Lytton Rancheria of California d/b/a Casino San Pablo *and* UNITE HERE Local 2850. Cases 32–CA–025585, 32–CA–025665, 32–CA–064020, and 32–CA–086359

December 16, 2014

DECISION AND ORDER REMANDING IN PART

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On March 5, 2013, Administrative Law Judge Jay R. Pollack issued the attached decision. The Charging Party filed exceptions with supporting argument and the Respondent filed an answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief; the Respondent filed an answering brief; and the General Counsel filed a reply brief.

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, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The Respondent operates a commercial gaming and entertainment establishment (the Casino). The Union represents about 160 employees, and the parties' most recent collective-bargaining agreement was effective from November 2006 through November 2009. The complaint alleges that the Respondent committed multiple Section 8(a)(1) and (5) violations. The judge found many of the alleged violations, and we adopt those findings.

However, despite making relevant findings of fact, the judge failed to analyze several other complaint allegations, including Section 8(a)(1) allegations related to the Respondent's employee handbook rules and Section 8(a)(5) allegations related to its denial of access to union representatives. The General Counsel and the Charging Party have excepted to the judge's failure to find these alleged violations.[3] As explained more fully below, we conclude that the Respondent violated Section 8(a)(1), as alleged, by maintaining four of the five challenged handbook rules. We further conclude, based on the judge's findings of fact, that the Respondent violated Section 8(a)(5) by unilaterally implementing rules barring union representatives from accessing the employee break room and by barring Union Representative Jessica Medina from its property indefinitely. However, we remand to the judge for further consideration the remaining allegation that the Respondent violated Section 8(a)(5) by unilaterally implementing a rule barring union representatives from accessing areas of the Casino where employee schedules are posted.

A. The Employee Handbook Rules

The complaint alleges, and the Respondent admits, that it maintained the following rules in its 2008 employee handbook from about August 2010 until May 2011, when the employee handbook was rewritten and redistributed:

(a) "*Unacceptable Behavior*

. . . .

Gossiping about other Team Members (including supervisors, managers, directors, etc.)."

(b) "*Team Member Conduct and Work Rules*

. . . .

The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

. . . .

Insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)."

(c) "*Solicitation, Distribution and Bulletin Boards*

. . . .

[1] The parties have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent did not except to the judge's findings that it violated Sec. 8(a)(5) by: (1) refusing to bargain with the Union; (2) unilaterally announcing and implementing new benefits for part-time employees; (3) unilaterally refusing to provide contractual health benefits for four unit employees; (4) unilaterally reducing the number of shifts for four unit employees; (5) unilaterally establishing rules that prohibit access to the Casino, including requiring union representatives to disclose the purpose of their meetings with employees and conditioning access on the Union having a scheduled meeting with an employee; and (6) refusing to provide relevant information necessary for bargaining and grievance handling. Further, the Respondent did not except to the judge's findings that it violated Sec. 8(a)(1) by coercively interrogating an employee and by telling an employee not to discuss his investigation with other employees.

There were no exceptions to the judge's failure to address consolidated complaint pars. 6(a) and (c), 12(a), (b), and (c)(6). Accordingly, we shall dismiss these complaint allegations. See *North Hills Office Services*, 346 NLRB 1099, 1099 fn. 9 (2006).

[2] We shall modify the judge's conclusions of law and remedy and substitute a new Order and notice to conform to our findings, and to the Board's decisions in *J. Picini Flooring*, 356 NLRB 11 (2010), and *Durham School Services*, 360 NLRB 694 (2014).

[3] The Charging Party has excepted only to the judge's failure to address certain of the 8(a)(5) allegations regarding restricting the access of the union representatives.

Team Members may not solicit or distribute literature in the workplace at any time, for any purpose."

(d) "*Team Member Conduct and Work Rules*

. . . .

The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

. . . .

Making false, fraudulent or malicious statements to or about a Team Member, a guest or San Pablo Lytton Casino."

(e) "*Access*

. . . .

Team Members are not permitted in the back of the house areas more than thirty (30) minutes prior to the beginning of their shift or longer than thirty (30) minutes following the end of their shift, except under the following circumstances:

1. To conduct business with Human Resources; Pre-arranged training sessions or orientations;
2. With the approval of a director, manager, or supervisor."

The complaint further alleges that the Respondent's maintenance of each of these rules violated Section 8(a)(1).

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts employees' Section 7 activity, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Absent such an explicit restriction, a violation is dependent upon a showing of one of the following: (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. In undertaking this analysis, the Board must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *MCPc, Inc.*, 360 NLRB 216, 222 (2014). However, ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. *Lafayette Park Hotel*, above, 326 NLRB at 828.

1. Rule Prohibiting Gossip

We find no merit in the General Counsel's cross-exception that the judge erred by failing to find that the rule prohibiting gossiping about other team members violated Section 8(a)(1). Applying *Lutheran Heritage*, the rule does not explicitly restrict Section 7 activities. Moreover, there is no evidence that the rule was promulgated in response to union activity or was applied to restrict the exercise of Section 7 rights. Accordingly, the only question is whether the Respondent's employees would reasonably construe the rule to prohibit Section 7 activity. We find that they would not.

In *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005), cited by the General Counsel, the Board found that a rule prohibiting "negative conversations about associates and/or managers" violated Section 8(a)(1). The Board found that employees would reasonably construe the rule to prohibit them from discussing concerns about their managers that affect working conditions, which would tend to cause them to refrain from engaging in protected activities. Id. The General Counsel argues that the instant rule is unlawful because gossip is arguably a form of negative conversation.

As explained in *Hyundai America Shipping Agency*, 357 NLRB 860 (2011), the rule at issue in *Claremont Resort* concerned employee conversations generally, which would implicitly include protected concerted activity. In contrast, the Respondent's rule here, like the rule found lawful in *Hyundai*, specifically prohibits gossip, which is commonly defined and reasonably understood as chatty talk or rumors or reports of an intimate nature. 357 NLRB 860, 861. See also *Wilshire at Lakewood*, 343 NLRB 141 fn. 2, 145 (2004), vacated in part on other grounds 345 NLRB 1050 (2005), revd. on other grounds *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007) (employer did not violate Section 8(a)(1) by maintaining a rule in its employee handbook prohibiting rumors and gossip in the facility). We find that the Respondent's employees would not reasonably construe the rule prohibiting gossiping about team members to restrict Section 7 activity. Accordingly, the allegation is dismissed.[4]

2. Rule Prohibiting Insubordination or other Disrespectful Conduct

We agree with the General Counsel that employees would reasonably construe the rule prohibiting insubordination or other disrespectful conduct to prohibit Section 7 activity. In the typical workplace, where traditional managerial prerogatives and supervisory hierarchies

