Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino *and* International Union of Painters and Allied Trades, District Council 15, Local 159, AFL–CIO. Case 28–CA–060841

August 27, 2015

DECISION AND ORDER REMANDING IN PART

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On March 20, 2012, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and supporting briefs, the Respondent filed answering briefs, and the General Counsel filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding in Part, and to adopt the judge's recommended Order as modified and set forth in full below.[2]

Facts

The Respondent, a Las Vegas casino and hotel, is owned and operated by Caesar's Entertainment, Inc. The Respondent maintains an 84-page employee handbook ("The Rio Employee Handbook") which it distributes to its workforce of approximately 3000 employees, about 1700 of whom are union-represented. All employees must sign a form acknowledging receipt of the handbook and their responsibility to comply with its provisions. The handbook advises employees that noncompliance with its provisions may result in discipline, including discharge. At issue here are nine handbook rules, the maintenance of which is alleged to violate Section 8(a)(1) of the Act. [3]

Legal Framework

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." Id. at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(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." Id. at 647.

The rules at issue here are not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity, under the first prong of the *Lutheran Heritage* test. In construing rules, *Lutheran Heritage* teaches that they are to be given a reasonable reading, and are not to be considered in isolation. Id. at 646. Further, any ambiguity in the rule must be construed against the drafter—here, the Respondent. *Lafayette Park*, supra at 825.

Discussion

We find, in agreement with the judge, that maintenance of four of the challenged handbook rules does not violate Section 8(a)(1) of the Act.[4] For the reasons dis-

[1] Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Union filed four post-brief letters.

[2] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified, and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[3] No exceptions were filed to the judge's finding that the Respondent's maintenance of a 10th rule, conduct standard No. 28, handbook, p. 2.20, violates Sec. 8(a)(1).

The panel unanimously finds the off-duty employee attire rule lawful. Chairman Pearce and Member McFerran form the majority with respect to the confidentiality rule (handbook, p. 2.21); the rules banning the use of cameras, camera phones, audio-visual and other recording equipment; and the rules banning some computer usage. Members Johnson and McFerran form the majority with respect to the recreational use rules (conduct standard No. 9 and the "Use of Facility" provision) and the "confidential company information" rule (conduct standard No. 10).

[4] For the following reasons, we agree with the judge that the Respondent did not violate Sec. 8(a)(1) by maintaining a handbook rule titled "Visiting Property When Not in Uniform" (handbook, p. 2.7). The contested provision ("clothing which displays profanity, vulgarity of any kind, . . . or offensive words or pictures") follows language in the same paragraph requiring employees to wear "neat and presentable" clothing, to wear "shirts, shoes or strapped sandals and name tag/badge if on property for work-related reasons or back of house services (e.g. HR, Payroll)," and not to wear such items as "bathing suits, short shorts, thong-type sandals, tube tops, halter tops, tank tops, thin straps, strapless clothing, midriff tops." Further, the record shows that employees frequently wear clothing at the facility that bears a union message. Viewing the rule in its context, employees would not reasonably conclude that Sec. 7 activity, including wearing messages or images about terms and conditions of employment, is encompassed by the rule.

cussed below, however, we reverse the judge and find that three other challenged rules are unlawful. Finally, we remand two rules for further consideration.

1. Rules prohibiting the disclosure of confidential information

In disagreement with the judge and our dissenting colleague, we find that the confidentiality rule on p. 2.21 of the handbook is unlawful. That rule provides:

> **Confidentiality**: All employees are prohibited from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. This type of disclosure includes participation in internet chat rooms or message boards. Exceptions to the rule include disclosures which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to:
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> - Company financial data
> - Plans and strategies (development, marketing, business)
> - Organizational charts, salary structures, policy and procedures manuals
> - Research or analyses
> - Customer or supplier lists or related information.
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> The property or Corporate Law department should be consulted whenever there is a question about whether the information is considered confidential. Any failure to uphold this policy should be communicated to the Law department and may result in immediate Separation of Employment. All managerial, supervisory, and selected positions are required to comply with the "Use and Disclosure of Confidential Information" policy.

The challenged Confidentiality rule is extraordinarily broad in scope, prohibiting employees from sharing "any information about the Company which has not been shared by the Company with the general public." Without more, this sweeping provision clearly implicates terms and conditions of employment that the Board has found to be protected by Section 7. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291–292 (1999). The rule then goes on to list illustrations of prohibited disclosures that go to the very core of protected concerted activity, leaving employees to reasonably conclude that this rule prohibits their Section 7 activity. For example, the rule lists "salary structures" among the confidential information that cannot be disclosed without the Respondent's consent. The Board has held, however, that bans on employees disclosing wages clearly violate Section 8(a)(1). See *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 1 (2014) (finding unlawful a rule prohibiting "dissemination of confidential information within [the company], such as personal or financial information, etc."); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (finding unlawful rules banning discussion of terms and conditions of employment, including "disciplinary information, grievance/complaint information, performance evaluations, salary information, salary grade, types of pay increases, and termination date of employees" and discussion of "confidential or sensitive information concerning the [c]ompany or any or its employees"), enfd. as modified 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). Likewise, the Board has found that rules prohibiting employee disclosure of the employer's manuals, including the employee handbook, are overbroad, as employees would reasonably understand them to encompass disclosure of employees' terms and conditions of employment, thereby infringing on employees' exercise of their Section 7 rights. *Quicken Loans*, 361 NLRB No. 94 (2014), reaffirming as modified and incorporating 359 NLRB No. 141 (2013) (rule

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In finding the "Visiting Property When Not in Uniform" rule to be lawful, Chairman Pearce does not rely on extrinsic evidence that employees wear clothing bearing a union message at the facility.

We also agree with the judge that the Respondent's conduct standard No. 9 (handbook, p. 2.19) and "Use of Facility" provision (handbook, p. 2.34) do not violate Sec. 8(a)(1) under either *Lutheran Heritage* or *Tri-County Medical Center*, 222 NLRB 1089 (1976). As the judge found, these rules clearly speak to off-duty employees' *recreational use* of the Respondent's facilities as *guests*, extolling them to visit during "non-peak business hours," to gamble responsibly, and to consume alcohol "responsibly while having a meal." Thus, we find that employees would not reasonably read these rules to restrict their access to the Respondent's facilities to exercise their Sec. 7 rights.

