UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CASINO PAUMA

and 21-CA-161832

UNITE HERE INTERNATIONAL UNION

Jean Libby, Esq.,
for the General Counsel.
Scott A. Wilson, Esq.,
for the Respondent.
Kristin L. Martin, Esq.,
Davis Cowell & Bowe LLP
for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to me by virtue of a joint motion and stipulation, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining unlawfully broad rules in its employee handbook. Respondent filed an answer denying the essential allegations of the complaint. The General Counsel and Respondent filed briefs in support of their positions.

Based on the stipulated record, as well as the briefs submitted by the parties, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent, which has an office and place of business located on tribal land in Pauma Valley, California, operates a commercial gaming and entertainment facility, including a gaming casino and restaurants. Its operations are open to members of the

general public, who constitute the vast majority of its customers, and Respondent employs primarily individuals who are not Native Americans. During a representative one-year period, Respondent derived gross revenues, from its business operations, in excess of $500,000, and purchased and received, at its Pauma Valley facility, goods valued in excess of $50,000 directly from points outside the State of California. The parties have stipulated that the Board has determined (See *Casino Pauma*, 363 NLRB No. 60 (2015), reaffirming an earlier finding in *Casino Pauma*, 362 NLRB No. 52 (2015)) that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. I therefore make a similar finding here.

I also find, as the parties have stipulated, that the Charging Party Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Stipulated Facts

Since about Mid-April 2015, Respondent has maintained the following rules in its employee handbook, a copy of which is attached to the stipulation as Exhibit 4:

> 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 telephones, fax 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 when 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 solicitations 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 or user-generated media. Keep in mind that everything you publish will be online for a long time, perhaps a lifetime! If you 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 Casino Pauma, 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 speaking for yourself and not on behalf of Casino Pauma. Don't cite or reference guests, vendors, clients or Team Members without their approval. If you do have approval, link back to 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 (emphasis in the original).

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

B. Discussion and Analysis

The complaint alleges that several rules set forth above, by their very language, are broad enough to restrict Section 7 rights of employees. Thus, even though the rules may not explicitly restrict those rights or may not be unlawfully formulated or applied, such rules are unlawful as maintained if "employees would reasonably construe the language to prohibit Section 7 activity." *William Beaumont Hospital*, 363 NLRB No. 162 (2016), citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In giving the rule in question a reasonable reading, the Board "must refrain from reading particular phrases in isolation." *Lutheran Heritage*, cited above, 343 NLRB at 646, citing *Lafayette Park Hotel,* 326 NLRB 824, 827 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). But ambiguities are construed against the promulgator of the rule. *Lafayette Park Hotel*, cited above, 326 NLRB at 828. See also *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007).

On brief, the General Counsel specifies 4 general categories of violations, some with subcategories (Br. 5-14): A. Rule 2.19, conducting personal business, is unlawful because it "bans employees from all of Respondent's property except when conducting Respondent's business." In particular, according to the General Counsel, the rule unlawfully restricts off-duty employees from engaging in protected activity; and it prohibits protected activity during nonworking time. B. Rule 2.22, solicitation and distribution, is unlawful because it prohibits protected solicitation and distribution "if the intended recipient expresses any discomfort or unreceptiveness whatsoever." C. Rule 2.23, social media, is unlawful because it prohibits employees from (1)"communicating

anything to do with work" on social media without an employer-approved disclaimer;[1] (2) posting social media references to co-workers without their prior approval; and (3) posting photos "in conjunction with work-related postings" without Respondent's prior approval. D. Rule 5.2, conflicts of interest, is unlawful because it requires Respondent's advance approval before soliciting co-workers.

Applying the above principles to the stipulated facts and considering the General Counsel's specific allegations set forth above, as well as Respondent's response, I find the rules at issue here violate the Act in several respects, as shown below.