[4] Contrary to his colleagues, Chairman Pearce would find that this rule violates Sec. 8(a)(1). He adheres to his dissenting view in *Hyundai*, above, 862 fn. 4, that the term gossip is "imprecise, ambiguous, and subject to different meanings, including a reasonable belief that it would include protected activity." Further, he finds that ambiguity is even more readily apparent here than in *Hyundai*, where the prohibition was against "harmful gossip" rather than the untethered "gossip."

are maintained, employees would reasonably understand this phrase as encompassing any form of Section 7 activity that might be deemed insufficiently deferential to a person in authority—in other words, as referring to something *less* than actual insubordination. For example, the act of concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary conduct, or jointly challenging an unlawful pay scheme—all core Section 7 activities—would reasonably be viewed by employees as "disrespectful" in and of themselves, regardless of their manner and means, and thus as violating the rule. See *First Transit, Inc.*, 360 NLRB 619, 620–621 (2014); *2 Sisters Food Group*, 357 NLRB 1816, 1817 (2011); *Claremont Resort & Spa*, above at 832 and fn. 4 (finding unlawful a rule prohibiting "negative conversations about associates and/or managers"). There is no shortage of Board cases where protected concerted activity was perceived by managers, supervisors, and security personnel as an affront to their authority and dealt with accordingly. See, e.g., *Hawaii Tribune-Herald*, 356 NLRB 661, 680 (2011); *Noble Metal Processing, Inc.*, 346 NLRB 795, 800 (2006).

If the prohibition here were limited to "insubordination," which connotes defiance of a workplace superior's job-related directive, we would agree with our dissenting colleague that the allegation should be dismissed.[5] For instance, in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003), denying enf. of *University Medical Center*, 335 NLRB 1318 (2001), the employer prohibited "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual." After noting that the Board objected chiefly to the "other disrespectful conduct" portion of the rule, the D.C. Circuit found that "[w]hen read in context, however, that prohibition clearly does not apply to union organizing activity—including 'vigorous proselytizing'; it applies to incivility and outright insubordination[.]" Id. at 1088. The prohibition here is not so limited, however. Although insubordination is characterized as a type of disrespectful conduct, the Respondent's rule is not squarely focused on insubordinate activity as was the case in *Community Hospitals*. Thus, we do not believe that employees would necessarily read the "disrespectful conduct" portion of the rule to be limited to insubordinate-type behavior. Rather, given the patent ambiguity of the term "disrespectful conduct," employees would reasonably construe the rule here to prohibit activities protected by Section 7. Accordingly, we find this rule overbroad and in violation of Section 8(a)(1).

Our dissenting colleague contends that we have read the rule out of context. In fact, the opposite is true. The language of the rule—"[i]nsubordination or *other* disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers)" (emphasis added)—establishes that "insubordination" is a subcategory of "disrespectful conduct," not the other way around. Although the "insubordination" component understandably addresses the Respondent's legitimate interests, the parameters of the underlying phrase "disrespectful conduct" are not so well defined. The rule's parenthetical clause does not serve as a limitation. First, it refers to conduct "including" —but not limited to—the example it gives. Second, a "failure to cooperate fully with" management representatives easily encompasses conduct less than actual insubordination, including oppositional Section 7 activity that managers deem uncooperative, such as engaging in a protected protest or strike, encouraging opposition to a contract proposal favored by management, or insisting on processing a grievance on behalf of a worker who management believes it has grounds to fire.

3. Rule Prohibiting Solicitation and Distribution of Literature in the Work Place

We agree with the General Counsel that the rule prohibiting solicitation or distribution in the workplace at any time, for any purpose, is overbroad and thus violates Section 8(a)(1). Generally, an employer's ban on solicitation that is not limited to working time, or on distribution of literature that is not limited to working time and working areas, is presumptively invalid. *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 615–621 (1962). The Board has held that gambling establishments, such as the one involved here, are analogous to retail stores for the purpose of assessing no-solicitation and no-distribution rules. Thus, an employer may lawfully prohibit all such activity in the gambling area, which the Board equates to "selling floor" areas in retail stores. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288, 294 (1999). Here, however, the Respondent's rule was not so constrained, but prohibited solicitation and distribution "in the workplace at any time, for any purpose." We agree with the Gen-

[5] *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014), cited by our colleague, is distinguishable on two grounds. The Board was concerned in that case with "negative attitude" language in the rule at issue, not its reference to "insubordination" and "lack of respect." In any event, the "lack of respect" portion of the rule was entirely unrelated to "insubordination" toward management. Id., at 459 fns. 2–3.

Although Chairman Pearce dissented in relevant part in *Copper River*, and adheres to his position there, he agrees that the instant rule is distinguishable.

eral Counsel that it is clearly overbroad and violates Section 8(a)(1).

4. Rule Prohibiting Making False, Fraudulent or Malicious Statements

We agree with the General Counsel that the rule prohibiting false, fraudulent, or malicious statements is overbroad and thus violates Section 8(a)(1). In *Lafayette Park Hotel*, above, the Board found unlawful a handbook provision which prohibited employees from "[m]aking false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees." 326 NLRB at 828. The Board reasoned that prohibiting employees from making merely false statements, as opposed to maliciously false statements, was overbroad and had the tendency to chill protected activity. Id., citing *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988). The Board further explained that the rule "'fail[ed] to define the areas of permissible conduct in a manner clear to employees,'" 326 NLRB at 828, quoting *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979). The Respondent's rule is essentially identical to the provisions found unlawful in *Lafayette Park Hotel*, and the cases cited there. See also *First Transit, Inc.*, above, slip op. 11–12; *Flamingo Hilton-Laughlin*, above, 330 NLRB at 288 fn. 4, 294. Accordingly, it is unlawful as well.

5. Rule Prohibiting Employees From Being in the Back of the House More than 30 Minutes Before or After Their Shifts

We agree with the General Counsel that the rule limiting off-duty employee access to the back of the house areas violates Section 8(a)(1). We evaluate the Respondent's access rule under the well-established test of *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Tri-County*, the Board held that an employer's rule barring off-duty employees from access to its facility is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Id. at 1089.