Contrary to the judge and his colleagues, Chairman Pearce would find that the Respondent's conduct standard No. 9 and "Use of Facility" provision are unlawful. Both rules require off-duty employees to secure supervisory or managerial approval before they visit the Respondent's "property," "public areas," "public facilities" or "facilities," thus giving the Respondent broad, unfettered discretion to interpret the rule to deny access to those engaged in protected activities. By this requirement, these rules do not comport with the third prong of *Tri-County Medical Center*, supra, requiring access rules to be uniformly applied. See *Saint John's Health Center*, 357 NLRB No. 170, slip op. at 5 (2011) ("In effect, the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can. Such a rule is not consistent with *Tri-County*."). See also *San Pablo Lytton Casino*, 361 NLRB No. 148, slip op. at 4 (2014). Moreover, the prior-approval requirement also runs afoul of *Lutheran-Heritage*, supra, as "employees would reasonably construe the broad managerial-approval exception as requiring them to disclose their intent to engage in protected activity when seeking such approval, a compelled disclosure that would certainly tend to chill the exercise of Sec. 7 rights." *San Pablo Lytton Casino*, supra, slip op. at 4 fn. 6.

Finally, for the reasons discussed later in this Decision, we find conduct standard No. 10 (handbook, p. 2.19) does not violate Sec. 8(a)(1). As also discussed later in this Decision, Chairman Pearce does not agree with this finding.

unlawfully overbroad that defined nondisclosable "non-public information" to include "all personnel lists, rosters," and "handbooks"). Yet, the rule expressly covers "policy and procedures manuals."

Contrary to the judge and our dissenting colleague, we do not find that *Mediaone of Greater Florida*, 340 NLRB 277 (2003), warrants a contrary result. The *Mediaone* rule found lawful prohibited disclosure of "customer and employee information, including organizational charts and databases," but did so only in the context of a lengthy litany of particularized information under the heading of "Proprietary Information." That particularized information included business plans, technological research and development, product documentation, marketing plans and pricing information, copyrighted works, trade secrets, financial information, patents, copyrights, trademarks, service marks, trade names and goodwill, as well as organizational charts. Id. at 278. As the *Mediaone* majority explained, the contested phrase appeared within a "larger provision prohibiting disclosure of 'proprietary information, including *information assets* and *intellectual property*' and [was] listed as an example of 'intellectual property'"; thus, employees would not likely understand that employee terms and conditions of employment were covered by the ban on disclosing proprietary information. Id. at 279 (original emphasis). Here, the rule's relationship to the Respondent's legitimate business concerns, is far less clear and, as discussed above, references to salary structures and policy manuals encompass information that employees have a protected right to disclose. See, e.g., *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 210 (5th Cir. 2014) (distinguishing *Mediaone* in enforcing Board order and finding that "personnel information and documents" is within "larger category of 'confidential information'" rather than a "sub-set of 'intellectual property'"); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3 (2014) (distinguishing *Mediaone* in finding unlawful rule requiring employees to "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.").[5]

Accordingly, we reverse the judge and find that language contained in the confidentiality rule, p. 2.21, violates Section 8(a)(1).[6]

2. Rules banning use of cameras, camera phones, audio-visual and other recording equipment

Relying on *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), review granted in part and enfd. in part 715 F.3d 928 (D.C. Cir. 2013), the judge found that the handbook's restrictions on employee recordings in conduct standards nos. 24 and 35 were lawful, and dismissed the related 8(a)(1) allegations. Those rules require as follows:

> Conduct standard No. 24, p. 2.20, (emphasis added):
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> Personal pagers, beepers and cell phones worn by employees must not be visible or audible to guests and should not impact job performance. The use of personal cellular/digital phones is prohibited while on duty, but is allowed during break time in designated break areas. *Camera phones may not be used to take photos on property without permission from a Director or above*.
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> Conduct standard No. 35, p. 2.21 (emphasis added):

[5] In Member McFerran's view, the Board's decision in *Mediaone* is in tension with the mainstream of Board precedent in this area and properly should be limited to the particular facts presented in that case.

[6] The General Counsel also contends that the Respondent's conduct standard No. 10 (handbook, p. 2.19) is unlawful. That rule provides, "Employees will not reveal confidential company information to unauthorized persons." We disagree and find this rule analogous to the rule found lawful in *Lafayette Park*, supra, 326 NLRB at 826 (prohibiting "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information") Further, to the extent that the confidentiality rule found unlawful above influenced employees' interpretation of conduct standard No. 10, our standard remedies for the unlawful confidentiality rule, which include ordering its rescission, will eliminate that concern.

Chairman Pearce would find the broadly worded conduct standard No. 10 unlawful. See, e.g. *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015) (and cited cases). He disagrees with the judge and his colleagues that this rule is akin to one found lawful in *Lafayette Park*, supra at 826. Unlike *Lafayette Park*, where the rule was limited to one specific type of information which employees would reasonably understand to relate to their employer's legitimate interest in the security of its proprietary information, conduct standard No. 10's generalized reference to undefined confidential information carries no similar restriction or connotation. As an ambiguous term, it must be construed against the Respondent as drafter. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 12 (2011); *Lafayette Park*, supra at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)). Thus, whether it is read individually or in conjunction with the confidentiality rule on page 2.21 of the handbook, conduct standard No. 10 is overbroad.

Unlike his colleagues, Member Johnson believes that the confidentiality rule on page 2.21 of the handbook is lawful. In *Mediaone*, the Board concluded "that employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the [r]espondent's proprietary business information rather than to prohibit discussion of employee wages." Id. at 279. The Respondent's rule here includes examples of undisputedly confidential company information that are the same or nearly the same as the "particularized" examples in *Mediaone*, a case which he views as correctly decided and that is still good law. Both sets of examples provide sufficient context for employees to understand that prohibited disclosures are limited to proprietary information and would not reasonably be understood as extending to discussion of employee wages or other terms and conditions of employment. Member Johnson finds the other cases relied on by the majority to be meaningfully distinguishable in terms of context from the rule in this case. See *Fresh & Easy Neighborhood Market,* 361 NLRB No. 8, slip op. at 4–6 (Member Johnson, dissenting).

Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events).

