJ Reaffirm his Decision on the Two Rules Previously Found Unlawful that are Not Affected by *Boeing*

In his Decision that issued July 18, 2016, the ALJ found that Casino Pauma's **Rule 2.22 Solicitation** was unlawful based on *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802,805 (1945); and *Stoddard Quirk Mfg. Co*., 138 NLRB 615, 621 (1962) that established the right of employees to solicit union support and distribute union literature during non-working time in non-work areas. Because Rule 2.22 broadly prohibited protected activities based on the subjective views of recipients, the ALJ found this rule to infringe on employees' Section 7 rights and therefore to be unlawful. ALJD p. 4.

As the ALJ correctly noted in his OSC, this conclusion is not affected by *Boeing*, since the Board has recently reiterated that *Boeing* "did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests." *Cordue Restaurants, Inc*., 368 NLRB No. 43, slip op.5 (2019). Moreover, this conclusion would not be changed by reopening the record or soliciting additional evidence. Thus, General Counsel requests that the ALJ reaffirm his decision as to the unlawfulness of this rule.[1]

[1] Counsel for Casino Pauma has advised General Counsel that it intends to respond to the OSC by asserting that this rule has been rescinded and a lawful rule was implemented by Casino Pauma in July 2017, thus vitiating the need to

The same argument applies to the portion of **Rule 5.2 Conflicts of Interest**, which was not affected by the *Boeing* decision. Specifically, the ALJ concluded that the portion of this rule that required obtaining advance written approval of management for employee solicitations "in support of any causes" infringed on employees' Section 7 rights. *Brunswick Corp*. 282 NLRB 794, 795 (1987). ALJD p. 4. Since this explicit pre-condition on solicitation is not affected by *Boeing*, and additional evidence would not change the analysis, the General Counsel requests that the ALJ reaffirm his decision as to this rule.[2]

Dated at Los Angeles, California, this 26th day of February 2020.

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reaffirm the original decision. However, it does not appear that Casino Pauma has raised this argument in any settlement discussions with the General Counsel or the ALJ to date or has otherwise presented any evidence that the rule found to have been unlawful was rescinded and replaced or that employees were informed of this. Also, the version of the replacement rule provided to General Counsel is devoid of any context and its numbering is inconsistent with the instant rule. Moreover, the ALJ has already rejected efforts by Casino Pauma to have him consider alternative language for its rules, deeming it more appropriate for compliance proceedings. ALJD at p.6. For these reasons, General Counsel requests that the ALJ reject this response regarding Rule 2.22 and reaffirm his original decision.

[2] Counsel for Casino Pauma has advised General Counsel that a revised Conflicts of Interest Rule will be promulgated in a new employee handbook to be imminently distributed to employees. As noted above, General Counsel is not aware that this revised rule was proffered or discussed during settlement discussions or otherwise, and Casino Pauma has provided no evidence that the former unlawful portions of that rule have been rescinded and the employees advised of its rescission. As noted above, this issue should be addressed in compliance after the decision has been reaffirmed.

STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Response to Order to Show Cause s**ubmitted by e-filing to the Division of Judges of the National Labor Relations Board on February 26, 2020.

The following was served with a copy of said document by electronic mail, on February 26, 2020:

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Respectfully submitted,

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