Under *Tri-County*, as applied in *Saint John's Health Center*, 357 NLRB 2078 (2011), the Respondent's rule is unlawful under the third prong of the *Tri-County* test because it does not "uniformly prohibit access to off-duty employees seeking entry to the property *for any purpose*." Id., at 2083 (emphasis added). Thus, outside the 30-minute pre and postshift periods, the rule specifically permits off-duty access for business with the human resources department and training and orientation sessions. Moreover, it provides for any additional access solely with management's approval. This last exception effectively vests management with unlimited discretion to expand or deny off-duty employees' access for any reason it chooses. See *Piedmont Gardens*, 360 NLRB 813, 814, (2014); see also *Saint John's Health*, above, slip op. at 5 ("In effect, the [r]espondent is telling its employees, you may not enter the premises after your shift except when we say you can."). The Respondent's policy thus clearly fails the third prong of the *Tri-County* test.[6]

6. Respondent's Attempted Repudiation of the Unlawful Rules

The Respondent contends that the General Counsel's handbook rule allegations are moot because, in 2011, it issued a new handbook that did not contain any of the contested rules. We disagree. In order for a repudiation to serve as a defense to an unfair labor practice finding, it must be timely, unambiguous, specific in nature to the coercive conduct, and untainted by other unlawful conduct. In addition, there must be adequate publication of the repudiation to the employees involved, and the repudiation must assure employees that, going forward, the employer will not interfere with the exercise of their Section 7 rights. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). In *DaNite Sign Co.*, 356 NLRB 975, 981 (2011), the Board affirmed the judge's finding that the employer did not cure its violation of Section 8(a)(1) by issuing a revised handbook that deleted the unlawful rule at issue. Here, as in *Danite Sign*, the Respondent did not effectively repudiate the unlawful handbook rules simply by issuing a revised handbook subsequently that deleted the rules.[7]

[6] For similar reasons, the rule fails to pass muster under a *Lutheran-Heritage* analysis, because 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.

Our dissenting colleague says that the Respondent's rule does not restrict employees' Sec. 7 rights because the Respondent provides sufficient access. Our colleague, however, fails to address the central principle set forth in *Saint John's Health Center*, above, that the Respondent's off-duty access rule violates Sec. 8(a)(1) because it does not *uniformly* prohibit access. Even if the Respondent's rule provides employees with 60 minutes of access, the Respondent still has the discretion to approve or deny additional access to the premises for any reason.

[7] We have not included a rescission provision for the unlawful rules in our Order because they have already been rescinded.

B. The Alleged Changes to the Union's Access to the Casino

The parties' expired collective-bargaining agreement contains the following provision regarding union access to the Casino:

> Properly authorized Representatives of the Union shall be permitted to enter the Employer's premises through the team member entrance in order to investigate the status of all employees and to investigate the conditions to see that the Agreement is being enforced. Upon entering the premises, Union Representatives shall notify the management that they are on the premises.
>
> . . . . At all times, Union Representatives shall conduct themselves in such a manner as to ensure that there is no unreasonable interruption or interference with the duties of an employee or the Employer's operation.

On January 25, 2011,[8] the Union agreed with the Respondent on modifications of the contractual access provision that its representatives would follow while the parties were negotiating a successor contract. Specifically, the union representatives agreed to advise the Respondent in advance of a visit, to sign in, and to be escorted when they moved from place to place within the casino.

1. Barring Access to Employee Break Room

The judge found that, on March 21, Union Representative Max Alper called in advance and was escorted to the employee cafeteria. Alper then asked to be escorted to the employee break room. He testified that he wanted to see if any union members were there. Security Supervisor Buddy Jah replied that he would have to check on this request, and he then left. When Jah returned, he told Alper that he could not go to the break room. When Alper asked why, Jah responded that this was what he had been told. Union Representatives Yulisa Elenes, Hao Bin Lee, and Alper testified that they had been able to go the employee break room in the past. Jah testified that he spoke to James Grant, the Respondent's director of guest safety, concerning Alper's request and that Grant informed him that he could not give authorization at that time. Grant testified that he could not accommodate Alper's request because the Casino was really busy. He also testified that Alper should have made an appointment in advance to go the break room.

The judge failed to address the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by denying the Union access to the break room. In their exceptions, the General Counsel and the Charging Party argue that although Alper had complied with the terms of the newly-modified contractual access provision, both by calling in advance and by requesting an escort to move around the back of the house, the Respondent nonetheless barred Alper from going to areas, including the break room, where union representatives had previously been permitted to go. They further contend that the Respondent unilaterally implemented this material change without giving the Union notice and an opportunity to bargain. We find merit in their exceptions.

A union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. See, e.g., *T.L.C. St. Petersburg, Inc.*, 307 NLRB 605, 610 (1992), enfd. mem. 985 F.2d 579 (11th Cir. 1993). "[A] unilateral change in an employer's policy permitting access by union representatives to its premises is a unilateral change in the employees' terms and conditions of employment and is, ordinarily, unlawful." *Turtle Bay Resorts*, 355 NLRB 1272, 1272 (2010). In addition, a unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain. *Ernst Home Centers*, 308 NLRB 848, 849 (1992).

In the present case, it is undisputed that up until March 21, the union representatives had been allowed to go to the employee break room. Denying Alper access to the break room was a material change in the parties' past practice about which the Respondent was obligated to bargain. Thus, by preventing the Union from meeting with employees in the break room, the Respondent hindered the Union's ability to represent employees, and this constituted a significant limitation on the employees' Section 7 rights. See, e.g., *Turtle Bay Resorts*, above at 1276 (employer's unilateral change of the parking conditions for union business agents on the property on official business was a material change of employees' terms and conditions of employment).

The Respondent contends that it was unable to accommodate Alper's request to go to the employee break room because the Casino was very busy. That the Casino may have been busy does not justify denying Alper access. There is neither language in the contractual access provision nor any past practice that would permit the Respondent to deny a union representative access to the break room because the Casino is busy. Further, there is no merit to the Respondent's assertion that Alper failed to make an appointment to visit the break room prior to his arrival. The Union had only agreed to advise the Respondent in advance of a visit; it was not required to provide advance notice as to which area it sought access. Accordingly, for all the reasons stated above, we

[8] All dates hereafter are in 2011, unless otherwise noted.

find that the Respondent violated Section 8(a)(5) and (1) by prohibiting union representatives from going to the employee break room.

2. Barring Union Representative from Property Indefinitely

The judge found that, on December 7, a grievance meeting was held at the Respondent's training center, located separate and apart from the Casino. Alper and Union Representative Jessica Medina attended the meeting on behalf of the Union. After the meeting was over, Alper attempted to talk with Human Resources Manager Chris Mavroudis. Grant, the director of guest safety, walked over and Mavroudis walked away. Grant told Alper and Medina that they needed to leave, and he repeated the request four or five times before they agreed to leave. On January 31, 2012, the Respondent's attorney sent an email to Alper stating that Medina was barred from the Respondent's property.