Contrary to the judge and our dissenting colleague, we find these provisions are unlawfully overbroad.[7] Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. Such protected conduct may include, for example, employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions,[8] documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules. See *Hyundai America Shipping Agency*, supra, 357 NLRB No. 80, slip op. at 1, 12 (finding unlawful maintaining rule prohibiting employees from disclosing "information or messages" from the employer's email, instant messaging, phone and other computer systems except to "authorized persons," which would reasonably be understood to include discussions about terms and conditions of employment); *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009) (finding that photography was part of the *res gestae* of employee's protected concerted activity in documenting inconsistent enforcement of employer dress code), reaffirmed and incorporated by reference at 355 NLRB No. 211 (2010), enfd. 452 Fed.Appx. 374 (4th Cir. 2011); *Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991) (finding employee's use of tape recorder in workplace to aid federal government investigation to be protected), enfd. mem. 976 F.2d 743 (11th Cir. 1992).

Further, the Respondent tied neither prohibition at issue here to any particularized interest, such as the privacy of its patrons. As our dissenting colleague observes, the Respondent does have a guest privacy provision as part of its confidentiality rules.[9] That provision admonishes employees not to share "privileged information" about guests' gaming habits and to respect celebrities' privacy. The Respondent, however, failed to link this or any other interest to the prohibitions at issue here. As a result, employees would not reasonably interpret these rules as related to the protection of patron privacy. Without such a limiting principle, the Respondent's employees are left to draw the reasonable conclusion that these two prohibitions would prohibit their use of audio-visual devices in furtherance of their protected concerted activities.[10]

Contrary to the judge and our dissenting colleague, we find *Flagstaff* distinguishable. In *Flagstaff*, the Board majority found lawful a medical center's rule prohibiting employee use of electronic equipment during work time and the "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities." 357 NLRB No. 65, slip op. at 4–5. Emphasizing the "weighty" privacy interest of hospital patients and of hospitals in preventing the wrongful disclosure of individually identifiable health information, the Board majority concluded that "[e]mployees would reasonably interpret [the employer's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." Id., slip op. at 5. Unlike the rule in *Flagstaff*, which expressly referenced "recording images of patients," the rules presented here include no indication that they are designed to protect privacy or other legitimate interests.[11]

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[7] As the General Counsel notes, the judge's statement that employees would not read the "ban as being designed to chill their Section 7 activities" is an imprecise statement of the *Lafayette Park* standard because whether the Respondent drafted the language with the intent to chill employees' protected activities is immaterial; the analysis focuses on whether employees would reasonably read the rule as written as a limit on such activities.

[8] It is settled that "expression of concerns about safety and [well-being] of . . . employees" in the work place constitutes protected activity. *Martin Marietta Corp*., 293 NLRB 719, 725 (1989) (citing *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962)). And employees are protected in publicizing their workplace concerns and discussing them with other employees and with union representatives. See *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990).

[9] That provision states (handbook, p. 2.21):

> Guest Privacy: Employees are prohibited from violating guest/employee privacy by disclosing privileged information. This privileged information includes but is not limited to a guest's level of play, frequency of visitation, buy-in amounts, win/loss results or any other record of their play or personal information. This information must not be shared with anyone other than the guest or a co-worker who clearly has a business reason for needing to know. This prohibits disclosing information to the guest's family members, friends, or business associates—anyone other than the guest.
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> As our Company expands both nationally and internationally and sponsor[s] events such as the WSOP and celebrity golf outings, a chance encounter with an employee's favorite actors, sports idols, or other public figures is possible and can leave quite an impression. While it is exciting to see celebrities visiting our properties, we must be sure to maintain the highest level of professionalism and discretion. It is essential that employees respect a celebrity's right to privacy and discretion.

[10] Of course, the fact that these prohibitions are subject to discretionary exemptions by the Respondent does not make them any less unlawful. See, e.g., *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (finding unlawful rule requiring employees to obtain permission before distributing union information in nonwork areas on nonworking time), enfd. 600 F.2d 132 (8th Cir. 1979).

Because the Respondent does not invoke security concerns as justification for these rules, we see no need to address our dissenting colleague's speculation about how the Board might decide future cases involving such concerns.

[11] Chairman Pearce adheres to his dissent in *Flagstaff*, but finds that case distinguishable here because the *Flagstaff* medical-care-provider

Based on the foregoing, we find that the Respondent's employees would reasonably interpret these rules to infringe on their protected concerted activity. Thus, these rules violate Section 8(a)(1).[12]

3. Rules banning some computer usage

Finally, we will remand allegations involving rules banning computer usage for further consideration. The judge found that the Respondent's work rules entitled "Use of Company Systems, Equipment, and Resources" are lawful under the Board's decision in *Register Guard*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).[13] Subsequent to the judge's decision, the Board overruled *Register Guard* in relevant part in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), and articulated a new analytic framework for determining the lawfulness of employer rules restricting employee use of a company's email system. The Board held in *Purple Communications*:

> we will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights.

Id., slip op. at 14. The Board applied its holding retroactively, and remanded the case to allow for the introduction of evidence under the new test. Id., slip op. at 16–17. Accordingly, we will sever and remand the allegation concerning the Respondent's rules entitled "Use of Company Systems, Equipment, and Resources" to the administrative law judge for further proceedings consistent with *Purple Communications,* including allowing the parties to introduce evidence relevant to a determination of the lawfulness of those rules.[14]

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employer had a strong interest in protecting patient privacy, an interest not present here. Casinos and hotels may have an interest in protecting customer privacy, but that privacy interest does not trump the employees' Sec. 7 rights. Accordingly, in this non-patient care setting, an employer must tailor its workplace rules to not interfere with Sec. 7 rights.

[12] Given our finding above, we need not engage in a debate about the relative weight of privacy interests for hotel or gaming patrons.

Unlike his colleagues, Member Johnson finds both rules lawful. He observes that there is no Sec. 7 right to *possession* of a camera or other recording device by employees on an employer's property, nor is there an inherent right to use a camera or other recording device in the course of Sec. 7 activity. Thus, the question is whether employees would reasonably view the rule in dispute as implicitly including and interfering with Sec. 7 activities. Answering that question, the Board majority in *Flagstaff* properly found that the hospital's rule was not unlawfully overbroad. 357 NLRB No. 65, slip op. at 4–5. As in that case, the Respondent's employees would certainly understand its weighty interests in protecting guest privacy and in protecting both the Respondent and guests from illegal or unfair gambling activities. And as in *Flagstaff*, these interests are expressly and contextually tied to the rules at issue here. The guest privacy rule (handbook, p. 2.21) quoted by my colleagues and the abundance of security cameras and other precautions undoubtedly impress upon employees the importance of these interests. Contrary to his colleagues, Member Johnson would not require an express tie-in of the camera-related rules to the privacy rule and Respondent's security interests, as he finds the connection obvious from the factual context. *Knowing the obvious reasons for these rules*, the Respondent's employees would similarly and reasonably interpret them as legitimate means of safeguarding guest privacy and the integrity of the Respondent's gaming operations, not as prohibitions of protected activity.