Rule 2.22 (General Counsel's B above) requires that all solicitations and distributions cease "immediately" if the "intended recipient expresses any discomfort or unreceptiveness whatsoever." With limited exceptions not applicable here, employees have the protected right under Section 7 of the Act to solicit and distribute literature to fellow employees on behalf of unions or other common interests dealing with wages, hours and terms and conditions of employment, so long as the solicitation is during non-work time and the distribution is not in work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-805 (1945); and *Stoddard Quirk Mfg. Co*., 138 NLRB 615, 621 (1962). This includes the right to "engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited." *Ryder Truck Rental*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). Because Rule 2.22 broadly prohibits protected activity based on the subjective views of recipients, it infringes on protected rights and could reasonably be read that way by employees. The rule thus violates Section 8(a)(1) of the Act. See *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011); and *Teletech Holdings, Inc*., 333 NLRB 402, 403 (2001).

Rule 5.2 (General Counsel's D above) prohibits employee solicitation "in support of any causes" unless "the General Manager has granted written approval in advance." Here again the language is broad enough to apply to protected solicitation of fellow employees on behalf of unions or other common interests—clearly Section 7 rights, as shown above. The rule's explicit pre-condition—obtaining written approval of management in advance—is an unlawful restriction on those rights. *Brunswick Corp.* 282 NLRB 794, 795 (1987). Accordingly, this rule also violates Section 8(a)(1) of the Act. See *Teletech Holdings*, cited above, 333 NLRB at 403; and *Schwan's Home Service*, 364 NLRB No. 20, slip op. 4 (2016).[2]

Rule 2.23 (General Counsel's C above) has a number of different admonitions with respect to employee use of electronic social media, some of which do not reasonably affect or restrict Section 7 rights. But some do, particularly references to communications dealing with "employment related concerns" or "having to do with work." Thus, the rule requires employees, when referring to "employment related

[1] The General Counsel's quoted reference to "anything to do with work" is not a phrase that appears in the rule. The rule states that if the employee publishes "content on any blog or website and it has to do with work" there must be a specified disclaimer.

[2] Rule 5.2 is titled "conflicts of interest," but the General Counsel's theory of violation addresses only the requirement that the employer's approval is required before employee solicitations.

concerns" in their use of social media, to provide a disclaimer, identify themselves and their job positions, and refrain from mentioning guests, vendors, clients or fellow employees without their approval. Such admonishments could reasonably be read by employees to restrict the free exercise of their Section 7 right to comment to fellow employees and others, including union representatives, about their work-related complaints concerning wages, hours and working conditions. See *Schwan's Home Service*, 364 NLRB No. 20, cited above, at slip op. 3 and fn. 10. As the General Counsel points out, the disclaimer is employer approved (Br. 11), which, as shown above in the discussion of the *Brunswick* case, unlawfully limits protected rights; and the requirement that fellow employees approve the invocation of protected rights flies in the face of the Board's ruling in the *Ryder Truck* case, cited above, that protected activity cannot be limited simply because other employees are offended. Indeed, the language of Rule 2.23 is broad enough to restrict email communications between employees, when both are on non-work time and using their own private computers and email accounts, and complaining about their working conditions. To the extent that the rule's admonishments and restrictions infringe on the full and free exercise of Section 7 rights as described above, they violate Section 8(a)(1) of the Act.

In addition, the General Counsel asserts (Br. 13-14) that Rule 2.23 is also unlawful because it bans posting photos without Respondent's approval. The General Counsel's premise is that photos may be part of employee protected activities. Thus, the General Counsel continues, the total ban on use of photos "gathered throughout the course of your career at Casino Pauma" and the admonition that "[p]hotos taken or obtained at Casino Pauma are the sole property of the casino and are not permitted to be used for personal use" are improper. The General Counsel also asserts that the employer's prior approval for such photos is an impermissible limitation on Section 7 rights, as discussed above in reference to the *Brunswick* case. I find merit in the General Counsel's position in this respect. Modern technology has made the use of the photographic ability of the ubiquitous iPhone commonplace in today's society. One can easily imagine an employee who observes unsafe conditions in the workplace taking a photo for use by a union, to obtain the support of fellow employees in an effort to resolve the unsafe working conditions, or even to report them to the appropriate government agencies. As long as this is done without significant interference with work, such activity is, and should be, protected. Rule 2.23 improperly limits such activity and employees would reasonably read the rule that way. As the General Counsel's brief points out, the Board has found rules restricting the use of video and audio recordings unlawful because they may be reasonably read to limit protected activity. See *Rio All Suites Hotel & Casino*, 362 NLRB No. 190, slip op. 3-5 (2015); and *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. 3-5 (2015). Those cases support a similar finding here. I therefore find the restrictions against use of photos in Rule 2.23 violative of Section 8(a)(1).[3]