The judge did not address the complaint allegation concerning this conduct. The General Counsel and the Charging Party argue in their exceptions that the Respondent denied employees access to their union representative in violation of Section 8(a)(5) by barring Medina from its property indefinitely. They assert that Medina did nothing at the December 7 grievance meeting that warranted her exclusion. The Respondent maintains that it expelled Medina from its property due to her refusal to leave the training center after being asked to do so several times following the grievance meeting. The Respondent does not explain why it chose to exclude Medina, but not Alper.

We agree with the General Counsel and the Union that the Respondent violated the Act as alleged. As set forth above, the access granted to union representatives was an existing term and condition of employment that survived the contract's expiration. It is undisputed that Medina previously had been permitted access to the Respondent's property. The contractual access provision provides that "Union Representatives shall conduct themselves in such a manner as to ensure that there is no unreasonable interruption or interference with the duties of an employee or the Employer's operation." The Respondent failed to establish that Medina and Alper unreasonably interfered with its operation. At most, they delayed their departure after a meeting, until asked to do so four or five times. The time between the first request that they leave and their departure was very short.[9] There was no confrontation, simply an attempt to continue the meeting a little longer than Grant and Mavroudis wanted. At most, Grant and Mavroudis got back to the Casino a few minutes later.[10]

In expelling Medina from its property, the Respondent deprived employees of their contractually granted access to their bargaining representative on the property. This interference constituted a unilateral change of a material term or condition of employment. See *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. sub nom. *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434 (9th Cir. 1995) (employer's expulsion of union representatives constituted a unilateral change of a material term or condition of employment, and interfered with the representational process). Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by barring Union Representative Medina from its property.

3. Barring Access to Area Where Employee Schedules are Posted

The judge found that, on March 10, Union Representative Alper called in advance of his visit to the Casino and checked in at the security desk when he arrived. After being escorted to the employee cafeteria, Alper requested that he be escorted to where the employee schedules were posted. Shortly thereafter, Human Resources Manager Mavroudis came to the cafeteria and informed Alper that he could not go to the location where the schedules were posted; instead, he offered to email the schedules to Alper. Alper testified that it was his understanding that, in the past, the Union had access to this area. Union Representative Lee corroborated Alper's testimony: he testified that when he was assigned to represent casino employees from 2006 through 2009, he did not need permission to go to this area and he was never prohibited from seeing employee schedules. Mavroudis, however, testified that he did not allow Alper access to the kitchen area to review employee schedules because that was a working area and union representatives had never been allowed access to that area. Mavroudis further testified

[9] Although the judge did not make a specific finding as to the time elapsed, Grant, who made the requests, testified that it was only about 4 minutes.

[10] Citing *Nynex Corp.*, 338 NLRB 659 (2002), the Respondent contends that it had the right to bar Medina from its property because she lost the Act's protection by refusing to leave the property. *Nynex* is distinguishable. In that case, the union executive board consisting of 13 individuals (12 of whom were employees) entered the employer's center unannounced, proceeded into work areas over the employer's repeated objections, and demanded to schedule appointments to discuss grievances. The Board, having considered that the union representatives caused a 2-hour disruption of work, found their conduct unprotected, and held that the employer did not violate Sec. 8(a)(1) by calling the police, suspending the employees involved, and suing the union for trespass. Id. at 660–661.

In the present case, Medina and Alper were rightfully on the property for a scheduled grievance meeting, and there was no evidence that their delay in leaving caused any disruption of the Respondent's business.

that, since at least March 2010, he had emailed employee schedules to the Union upon request.

The complaint, at paragraph 12(c)(2), alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a rule barring union representatives from accessing areas of the Casino where employee schedules are posted. In their exceptions concerning the judge's failure to address this allegation, the General Counsel and the Charging Party argue that, prior to March 10, union representatives regularly had been allowed access to these areas and that the Respondent did not provide the Union notice or an opportunity to bargain over this change. Given the conflicting testimony outlined above, resolution of this issue turns on credibility determinations that the judge must make in the first instance. Accordingly, we shall remand the denial of access allegation to the judge for the limited purpose of making specific credibility findings resolving the conflicting testimony between the General Counsel's witnesses and Mavroudis, and issuing findings of fact, conclusions of law, and a supplemental recommended Order with respect to this allegation.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 4.

"4. The Respondent violated Section 8(a)(5) and (1) of the Act by implementing new rules restricting the Union's access to unit employees at the facility, without providing the Union notice and an opportunity to bargain, including: (a) requiring union representatives to disclose the purpose of their meetings with employees; (b) conditioning access on the Union having a scheduled meeting with an employee; (c) prohibiting union representatives from going to the employee break room; and (d) barring a union representative from access to its property."

2. Insert the following as Conclusion of Law 7 and renumber the subsequent paragraphs.

"7. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally reducing the number of shifts for four unit employees.

3. Insert the following as Conclusion of Law 11 and renumber the subsequent paragraph.

"11. The Respondent violated Section 8(a)(1) of the Act by maintaining in its employee handbook, from about August 2010 until May 2011, work rules:

"(a) Proscribing 'Insubordination or other disrespectful conduct (including failure to cooperate fully with security, supervisors, and managers).'

"(b) Stating 'team members may not solicit or distribute literature in the workplace at any time, for any purpose.'

"(c) Proscribing 'making false, fraudulent, or malicious statements to or about a team member, a guest or San Pablo Lytton Casino.'

"(d) Stating 'team members are not permitted in the back of the house areas more than thirty (30) minutes prior to the beginning of their shift or longer than thirty (30) minutes following the end of their shift, except under [certain] circumstances.'"

AMENDED REMEDY

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

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide contractual health benefits for four unit employees and by unilaterally reducing the number of shifts for those employees, we shall order the Respondent to rescind these actions and to make these employees whole for any loss of earnings and other benefits they may have suffered as a result of these unlawful changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall reimburse the four unit employees for any expenses resulting from its refusal to provide contractual health benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above. Further, consistent with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent must compensate these employees for any adverse tax consequences of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

We also find that a public reading of our remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread that the reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices, and to enable employees to exercise their Section 7 rights free of coercion. See, e.g., *Carey Salt Co*., 360 NLRB 201, 202 (2014); *HTH Corp*., 356 NLRB 1397,1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012); *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008). Therefore, we will require that the attached notice be read publicly

by the Respondent's representative or by a Board agent in the Respondent's representative's presence.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Lytton Rancheria of California d/b/a Casino San Pablo, San Pablo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the Union, UNITE HERE Local 2850.