[13] The computer confidentiality rule, p. 2.14, states in relevant part (emphasis added):

> Do not disclose or distribute outside of [Rio's] any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.

The general restrictions section on computer usage, p. 2.14, provides (emphasis added):

Computer resources may not be used to:

- Commit, aid or abet in the commission of a crime
- Violate local, state or federal laws
- Violate copyright and trade secret laws
- *Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an internet message board to post any message, in whole or in part, or by engaging in an internet or online chatroom*
- *Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous*
- *Send chain letters or other forms of non-business information*
- Seek employment opportunities outside of the Company
- Invade the privacy of or harass other people
- *Solicit for personal gain or advancement of personal views*
- *Violate rules or policies of the Company*

Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.

[14] Although Chairman Pearce agrees with the General Counsel that, even under the prior *Register Guard* decision, the Respondent's rules restricting computer usage were unlawfully overbroad to the extent that they prohibited the disclosure of "any information that is marked or considered confidential" and banned employee solicitation for "advancement of personal views," he agrees that the rules should be remanded to the judge in the first instance to consider under *Purple Communications*.

For the reasons set forth in his dissent in *Purple Communications*, Member Johnson disagrees with remanding the allegations concerning the computer usage rules to the judge for further proceedings and anal-

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Maintaining the provision in its Rio Employee Handbook headed "Confidentiality," p. 2.21, that contains the following language: "All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public [including] . . . . Organizational charts, salary structures, policy and procedure manuals."

(b) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 24," p. 2.20, that contains the following language: "Camera phones may not be used to take photos on property without permission from a Director or above."

(c) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 35," p. 2.21, that contains the following language: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

(d) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 28," p. 2.20, that contains the following language: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, the Respondent is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. Having found that the Respondent maintains unlawful handbook rules, including confidentiality rules, camera and audio-visual equipment use rules, and a restriction about walking off the job, the Respondent is required to revise or rescind the unlawful rules. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated there, the Respondent may comply with our order of rescission by reprinting the Rio Employee Handbook without the unlawful language or, in order to save the expense of reprinting the whole handbook, it may supply its employees with handbook inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rules must include the inserts before being distributed to employees. Id. at 812 fn. 8. See also *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 3 (2014).[15]

ORDER

The Respondent, Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the provision in its Rio Employee Handbook headed "Confidentiality," p. 2.21, that contains the following language: "All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public [including] . . . . Organizational charts, salary structures, policy and procedure manuals."

(b) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 24," p. 2.20, that contains the following language: "Camera phones may not be used to take photos on property without permission from a Director or above."

(c) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 35," p. 2.21, that contains the following language: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

(d) Maintaining the provision in its Rio Employee Handbook headed "Conduct Standard No. 28," p. 2.20, that contains the following language: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."

(e) In any like or related manner interfering with, re-

ysis consistent with the majority opinion in that case. He further agrees with the judge's dismissal of the computer usage allegations because the evidence does not establish that employees would reasonably construe the computer usage rules as prohibiting Sec. 7 activity in any case.

[15] The allegations concern the handbook in use at the Rio location. Although the record indicates that the handbook is similar to that in use at other locations of Caesar's Entertainment, formerly known as Harrah's Operating Company, Inc., the record does not make clear whether the unlawful provisions at issue are contained in the handbooks in use at the other sites. Therefore, a nationwide order is not appropriate. Cf. *Guardsmark, LLC v. NLRB*, supra at 381 (nationwide order issued where same provisions in effect at other locations).

straining, 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 provision in the Rio Employee Handbook headed "Confidentiality," p. 2.21, that contains the following language: "All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public [including] . . . . Organizational charts, salary structures, policy and procedure manuals."

(b) Rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 24," p. 2.20, that contains the following language: "Camera phones may not be used to take photos on property without permission from a Director or above."

(c) Rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 35," p. 2.21, that contains the following language: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

(d) Rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 28," p. 2.20, that contains the following language: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."

(e) Furnish all current employees at its Las Vegas facility with inserts for its Rio Employee Handbook that (1) advise that the unlawful provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees at its Las Vegas facility revised copies of its Rio Employee Handbook that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(f) Within 14 days after service by the Region, post at its Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino facility in Las Vegas, Nevada copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In addition to physical posting of papers notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility 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 such time since January 5, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible officer on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining the rules entitled "Use of Company Systems, Equipment, and Resources" is hereby severed and remanded to the Chief Administrative Law Judge for assignment to a judge for further appropriate action as set forth above

IT IS FURTHER ORDERED that the judge to whom the case is assigned shall afford the parties an opportunity to present evidence on the remanded issue and shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. August 27, 2015

Mark Gaston Pearce, Chairman

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[16] 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."

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 provision in our Rio Employee Handbook headed "Confidentiality," p. 2.21, that contains the following language: "All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public [including] . . . . Organizational charts, salary structures, policy and procedure manuals."

WE WILL NOT maintain the provision in our Rio Employee Handbook headed "Conduct Standard No. 24," p. 2.20, that contains the following language: "Camera phones may not be used to take photos on property without permission from a Director or above."

WE WILL NOT maintain the provision in our Rio Employee Handbook headed "Conduct Standard No. 35," p. 2.21, that contains the following language: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

WE WILL NOT maintain the provision in our Rio Employee Handbook headed "Conduct Standard No. 28," p. 2.20, that contains the following language: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the provision in the Rio Employee Handbook headed "Confidentiality," p. 2.21, that contains the following language: "All employees are prohibited from disclosing to anyone outside of the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public [including] . . . . Organizational charts, salary structures, policy and procedure manuals."

WE WILL rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 24," p. 2.20, that contains the following language: "Camera phones may not be used to take photos on property without permission from a Director or above."