Rule 2.19, titled "Conducting Personal Business" (General Counsel's A above) is poorly written and deals with multiple prohibitions, making it difficult to parse. But the

[3] There is no allegation that the ban on use of confidential or proprietary information in Rule 2.23 is unlawful.

prohibition against conducting "personal business" on company property and "while at work" can reasonably be read to restrict the communications of employees with each other about union or other Section 7 protected rights in non-work areas and on non-work time. See discussion above in reference to the Supreme Court's *Republic Aviation* opinion and the Board's *Stoddard-Quirk* ruling. The rule makes it clear that personal business is the opposite of "Casino Pauma business," thus including communications about unions or complaints about working conditions in the "personal business" category. The restriction of protected activity "while at work" is also too broad because it is not properly restricted to "work time" and thus bans protected activity during nonwork time, such a time on lunch, breaks and before and after work. See *Our Way, Inc*., 268 NLRB 394 (1983). See also *2 Sisters Food Group*, cited above, 357 NLRB at 1817.

The language of Rule 2.19 can also reasonably be read to deny off-duty employees the right to engage in protected activity in non-work areas of Respondent's property, contrary to the Board's protection of such right in *Tri-County Medical Center*, 222 NLRB 1089 (1976). Thus, in this respect, the rule is unlawfully broad. See *Flamingo Hilton,* 330 NLRB 287, 289-290 (1999); and *Teletech Holdings*, cited above, 333 NLRB at 404.

At the least, the prohibitions against conducting "personal business" in Rule 2.19 are ambiguous insofar as that term may be read to include discussions about unions and other concerted activity; the rule thus puts employees at risk if they guess wrongly about what the Respondent means by "personal business." See *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. 1, fn. 3 (2015); and *Schwan's Home Service*, cited above, 364 NLRB No. 20, slip op. 3. Accordingly, to the extent that the restrictions in the rule against conducting "personal business" prevent or limit employees from engaging in the Section 7 activity mentioned above, the rule violates Section 8(a)(1) of the Act.

In its brief, Respondent raises only one defense to the complaint allegations—that it had legitimate business interests to justify the rules at issue. But neither the rules themselves nor anything in the stipulation provides either the necessary specificity or the basis for such legitimate business interests. Nor does Respondent provide a sufficient nexus of such business interests to the language of the rules. In any event, the gravamen of the violations is that the rules are too broad and thus infringe on Section 7 rights in the manner I have explained above.[4]

Respondent's brief also submits alternative language for the rules, which it asserts the General Counsel rejected in settlement discussions. Moreover, Respondent offers additional language for me to consider, presumably as a settlement solution. I am reluctant to consider these matters because it is not my job to either rewrite rules or advise an employer how to rewrite rules in a manner that does not violate the Act. But I

[4] Contrary to Respondent's suggestion, its benign intent in formulating the rules provides no defense if, as the case law makes clear and as I have found here, the language of the rules may reasonably be read to infringe on Section 7 rights.

am hopeful that my decision provides adequate guidance to aid in an acceptable resolution of this case in compliance.

CONCLUSIONS OF LAW

1. By maintaining rules that (a) require solicitations and distributions to "cease immediately" if the "intended recipient expresses any discomfort or unreceptiveness whatsoever;" (b) prohibit solicitations unless management gives prior approval; (c) require employees who use social media to communicate "employment related concerns" to provide a disclaimer, identify themselves and their job positions, and refrain from mentioning guests, vendors, clients or fellow employees without their approval; and (d) prohibit employees from discussing "personal business" on company property and "while at work," Respondent has violated Section 8(a)(1) of the Act.

2. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

Remedy

Having found that Respondent has engaged in unfair labor practices found above, it shall be ordered to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act. Respondent must rescind or revise the handbook rules that have been found unlawful. It may comply by rescinding the unlawful language and republishing its employee handbook without it. The Respondent may supply the employees either with handbook inserts stating that the unlawful language has been rescinded, or with new and lawfully worded language on adhesive backing that will correct or cover the unlawful language until it republishes the handbook without the unlawful language. Any copies of the handbook that include the unlawful language must include the inserts before being distributed to employees. See *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in rel. part 475 F.3d 369 (D.C. Cir. 2007).

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

ORDER

Respondent, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Maintaining language in its employee handbook rules that bans employee solicitations or distributions dealing with union or other protected activity if the

[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 herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

intended recipient expresses discomfort or unreceptiveness, or requires advanced approval from management for such solicitations.

(b) Maintaining language in its employee handbook rules that requires employees using social media to express "employment concerns" to provide a disclaimer, identify themselves and their job positions, and refrain from mentioning guests, vendors, clients or fellow employees without their approval.

(c) Maintaining language in its employee handbook rules that prohibits employees from conducting "personal business" on company property and "while at work" insofar as it limits employees from engaging in union and other protected activity on non-work time and limits off-duty employees from engaging in such activity in non-work areas.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the language in its employee handbook rules that prohibits employee solicitation or distributions dealing with union or other protected activity if the intended recipient expresses discomfort or unreceptiveness or requires advanced approval from management for such solicitation.

(b) Rescind the language in its employee handbook rules that requires employees using social media to express "employee concerns" to provide a disclaimer, identify themselves and their job positions and refrain from mentioning guests, vendors, clients or fellow employees without their approval.

(c) Rescind the language in its employee handbook rules that prohibits employee from conducting "personal business" on company property and "while at work" insofar as it limits employees from engaging in union and other protected activity on non-work time and limits off-duty employees from engaging in such activities in non-work areas.

(d) Furnish all current employees with inserts for the current employee handbook rules that advise that the unlawful language in the rules has been rescinded or provide lawful language for those rules; or publish and distribute to employees a revised handbook that does not contain the unlawful language or provides the language of lawful policy or rules.

(e) Within 14 days after service by the Region, post at its facility in Pauma Valley, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places,

[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."

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 dite, 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 Respondent at any time since October 13, 2015.

(f) 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 the Respondent has taken to comply.

Dated, Washington, D.C., July 18, 2016.

Robert A. Giannasi
Administrative Law Judge

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 language in the employee handbook rules that bans employee solicitations or distributions dealing with union or other protected activity if the intended recipient expresses discomfort or unreceptiveness, or requires advanced approval from management for such solicitations.

WE WILL NOT maintain language in the employee handbook rules that requires employees using social media to express “employment concerns” to provide a disclaimer, identify themselves and their job positions, and refrain from mentioning guests, vendors, clients or fellow employees without their approval.

WE WILL NOT maintain language in the employee handbook rules that prohibits employees from conducting “personal business” on company property and “while at work” insofar as it limits employees from engaging in union and other protected activity on non-work time and limits off-duty employees from engaging in such activity in non-work areas.

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

WE WILL rescind the language in the employee handbook rules that prohibits employee solicitation or distributions dealing with union or other protected activity if the intended recipient expresses discomfort or unreceptiveness or requires advanced approval from management for such solicitation.

WE WILL rescind the language in the employee handbook rules that requires employees using social media to express “employee concerns” to provide a disclaimer, identify themselves and their job positions and refrain from mentioning guests, vendors, clients or fellow employees without their approval.

WE WILL rescind the language in its employee handbook rules that prohibits employee from conducting "personal business" on company property and "while at work" insofar as it limits employees from engaging in union and other protected activity on non-work time and limits off-duty employees from engaging in such activities in non-work areas.

WE WILL furnish all current employees with inserts for the current employee handbook rules that advise that the unlawful language in the rules has been rescinded or provide lawful language for those rules; or publish and distribute to employees a revised handbook that does not contain the unlawful language or provides the language of lawful policy or rules.

CASINO PAUMNA

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-161832 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, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184.