(b) Implementing new rules restricting the Union's contractual access to unit employees at the facility, without providing the Union notice and an opportunity to bargain, including: (1) requiring union representatives to disclose the purpose of their meetings with employees; (2) conditioning access on the Union having a scheduled meeting with an employee; (3) prohibiting union representatives from going to the employee break room; and (4) barring union representatives from access to its property.

(c) Unilaterally announcing and implementing new benefits for part-time employees.

(d) Unilaterally refusing to provide contractual health benefits for unit employees working 16 or more shifts per month.

(e) Unilaterally reducing the number of shifts for those employees.

(f) Refusing to furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

(g) Coercively interrogating any employee about union support or union activities.

(h) Telling employees not to discuss their investigations with other employees.

(i) Maintaining a work rule that prohibits insubordination or other disrespectful conduct.

(j) Maintaining a work rule that prohibits solicitation or distribution in the workplace at any time, for any purpose.

(k) Maintaining a work rule that prohibits making false, fraudulent, or malicious statements.

(l) Maintaining a work rule that prohibits employees from being in the back of the house more than 30 minutes prior to the beginning of their shift or longer than 30 minutes following the end of their shift except under certain specified circumstances.

(m) 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) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time food and beverage, maintenance, and housekeeping employees, including barbacks, bartenders, broiler server, casino servers, lead food servers, American line cooks, Asian Line cooks, broiler porters, casino porters, concession workers, hosts/hostesses, lead cook, lead utility worker, housekeepers, lead housekeepers, slot technicians and gaming floor persons employed by Respondent at its San Pablo, California gaming establishment; excluding all other employees, guards, and supervisors, as defined by the Act.

(b) On request of the Union, rescind the unilateral changes implemented in its employees' terms and conditions of employment, specifically:

(1) Requiring union representatives, pursuant to their contractual access to the property, to disclose the purpose of their meetings with employees.

(2) Conditioning union representatives' contractual access on their having scheduled meetings with employees.

(3) Prohibiting union representatives, pursuant to their contractual access to the property, from going to the employee breakroom.

(4) Barring union representative Jessica Medina from contractual access to the property.

(5) Granting part-time employees holiday pay and additional days off without pay.

(6) Refusing to provide contractual health benefits for unit employees working 16 or more shifts per month.

(7) Reducing the number of shifts for unit employees.

(c) Make whole Al Balbuena, Isabel Garriddo, Redolfo Trinidad, and Ali Challal, for any loss of earnings and other benefits suffered as a result of reducing the number of shifts that they worked and by denying them contractual health benefits from March 2011 to September 2011, including, but not limited to, reimbursing them for any

[11] Although the General Counsel did not seek an order requiring the Board's notice to be read aloud, his failure to do so does not preclude our imposing such a remedy. The Board has broad discretionary authority under Sec. 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. *NLRB v. J. H. Rutter-Rex Mfg.* Co., 396 U.S. 258, 262–263 (1969). It is well established that remedial matters are traditionally within the Board's province and may be addressed by the Board even in the absence of exceptions. See, e.g., *Fieldcrest Cannon, Inc*., 318 NLRB 470, 473 fn. 6 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996); *Schnadig Corp*., 265 NLRB 147 (1982).

medical expenses or costs they incurred as a result of not receiving their contractual health insurance for that period.

(d) Compensate Al Balbuena, Isabel Garriddo, Redolfo Trinidad, and Ali Challal for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in San Pablo, California, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 32, 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, 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 June 2010.

(h) Within 14 days of the date of this order, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, to fully communicate with employees, at which the attached notice marked "Appendix" will be publicly read by a responsible corporate executive in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a responsible corporate executive.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 32, a sworn certification of a responsible official on a form provided by Region 32 attesting to the steps 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 portion of this proceeding relating to the complaint allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a rule barring union representatives from access to areas of the casino where employee schedules are posted is remanded to Judge Jay R. Pollack for the purpose of making credibility resolutions concerning the conflicting testimony between the General Counsel's witnesses and the Respondent's witness, Chris Mavroudis, as discussed in the decision above. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order in light of the Board's remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER JOHNSON, dissenting in part.

Contrary to my colleagues, I would find that the Respondent's rules prohibiting insubordination or other disrespectful conduct and limiting off-duty employee access to "back of the house" areas were lawful. I also again urge the Board to adopt a more rational and comprehensive approach to litigation of work rule allegations under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Finally, even considering those two rule violations in conjunction with all other violations found here, I would not find the additional notice-reading remedy to be warranted in the circumstances of this case. In other respects, I join my colleagues' decision.

I. THE RULES AT ISSUE

A. The Insubordination Rule

In my view, the Respondent's rule prohibiting insubordination or other disrespectful conduct obviously addresses legitimate business concerns. I find that a reasonable employee would not read the rule to prohibit conduct protected by the Act for two reasons. First, the phrase "disrespectful conduct" is stated as essentially a subcategory of the term "insubordination"—as demonstrated by the rule's complete text, which prohibits

[12] 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."

"[i]nsubordination *or other* disrespectful conduct." (Emphasis added.) Second, "disrespectful conduct" is further elucidated by the parenthetical example, which defines "disrespectful conduct" to include "failure to cooperate with Security, supervisors and managers." Thus, the "disrespectful conduct" addressed by the rule is specifically directed to the rule's focus on "insubordination."

My colleagues contend that "'insubordination' is a subcategory of 'disrespectful' conduct, not the other way around," and that employees would reasonably construe the term "disrespectful conduct" to encompass Section 7 activity. As I explain below, their interpretation defies established canons of construction, including ejusdem generis, which means "of the same kind or nature."[1] Here, the general "other disrespectful conduct" must be read to be of the same kind or nature as the more specific "insubordination," and the parenthetical drives that point home. As the majority acknowledges, in *Community Hospitals of Central California v. NLRB*, the D.C. Circuit reversed the Board's conclusion that a similar rule was unlawful, finding that the "Board's suggestion that employees would consider 'vigorous proselytizing for or against a union,' or other protected activity, 'insubordinate' within the condemnation of [the rule], is implausible."[2] My colleagues claim, without any real explanation, that the rule in *Community Hospitals* was "squarely focused" on insubordinate conduct, apparently drawing a distinction between the rule there and the instant rule which employees would not "necessarily read . . . to be limited to insubordinate-type behavior."[3] But, unlike the rule here, which actually provides an example of what is meant by "disrespectful conduct," the *Community Hospitals* rule provided no such additional guidance to employees. Here, by contrast, the rule describes disrespectful conduct to include the "failure to cooperate fully with Security, supervisors and managers," i.e., clearly connotes insubordinate conduct directed towards managers.[4] As the court stated in *Community Hospitals*, 335 F.3d at 1089, the "'other disrespectful conduct' to which [the rule] refers is clearly conduct of a piece with 'insubordination'. . . ." And, as the Board explained in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), "any arguable ambiguity" in the rule that the majority sees here impermissibly "arises only through parsing the language of the rule, viewing the phrase ["or other disrespectful conduct"] . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights." In other words, this is not real ambiguity at all.