WE WILL rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 35," p. 2.21, that contains the following language: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

WE WILL rescind the provision in the Rio Employee Handbook headed "Conduct Standard No. 28," p. 2.20, that contains the following language: "Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."

WE WILL furnish you with inserts for our Rio Employee Handbook that (1) advise that the unlawful provisions have been rescinded or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or WE WILL publish and distribute to you revised copies of our Rio Employee Handbook that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

CAESAR'S ENTERTAINMENT D/B/A RIO ALL-SUITES HOTEL AND CASINO

The Board's decision can be found at www.nlrb.gov/case/28-CA-060841 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, D.C. 20570, or by calling (202) 273-1940.

Pablo Godoy and *Larry A. Smith,* for the Acting General Counsel.

John D. McLachlan and *David B. Dornak,* for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. I heard this case at Las Vegas, Nevada, on January 10, 2012. The In-

ternational Union of Painters and Allied Trades, District Council 15, Local 159, AFL–CIO (Charging Party or Local 59) filed the charge on July 5, 2011.[1] On September 30, 2011, the Regional Director for Region 28 of the National Labor Relations Board (NLRB or Board) issued a complaint on behalf of the Acting General Counsel alleging that Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino (Respondent or Company) violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining certain employee work rules alleged to be overly-broad and discriminatory.[2] Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after carefully considering the briefs filed by the Acting General Counsel and Respondent,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation engaged in the operation of a hotel and casino at Las Vegas, Nevada, derived gross revenues in excess of $500,000 during 12-month period ending July 5, 2011. During same period, Respondent, in conducting its business operations described above, purchased and received at the its Las Vegas facility goods valued in excess of $50,000 directly from points outside the State of Nevada. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The Company is one of 10 properties in Las Vegas, Nevada, owned and operated by Caesar's Entertainment, Inc. (Caesar's). This property employs more than 3000 employees. About 1700 of those employees are covered by the three collective-bargaining agreements between the Company and four separate labor organizations. Neither Local 159 nor any of its affiliated organizations represent any of the Company's workers nor is there any evidence that it currently seeks to represent any workers at this property.

The Acting General Counsel alleges in paragraph 4 of the complaint that Respondent has maintained 10 overly broad work rules that tend to chill employee Section 7 activities. The challenged rules are set forth in the "The Rio Employee Handbook" (the handbook) under the section titled "What the Rio Expects From You." (Jt. Exh. 1, p. 3, et seq.) The Company provides the handbook to each newly hired employee and redistributes it to all employees when revised. The handbook, which appears to be adapted from that in use at Caesar's properties nationwide, was last revised in 2007. None of the unions that currently represent employees have filed a grievance challenging the rules at issue here.

B. General Legal Principles That Govern Workplace Rules Under the NLRA

An employer violates Section 8(a)(1) by maintaining workplace rules that tend to chill Section 7 activities by its employees. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). In *Lutheran Heritage Village—Livonia*, 343 NLRB 646 (2004), the Board established an analytical framework for fact finders faced with deciding NLRA cases that challenge the legality of workplace rules. It provides that rules explicitly restricting Section 7 activities violate Section 8(a)(1). But where a rule does not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. Id. at 647. If a rule explicitly infringes the Section 7 rights of employees, the mere maintenance of the rule violates the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375–376 (D.C. Cir. 2007) In all cases, the Board requires the trial judge to give the rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights. 343 NLRB at 646.

The specific rules at issue are described below, with the challenged aspects generally shown in italics. No evidence shows that either the handbook or any specific rule contained in it was adopted in response to a union organizing campaign. Additionally, there is no evidence that the rules have ever been applied to inhibit employee Section 7 activities. Consequently, the analysis provided below centers on whether a challenged rule expressly restricts employee conduct protected by Section 7, and, if not, whether employees would reasonably construe the rule to prohibit Section 7 activity.

C. Relevant Facts and Conclusions

1. The off-duty employee attire rule

Complaint paragraph 4(1) alleges that the handbook rule prohibiting off-duty employees from wearing "clothing which displays profanity, vulgarity of any kind, obscene or offensive words or phrases (sic)." This prohibition applies essentially to off-duty employees who visit Respondent property for a variety of purposes. The rule in its entirety reads:

> **Visiting Property When Not In Uniform:** When on property while off duty for training, New Hire Orientation, meetings, or coming in to change for work, the following Appearances Guidelines apply: All clothing must be neat and presentable. Clothing may not be torn, damaged or defaced in any way. The following items should be worn: shirts, shoes or strapped sandals and name tag/badge if on property for

[1] The name of the International Union has been corrected to reflect its official name.

[2] Sec. 8(a)(1) makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7." The part of Sec. 7 pertinent here guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all such activities."

[3] Local 159 joined in the brief filed by the Acting General Counsel.

> work-related reasons or back of house services (e.g., HR, Payroll). *The following may not be worn: bathing suits, short shorts, thong-type sandals, tube tops, halter tops, tank tops, thin straps, strapless clothing, midriff tops, clothing which displays profanity, vulgarity of any kind, obscene or offensive words or pictures*.

The Acting General Counsel implicitly concedes that this rule does not explicitly restrict Section 7 activity. Rather, he claims the words "clothing which displays profanity, vulgarity of any kind, obscene or offensive words or pictures" could reasonably lead an employee to "construe the rule to prohibit them from wearing clothing intended to protest working terms or conditions for fear that Respondent may deem it to be vulgar, profane, or offensive." (AGC Br., p. 7.) Respondent argues that this rule is but one aspect of a six page section of the handbook addressing the image employees present to the hotel guests rather than a prohibition against wearing clothing with a "union message."

I do not agree with the claim that Respondent violated the Act by the mere maintenance of this rule because I am unpersuaded that employees would reasonably construe the rule to prohibit Section 7 activity. This is particularly true where, as here, the evidence shows that employees frequently wear clothing at the facility that bears a union message. The Acting General Counsel's argument, in my judgment, ignores the Board's admonition against reading phrases in isolation and making improper presumptions about interference with employee rights. Fairly read, in the context where it appears, the adjective "offensive" addresses matters of taste a reasonable person would regard as outside the norms of decency common in the community from which Respondent draws its customers rather any of the various forms of activity protected by Section 7. *Adtranz ABB Daimler-Benz Transportation, N.A. Inc. v. NLRB*, 253 F.3d 19, 26 (D.C. Cir. 2001).

The two cases cited by the Acting General Counsel predate *Lutheran Heritage Village*. (AGC Br., p. 8.) One of the cited cases, *University Medical Center,* 335 NLRB 1318 (2001), was denied enforcement in pertinent part by the D.C. Court of Appeals. 335 F.3d 1079 (D.C. Cir. 2003). Given the favorable discussion in the Board's *Lutheran Heritage Village* decision of that circuit's rationale in *Adtranz,* supra*,* a case similar to *University Medical Center*, I find the continued vitality of the two Board cases cited by the Acting General Counsel very questionable. For these reasons, I recommend dismissal of this allegation.

2. The rules governing the use of facilities by off-duty employees

The allegations in complaint paragraphs 4(2) and 4(3) challenge work rules applicable to the use of Respondent's facilities by off-duty employees. The former is explicitly stated as conduct standard No. 9 and is 1 of 35 enumerated in the employee handbook, under the "Conduct Standards" section. The rule, along with the section's preamble, read:

> **Conduct Standards:** Out of respect for our guests and each other, you are expected to maintain certain behavior and performance standards. The following list provides examples of behavior that can result in disciplinary action; it is not intended to be an exhaustive list. You are expected to use good judgment at all times in behaving appropriately at work.
>
> * * *
>
> *9. With your manager's authorization you may use the Rio public facilities while off duty. When doing so, employees must act professionally and adhere to Conduct Standards (note the above Conduct Standard regarding gambling). In addition, if alcohol is consumed, it should be done responsibly while having a meal. Employees participating in company-sponsored events where alcohol is served (e.g. award banquets) must act responsibly and professionally.*

The other rule in this category challenged by the Acting General Counsel appears several pages ahead of rule 9. It reads as follows:

> **Use of Facility**: Our guests have priority in using our facilities. Employees, however, are welcome to visit the property as a guest during off duty, non-peak business hours. *Visits are permitted with your supervisor's or manager's approval so long as you are not in uniform. With that approval, you may visit public lounges, restaurants, casino and other public areas while off duty. When using any of the facilities as a guest you are restricted to public areas. Even though off duty, you are expected to conduct yourself in a manner consistent with the Conduct of Standards. Please ensure you review Conduct Standards #7 (gambling) and #9 (consuming alcohol) prior to visiting the property.*

The Acting General Counsel argues that these two rules are "facially invalid" because they require employees to obtain permission anytime they wish to visit Respondent's facility when off duty. In addition, the Acting General Counsel argues the rules are unlawful because a reasonable employee could construe them to inhibit Section 7 activities. In support of his contentions, the Acting General Counsel cites *Teletech Holdings, Inc*., 333 NLRB 402 (2001) (rule barring the distribution of literature without "proper authorization" unlawful because it was not limited to working time nor working areas and because it required prior managerial authorization) and *Tri-County Medical Center*, 222 NLRB 1089 (1976) (rule barring off-duty employees access to parking lots, gates, and other outside nonworking areas unlawful in the absence a business justification). Respondent, noting that neither of these access rules mention or implicate any type of Section 7 activity, argues that both rules are analogous to a rule found lawful by the Board in *Lafayette Park Hotel,* supra at 827.

I concur with Respondent's contention that these rules are essentially indistinguishable from hotel rule 6 found lawful in the *Lafayette Park Hotel* case. There the Board, citing *Brunswick Corp*., 282 NLRB 794, 795 (1987), found hotel rule 6 could not be read by reasonable employees as requiring prior managerial permission in order to engage in protected activities on their free time in nonwork areas. Plainly, Respondents rules address only the use of "public" areas inside the hotel facility. As such the rules are inapplicable to parking lots and exterior nonwork areas such as those addressed in the *Tri-County* case, or even nonwork interior areas. And as the rules make no ref-

erence to the distribution of literature, the Acting General Counsel's reliance on the *Teletech Holdings* case is misplaced. Accordingly, I recommend dismissal of complaint paragraphs 4(2) and 4(3).

3. The confidentiality rules

Complaint paragraphs 4(4) and 4(5) allege that Respondent maintains confidentiality rules that violate Section 8(a)(1). Complaint paragraph 4(4) alleges Respondent's broad elaboration of its confidentiality policy (Rule 2.21) is unlawful. That provision provides:

> ***Confidentiality****: All employees are prohibited from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public. This type of disclosure includes participation in internet chat room or message boards. Exceptions to the rule include disclosure which are authorized by the Company or required or authorized by the law. This information includes, but is not limited to:*
>
> - Company financial data
> - Plans and strategies (development, marketing, business)
> - Organization charts, salary structures, policy and procedures manuals
> - Research or analyses
> - Customer or supplier lists or related information.
>
> *The property or Corporate Law department should be consulted whenever there is a question about whether the information is considered confidential. Any failure to uphold this policy should be communicated to the Law department and may result in immediate Separation of Employment. All managerial, supervisory, and selected positions are required to comply with the "Use and Disclosure of Confidential Information" policy.*

Complaint paragraph 4(5) challenges conduct standard No. 10, which states: "*Employees will not reveal confidential information to unauthorized persons*."

Although the allegation at complaint paragraph 4(4) suggests that the Acting General Counsel regards the confidentiality rule (Jt. Exh. 1, p. 2.21) as unlawful in its entirety, the argument contained in his brief dispels any such notion. Thus, his brief states:

> Included within Respondent's broad definition of what constitutes confidential information, is the prohibition against the disclosure of "organizational charts, salary structures, policy and procedure manuals." The rule further defines confidential information as "any information about the company which has not been shared by the Company with the general public."

(AGC Br. pp. 12–13.) Citing *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) and *Automatic Screw Products,* 306 NLRB 1072 (1992), the Acting General Counsel argues that the rule is "unlawful on its face" because it would inhibit union and protected concerted activity by precluding employees from discussing wages and working terms and conditions as well as freely contacting and conferring union representative, Board agents, or other third parties on "internet chat rooms or message boards" concerning these particular subjects.

Respondent's argument, which draws a distinction between "salary structures" and an individual employee's wage rate, argues that nothing in these two rules implicate matters protected by Section 7. In addition, Respondent argues that this rule is analogous to the confidentiality rules the Board found lawful in *Lafayette Park Hotel*, supra, *Super K-Mart*, 330 NLRB 263 (1999), and *Mediaone of Greater Florida, Inc*., 340 NLRB 277 (2003). I agree.