Further, I note that the majority's analysis departs from other Board precedent finding similar rules to be lawful. See *Copper River of Boiling Springs, LLC*, 360 NLRB 459, 459, fns. 2–3, 13 (2014) (finding lawful employer's maintenance of a rule prohibiting "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests," which "includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests");[5] *Lutheran Heritage*, above, 343 NLRB at 647 (citing with approval the D.C. Circuit's decision in *Community Hospitals*, above, and declining, where rule did not refer to Section 7 activity, to conclude that a "reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way. To take a different analytical approach would require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable); *Lafayette Park Hotel*, 326 NLRB at 825 (finding lawful a handbook rule prohibiting "[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [employer's] goals and objectives"; no ambiguity in rule addressing legitimate business concerns). Consistent with the above precedent, I find that employees would not reasonably understand the Respondent's rule to prohibit Section 7 activity.

My colleagues rely on *First Transit, Inc.*, 360 NLRB 619, 620–621 (2014); *2 Sisters Food Group*, 357 NLRB

[1] *Merriam-Webster Online Dictionary*.

[2] *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003), denying enf. of *University Medical Center*, 335 NLRB 1318 (2001). The rule at issue prohibited "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual."

[3] The majority does not attempt to explain why, if the rule in *Community Hospitals* was as "squarely focused" as it now claims, the Board there found it unlawfully overbroad. This lack of explanation only highlights the complete lack of predictability that I discuss below.

[4] The majority gives the same mistaken construction of the parenthetical illustration as it does to the general rule, reasoning that "failure to cooperate" is, like "disrespectful conduct," comprehensive of less than insubordinate conduct, including protected protest and grievance activity.

[5] The majority argues that *Copper River of Boiling Springs*, above, is distinguishable because, in that case, the Board was concerned not with the rule's reference to "insubordination" and "lack of respect," but with the reference to "negative attitude." It is true that, in footnotes, the Board addressed the "negative attitude" language in the rule in response to Chairman Pearce's dissent focusing on that language. However, the Board adopted the judge's analysis, which, in my view, considered the rule as a whole. In this regard, the judge's analysis relied in part on the D.C. Circuit's rationale in *Community Hospitals*, which, as explained above, found that a similar rule, read as a whole, was intended to prohibit insubordinate activity. 360 NLRB 459, 470–47113. Further, the judge explained that the "language in a rule which relates a prohibition to a specific legitimate business purpose may well affect how employees reasonably understand the scope of the rule." Id. at 13.

1816, 1817 (2011); and *Claremont Resort & Spa*, 344 NLRB 832, 832 and fn. 4 (2005), to support their position. I dissented in *First Transit*, above, at 621 fn. 8, reasoning that the employer's rule prohibiting "[d]iscourteous or inappropriate attitude or behavior . . . was similar to other rules that the Board has found lawful. Further, I agree with then-Member Hayes' dissent in *2 Sisters Food Group*, above, at 1829, where the majority, in finding unlawful a rule subjecting employees to discipline for the "inability or unwillingness to work harmoniously with other employees" departed from Board precedent holding lawful rules that do no more than reflect "the lawful expectation that employees 'comport themselves with general notions of civility and decorum in the workplace.'" Moreover, I find *Claremont Resort & Spa*, prohibiting "negative conversations about associates and/or managers," distinguishable. There, the rule expressly encompassed concerted activity by proscribing "conversations," in contrast to the rule at issue here. As noted by the judge in *Copper River of Boiling Springs*, above, 360 NLRB 459, 471, a rule prohibiting "'conversation' cuts to the very essence of activity which the Act protects because all other actions contemplated by the statutory scheme flow out of employees' discussions about their wages, hours, and other terms and conditions of employment . . . ." In any event, in none of the cases cited by the majority did the contested rule reference insubordination.

B. The Off-Duty Access Rule

I also find that the Respondent's off-duty access rule complies with *Tri-County Medical Center*, 222 NLRB 1089 (1976). The rule lawfully limits off-duty employees from accessing back of the house areas more than 30 minutes prior to the beginning of their shift or longer than 30 minutes following the end of their shift. I recognize the importance of providing off-duty employees with some opportunity to exercise their Section 7 rights. But I believe that employers have legitimate business interests in limiting such access, such as prevention of situations where off-the-clock work might later be alleged, a risk management interest that has nothing to do with Section 7 rights. Thus, I find that the Respondent's blanket allowance of 60 minutes for off-duty access for any purpose is sufficient time for employees to exercise Section 7 activity, even if more extensive access could be granted for other business-related purposes.

The Respondent's rule provides off-duty employees with plenty of time to engage in protected concerted activity before off-duty access is denied. Most importantly here, the interest sought to be protected by *Tri-County*'s test is some baseline quantum of cross-shift access, so that employees can exercise Section 7 rights between shifts. That was why *Tri-County*, above at 1018 (footnote omitted, emphasis. added), narrowed the prior access rule standard that the Board had established a few years previously in *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973):

> The holding of *GTE Lenkurt* must be narrowly construed to prevent undue interference with the rights of employees under Section 7 of the Act freely to communicate their interest in union activity *to those who work on different shifts.*

Bearing that underlying purpose in mind, and noting as well that *Tri-County* permits a total ban on off-duty employee access to a facility's interior, it stands to follow that once an employer has provided enough time to employees for Section 7 activity in between shifts within the facility, then business-related or supervisory-approval-related limitations on *additional* time do not fall afoul of prong 3 of *Tri-County* or any other part of its test. I would find that the 1 hour per workday of additional off-duty time that the Responded afforded, on top of meal and breaktime, is enough in the circumstances of this case.[6]