At first blush, Respondent's prohibition against the disclosure of information contained in organizational charts, salary structures, and policy and procedures manuals is arguably an explicit restriction on Section 7 activity and thus unlawful on its face as argued by the Acting General Counsel. Thus, in the context of union organizing activity, an organizational chart typically contains information of particular significance in determining the scope of an appropriate unit, the unit placement of particular individuals, and other critical details of significance to the employee organizational effort. Arguably, rules permitting employers to muzzle their employees with respect to this type of information, whether gained from a first-hand observation of an organizational chart, or have come to know by way of their employment experience, would be clearly destructive of matters at the core of the Section 7 right to participate in the planning of a union organizing strategy with professional organizers. Similarly, policy and procedures manuals often contain significant information about the terms and conditions of employment for employees. For example, it is not unusual for these types of documents in the hotel industry to contain production standards and rules applicable to particular groups of employees such as room cleaners, or even minutiae addressing the expected conduct of particular groups having contact with the public. And finally, after employees select a representative, sharing information they have gained concerning the employer's salary structures with their professional bargaining representative to fashion bargaining demands would be of particular importance.

But having said that, the Board's decision in *Mediaone,* supra, has already held that an employer's rule that barred the disclosure of "organizational charts and databases" (the latter would almost certainly contain an employer's salary structures) among numerous other matters do not explicitly restrict Section 7 activity. And as to whether employees would reasonably construe such rules as inhibiting Section 7 activity, the Board majority, by the following language, gives the overall context in which the doubtful portions appear considerable significance:

> [W]e do not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union. Although the phrase "customer and employee information, including organizational charts and databases" is not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of "proprietary information, including *information assets* and *intellectual property*" and is listed as an example of "intellectual property." Other examples include "business plans," "marketing plans," "trade secrets," "financial information," "patents," and "copyrights." Thus, we find, contrary

> to our dissenting colleague, that employees, reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of the Respondent's proprietary business information rather than to prohibit discussion of employee wages.[6] "Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of proprietary information." *Lafayette Park*, supra, 326 NLRB at 826 (employer rule prohibiting "divulging Hotel private information to employees or other individuals or entities that are not authorized to receive that information" found lawful*); Super K-Mart*, supra, 330 NLRB at 263, 264 (employer rule stating that "Company business and documents are confidential" and "disclosure of such information is prohibited" found lawful). [Footnotes omitted]

340 NLRB 279. Although Respondent's rule contains no magic words such as "intellectual property" or "proprietary assets," the examples set forth in Respondent's rules plainly establish that these are the interests Respondent seeks to protect. For this reason, I find it doubtful that employees reading Respondent's confidentiality rules would miss that notion or misinterpret them as a restriction on their Section 7 right to disclosure information they have gained that would advance their interests concerning their wages, hours and other terms and conditions of employment. Accordingly, I recommend dismissal of these allegations.

4. The computer usage rules

The complaint paragraphs 4(6) and 4(7) allege that Respondent's computer usage policy (Jt. Exh. 1, p. 2.13-2.16) violates the Act. The rule at issue appears in the handbook's "Computer Usage" section:

> **Computer Usage**: Computer resources are Company property and are provided to authorized users for business purposes. The company has the right to review or seize computer resources, including hardware, software, documents and electronic correspondence.
>
> * * *
>
> **Confidentiality:**
> Do not disclose or distribute outside of Rio's any information that is marked or considered confidential or proprietary unless you have received a signed non-disclosure agreement through the Law Department. In some cases, such as with Trade Secrets, distribution within the Company should be limited and controlled (e.g., numbered copies and a record of who has received the information). You are responsible for contacting your department manager or the Law Department for instructions.
>
> * * *
>
> **General Restrictions:**
> Computer resources may not be used to:
> - Commit, aid or abet in the commission of a crime
> - Violate local, state or federal laws
> - Share confidential information with the general public, including discussing the company, its financial results or prospects, or the performance or value of company stock by using an Internet message board to post any message, in whole or in part, or by engaging in an internet or online chat room
> - Convey or display anything fraudulent, pornographic, abusive, profane, offensive, libelous or slanderous
> - Send chain letters or other forms of non-business information
> - Seek employment opportunities outside of the Company
> - Invade the privacy of or harass other people
> - Solicit for personal gain or advancement of personal views
> - Violate rules or policies of the Company
>
> Do not visit inappropriate (non-business) websites, including but not limited to online auctions, day trading, retail/wholesale, chat rooms, message boards and journals. Limit the use of personal email, including using streaming media (e.g., video and audio clips) and downloading photos.

The Acting General Counsel urges that the Board overrule *Register Guard*, 351 NLRB 1110 (2007), and reinstate the principles in existence prior to that decision. Those principles, the Acting General Counsel argues, required an employer, with limited exceptions, to permit its employees to engage Section 7 communications using company equipment if the employer permitted other nonwork related communications using employer property. I decline to address the wisdom, or lack thereof, of the *Register Guard* decision as that is a matter for the Board to consider and decide.

In addition, the Acting General Counsel, noting that employees may use the Company's computers to access their personal email and to use of "streaming media" on a limited basis, argues that the restrictions contained in the Company's computer usage policy "inhibit employee's Section 7 rights, as they do not allow employees to express concerns which may later become logical outgrowths of group concerns or discuss wages or working conditions." The restrictions the Acting General Counsel refers to are those bullet points set out above. In framing this argument, the Acting General Counsel assumes that the word "confidential" as used in the computer usage policy parallels that found in the confidentiality rules. Respondent disputes the Acting General Counsel's implicit assertion that the words "confidential information" as used here could reasonably be read to limit discussions of matters covered by Section 7. I agree.

Contrary to the Acting General Counsel's assertion, the computer usage rule does not explicitly import the definition of "confidential" from the handbook's confidentiality rules or refer to the subsequently appearing confidentiality rule at all. Nor would one expect it to where, as here, I have concluded in agreement with Respondent that the scope of the confidentiality rule gains its meaning from its from its specific context. Hence, as with the conclusions reached above concerning the confidentiality rule, I find the computer usage rule contains no explicit restriction on Section 7 rights. That being so, the Acting General Counsel had the burden of establishing by a preponderance of the evidence that employees would reasonably construe the computer usage rule so as to prohibit Section 7 activity. I find the Acting General Counsel failed to meet that burden. Accordingly, I recommend dismissal of complaint paragraph 4(6).