II. CHANGING THE AD HOC METHODOLOGY OF DECIDING EMPLOYER RULE CASES UNDER *LUTHERAN HERITAGE VILLAGE-LIVONIA*

It is incumbent on any adjudicatory or quasi-adjudicatory agency, like the Board, not only to decide the cases before it correctly, but to give parties guidance as to why it is deciding cases the way it does. More than any other area of jurisprudence under the Act, the *Lutheran Heritage* "reasonable employee" standard has come under acute, justified criticism for producing unpredictable results. What should be concerning to the Board is that a test generating unpredictable results, by definition, makes compliance impossible. Indeed, one current member of the Board has already given up on the test entirely. *MCPc, Inc.*, 360 NLRB 216, 216 fn. 4 (Member Miscimarra, concurring). I generally commend my colleagues' efforts to begin delineating parameters within the *Lutheran Heritage* test that, in turn, will facilitate compliance with the Act, such as the discussion in *First Transit, Inc.*, 360 NLRB 619 (2014), of what may

[6] For similar reasons, I find the Respondent's off-duty access rule is valid under *Lutheran Heritage*, above. Reasonable employees would not understand the rule to prohibit Sec. 7 activity because the Respondent has provided substantial access for off-duty employees to engage in protected concerted activity before and after their shifts. Because the Respondent has allowed 60 minutes of access *for any purpose*, including Sec. 7 activity, employees would have no reason to believe that the Respondent would discriminatorily deny them additional access for protected activity, while permitting it for other purposes.

constitute an adequate Section 7 "safe harbor provision." However, much more remains to be done.

A central problem for the current Board is that the *Lutheran Heritage* test depends on how the reasonable employee would interpret an employer rule in "context,"[7] even while the Board supplies no guidance to parties on how *it* will look at context, and what the relevant context is. Indeed, with respect to divining unlawful ambiguity in a rule, it often seems that we apply a reasonable Board Member standard rather than a reasonable employee standard. In any event, simply telling employers that the Board will look at "context" in order to interpret the reaction of a reasonable employee, is about as productive as telling them that we will look to "natural law." If we expect employers to comply and write lawful rules, we owe them an explanation of how we (standing in the shoes of the reasonable employee) would interpret those rules. In short, we need to tell parties what our interpretive rules are, so they can draft their own, compliant rules for the workplace.

Because all human beings, including employees and their supervisors, interpret documents on a day-to-day basis, there are obviously rules that they use, and that we can enunciate in applying the *Lutheran Heritage* test. One such rule that should apply is known to lawyers as "ejusdem generis," although the concept is generally familiar to most people. The loose concept is as follows: where general words follow words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned. Here, where "other disrespectful conduct" follows "insubordination," a normal person interprets such conduct to be a species of, or akin to, insubordination.

It bears noting that former Member Hurtgen addressed the same concept years ago in the same context of an employer's insubordination/disrespectful conduct rule. In his dissent in *University Medical Center*, 335 NLRB 1318, 1325 (2001), he noted how ejusdem generis is merely common sense for interpreting any rule:

> In my view, words in a rule are to be interpreted in the context of the rule, not simply by reference to a dictionary. Applying that principle, the [insubordination] rule, in context, is aimed at conduct in the course of business dealings. Indeed, the meaning of the term "or other disrespectful conduct" is limited by the remainder of the rule's language to certain types of conduct. Thus, the "disrespectful conduct" addressed by the rule is specifically directed at "insubordination, refusing to follow directions, obey legitimate requests or orders." Applying the rule of ejusdem generis, the term "disrespectful" means conduct of a nature that is similar to the types of conduct previously set forth.

More importantly for the Board's purposes, the court of appeals agreed with former Member Hurtgen when it denied enforcement of the Board's order in that case. As I think *University Medical Center* should control this case, the court's reasoning, 335 F.3d at 1088–1089, is instructive:

> The Board objected chiefly to the Rule's prohibition of "other disrespectful conduct." When read in context, however, that prohibition clearly does not apply to union organizing activity—including "vigorous proselytizing"; it applies to incivility and outright insubordination, in whatever context it occurs. Although Community's employees are perhaps unlikely to know the term *ejusdem generis*, they no doubt grasp as well as anyone the concept it encapsulates: The "other disrespectful conduct" to which Rule 1 refers is clearly conduct of a piece with "insubordination" or "refusing to follow directions [or to] obey legitimate requests or orders."

Thus, my urging that the Board decide on an actual defined set of rules for interpreting employers' rules is not just grounded in fairness to the parties, and common sense, but also in consideration of the ultimate enforceability of our orders. Few circuit courts in the long run are going to countenance the ever-shifting sands of standardless discretion in making ad hoc determinations under *Lutheran Heritage* in its current form. Even when given substantial judicial deference, an agency ultimately must give a "reasonable" explanation of why one employer rule that was adjudged invalid is different than a very textually similar rule adjudged valid. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–844 (1984). Deciding on a more specific test for our own interpretive process will produce better results, and, just as worthy of a goal, more compliance with the Act.

III. THE NOTICE READING REMEDY

Finally, I disagree with my colleagues' decision, sua sponte, to order the Respondent to read aloud the Board's notice. Until recently, it seemed clear that such a remedy was viewed as "special" or "extraordinary" and would only be required in limited circumstances where the unlawful conduct of a respondent was deemed to be "egregious." See, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499, 499 fn. 1 (2011) (citing *Ishikawa Gasket*

[7] *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 73 (2014) (majority found that the breadth of the challenged rule was not adequately limited by its context).

America, Inc., 337 NLRB 175, 176 (2001)). The Respondent's violations of Section 8(a)(1) and (5), while numerous, do not rise to what has traditionally been regarded as an egregious level of misconduct. Moreover, even under the somewhat more permissive and ill-defined standard used in some recent cases,[8] it is my view that the violations committed here by the Respondent do not warrant a notice-reading remedy.

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 refuse to meet and bargain with the Union.

WE WILL NOT implement new rules restricting the Union's contractual access to unit employees at the facility, without providing the Union notice and an opportunity to bargain, including: (1) requiring union representatives to disclose the purpose of their meetings with employees; (2) conditioning access on the Union having a scheduled meeting with an employee; (3) prohibiting union representatives from going to the employee break room; and (4) barring union representatives from access to our property.

WE WILL NOT unilaterally announce or implement new benefits for part-time employees.

WE WILL NOT unilaterally refuse to provide contractual health benefits for unit employees working 16 or more shifts per month.

WE WILL NOT unilaterally reduce the number of shifts for those employees.

WE WILL NOT refuse to furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

WE WILL NOT coercively interrogate employees about union support or union activities.

WE WILL NOT tell employees not to discuss their investigations with other employees.

WE WILL NOT maintain overly broad work rules that restrain employees in the exercise of the rights set forth above by:

> Prohibiting insubordination or other disrespectful conduct.
>
> Prohibiting solicitation or distribution in the workplace at any time, for any purpose.
>
> Prohibiting making false, fraudulent or malicious statements.
>
> Prohibiting employees from being in the back of the house more than 30 minutes prior to the beginning of their shift or longer than 30 minutes following the end of their shift except under certain specified circumstances.