5. Rules governing the use of camera and audio visual devices at work

The General Counsel alleges that two of Respondent's rules prohibiting the use of camera phones or other audio visual devices at work unlawfully interfere with employee Section 7 activities. See complaint paragraphs 4(8) and 4(10). These rules are enumerated as conduct standards 24 and 35, respectively, in the employee handbook. They provide:

> 24. Personal pagers, beepers and cell phones worn by employees must not be visible or audible to guests and should not impact job performance. The use of personal cellular/digital phones is prohibited while on duty, but is (??not) allowed during break time in designated break areas. *Camera phones may not be used to take photos on property without permission from a Director or above.*
>
> 36. Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events).

The Acting General Counsel argues that as these rules are unlawful because employees could be reasonably interpret them to restrict the photographing or filming of fellow employees engaged in concerted activities such as picketing, or from photographing or filming unsafe working conditions. Respondent argues that the Board's decision in *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), requires the dismissal of this allegation.

These two rules do not explicitly restrict Section 7 activity, nor, as previously stated, is there any evidence that Respondent adopted these rules in response to union activity or applied them to inhibit such activity. Hence, the question then becomes whether the Acting General Counsel met his burden of showing that employees would reasonably interpret the rules as a restriction on their protected activities.

As a general rule, an employer may restrict photographing and filming particularly within its interior work areas in order to prevent the disruptions to its operations and to protect against security breaches.[4] See e.g., *Bill's Electric*, 350 NLRB 292, 295 (2007) (salts who voluntarily participated with a union agent's videotaping of their employment application process after the employer's request that the filming cease amounts to misconduct outside the protection of the Act). It is not uncommon for business organizations to regularly provide its employees with training emphasizing the well-recognized practice restricting onsite filming and photographing. Given the widespread recognition of this practice, I am highly dubious of the Acting General Counsel's core argument that employees would reasonably interpret these rules as a restriction against the type of protected activity cited in his brief, i.e., picketing (likely to occur outside) and abnormally dangerous working conditions.

The Acting General Counsel's argument fails to gain the least bit of momentum from his efforts to distinguish the *Flagstaff Medical Center* case. The Acting General Counsel asserts, in effect, that the key component of the Board's decision in that case rests in the requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPPA). Because there is no comparable legal duty to protect the privacy of hotel guests, the Acting General Counsel argues, the *Flagstaff Medical Center* case is inapplicable here.

I find the Acting General Counsel's arguments concerning the import of the *Flagstaff Medical Center* decision fail for two principal reasons. First and foremost, the Acting General Counsel's argument mirrors the dissent's position in *Flagstaff Medical Center* that employees would reasonably read the photography ban to bar taking a picture of a smoking electrical outlet to support their efforts to improve safe working conditions. Obviously the Board majority did not share the dissenting member's outlook and it is the majority's view of the law that I am obliged to apply.

And secondly, I disagree with the Acting General Counsel's otherwise limited view that the outcome in *Flagstaff Medical Center* concerning the photography ban is largely predicated on HIPPA privacy requirements. In effect, the Acting General Counsel presupposes that employers should be restricted in establishing similar workplace rules to those instances where the law imposes a specific duty. In my judgment, this contention is flawed. In the same sense that an employer may discharge an employee for a good reason, bad reason, or no reason at all so long as it is not a reason prohibited by law, the law recognizes the right of an employer to establish workplace rules within a similar framework. As Respondent argues, a hotel and a casino operation has a strong interest in protecting and guarding the privacy of its guests even though the guests' privacy interests do not always enjoy some form of legal protection similar to that of hospital patients. In the overwhelming majority of instances, hotel employees understand and respect the privacy of the hotel guests. This common recognition on the part of hotel employees augurs against a conclusion that they would reasonably read a photography and filming ban as being designed to chill their Section 7 activities. Hence, absent some compelling evidence to the contrary not present here, I find it likely that the typical hotel employee would perceive that the rule at issue here has nothing at all to do with their right to engage in union or concerted activities. For these reasons, I have concluded that the Acting General Counsel failed to establish by a preponderance of the evidence that Respondent violated the Act by merely maintaining a rule banning the taking of photos and filming at its workplace. Accordingly, I recommend dismissal of this allegation.

6. Rule against walking off the job

Complaint paragraph 4(9) sets forth the last rule at issue. That rule, conduct standard 28, provides:

> *28. Employees who walk off the job during shift will be considered to have abandoned their job and voluntarily separated their employment."*

This rule requires little discussion. It is devoid of ambiguity. It is an explicit restriction on Section 7 rights. The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. *NLRB v. Erie Resis-*

[4] Indeed, the Federal courts famously do likewise. See *Hollingsworth v Perry*, 558 U.S. 183 (2010).

tor Corp., 373 U.S. 221 (1963); *Montefiore Hospital,* 621 F.2d 510 (2d Cir. 1980). The Board has long held that an employer violates Section 8(a)(1) by maintaining a blanket prohibitions against work stoppages, i.e., those that fail to distinguish between protected and unprotected work stoppages. *Catalox Corp*., 252 NLRB 1336, 1339 (1980). Respondent's work-stoppage rule amounts to the type of overly broad ban prohibited by the Board. For this reason, I find this Respondent's walkout rule violates 8(a)(1).

CONCLUSION OF LAW

By maintaining a workplace rule that prohibits employees from engaging in a walkout, Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

My recommended order requires Respondent to expunge its rule prohibiting employees from engaging in a walkout protected by Section 7 of the Act and to post the attached notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a workplace rule prohibiting employee walkouts protected by Section 7 of the Act.

(b) 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) Expunge from its workplace rules any prohibition against employees engaging in a walkout protected by Section 7 of the Act.

(b) Within 14 days after service by the Region, post at its Rio All-Suites facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

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 facility 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 January 5, 2011.

(c) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., March 20, 2012.

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 a workplace rule that prohibits employees from engaging in a walkout protected by Section 7 of the Act.

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

WE WILL remove from our rules any prohibition against employees engaging in a walkout protected by Section 7 of the Act.

CAESARS ENTERTAINMENT D/B/A RIO ALL-SUITES HOTEL AND CASINO

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] 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."