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

WE WILL, on request, meet and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit concerning terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time food and beverage, maintenance, and housekeeping employees, including barbacks, bartenders, broiler server, casino servers, lead food servers, American line cooks, Asian Line cooks, broiler porters, casino porters, concession workers, hosts/hostesses, lead cook, lead utility worker, housekeepers, lead housekeepers, slot technicians and gaming floor persons employed by us at our San Pablo, California gaming establishment; excluding all other employees, guards, and supervisors, as defined by the Act.

WE WILL, on request of the Union, rescind the unilateral changes that we have implemented in our employees' terms and conditions of employment, specifically:

> (1) Requiring union representatives, pursuant to their contractual access to the property, to disclose the purpose of their meetings with employees.

[8] See, e.g., *HTH Corp.*, 356 NLRB 1397, 1404 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012).

(2) Conditioning union representatives' contractual access on their having scheduled meetings with employees.

(3) Prohibiting union representatives, pursuant to their contractual access to the property, from going to the employee break room;

(4) Barring Union Representative Jessica Medina from contractual access to the property.

(5) Granting part-time employees holiday pay and additional days off without pay.

(6) Refusing to provide contractual health benefits for unit employees working 16 or more shifts per month.

(7) Reducing the number of shifts for unit employees.

WE WILL make whole Al Balbuena, Isabel Garriddo, Redolfo Trinidad, and Ali Challal for any loss of earnings and other benefits suffered as a result of reducing the number of shifts that they worked and by denying them contractual health benefits from March 2011 to September 2011, including, but not limited to, reimbursing them for any medical expenses or costs they incurred as a result of not receiving their contractual health insurance for that period.

WE WILL compensate Al Balbuena, Isabel Garriddo, Redolfo Trinidad, and Ali Challal, for the adverse tax consequences, if any, of receiving a lump-sum award and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for Balbuena, Garriddo, Trinidad, and Challal.

WE WILL furnish relevant information requested by the Union for collective bargaining or grievance handling purposes.

LYTTON RANCHERIA OF CALIFORNIA D/B/A CASINO SAN PABLO

The Board's decision can be found at www.nlrb.gov/case/32–CA–025585 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Gary M. Connaughton, Esq. and *Angela Hollowell-Fuentes, Esq.*, for the Acting General Counsel.

Richard J. Curiale, Esq. and *Joseph C. Wilson, Esq.*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on October 29 through November 1, 2012. On February 4, 2011, UNITE HERE Local 2850 (the Union) filed the charge in Case 32–CA–025585 alleging that Lytton Rancheria of California, d/b/a Casino San Pablo (Respondent) committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). On April 4, 2011, the Union filed the charge in Case 32–CA–025665 against Respondent. On September 7, 2011, the Union filed the charge in Case 32–CA–064020. The charge in Case 32–CA–086359 was filed by the Union on July 31, 2012. On August 29, 2012, the Regional Director for Region 32 of the National Labor Relations Board (the Bard) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing. On October 11, 2012, the Regional Director issued amendments to the complaint. On October 12, 2012, the Regional Director issued a complaint in Case 32–CA–086359. The complaints were consolidated on October 19, 2012.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses,[1] and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, with an office and principal place of business in San Pablo, California, has been engaged in the operation of a commercial gaming and entertainment establishment, including a gaming casino, restaurant, and cocktail bar (the

[1] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Casino). In the 12 months prior to issuance of the complaint, Respondent, in conducting its business operations, derived gross revenues in excess of $500,000. Further, Respondent received goods and services valued in excess of $5000 from points outside the State of California. Accordingly, Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Bargaining

Respondent operates a commercial gaming and entertainment establishment, including gaming casinos, restaurants, and cocktail bar at a location in San Pablo, California (the Casino). The Casino employs approximately 470 employees. The Union represents approximately 160 employees at the Casino. The most recent collective-bargaining agreement between Respondent and the Union was effective by its terms from November 2006 through November 2009.

Bargaining for a successor agreement began in November 2009. The parties met 14 times for bargaining between November 2009 and January 25, 2011, including a session on October 18, 2010. During the October 18, 2010 bargaining session, the primary focus of the bargaining was the issue of healthcare. Present for the Union was its chief negotiator, Wei-Ling Huber. Representing Respondent was Attorney Richard Curiale and Attorney Kathryn Ogas. Curiale started the session by stating that Respondent had gotten a response from its healthcare provider. Curiale said that it would be too expensive for Respondent to switch to the Union's health plan. Curiale presented a new comprehensive contract proposal which, included two new healthcare options. The Union did not reject these proposals but expressed its problems with the employee cost of the healthcare proposals.

The next bargaining session was held on November 3, 2010. At this meeting Curiale pressed Huber to make a choice on the two healthcare options offered by Respondent. Huber refused to do so. Huber made a counterproposal which included a wage proposal.

The parties next met on November 17, 2010. At this meeting, Curiale proposed a healthcare plan that was less costly for employees than the two choices offered on October 18. Respondent would also be offering a $350 signing bonus. Curiale said the Union had to accept or reject the plan within the next 2 days. Huber answered that while the new healthcare proposal was a large improvement over what had been offered previously, the Union could not accept the plan outside the framework of a complete agreement. Huber added that if Respondent implemented this healthcare proposal, the Union would not file unfair labor practice charges as long as Respondent continued to bargain over the rest of the contract. Curiale said that the healthcare issue needed to be decided that day. Curiale stated that the Casino was unwilling to talk about money because the Lytton Tribe (that owned the Casino) did not want to bargain about anything other than healthcare at that time. The Union caucused, and then Huber answered that she could not give an answer that day or the next day. Huber asked for a counterproposal on language issues that were still outstanding. Curiale said he would take the healthcare offer off the table but he was not sure that he was authorized to do so. Curiale then ended the meeting.

On November 18, the parties met again for bargaining. The Union accepted Respondent's healthcare plan. Huber stated that the Union was only accepting the healthcare plan and nothing else. Huber stated that issues such as healthcare eligibility were still up for negotiations as well as wages. Curiale stated that everything but healthcare was still open. Huber accepted the healthcare plan but stated she intended to negotiate over every other issue. She said that in January 2011, when the parties would start negotiating wages again, she would give Respondent a higher wage proposal. Curiale said he understood.

The parties next met on November 24 but did not discuss wages. The parties met again on December 16, 2010. During this meeting Curiale stated that Respondent was not going to move on anything. Curiale said he would get the Union a final proposal.

On January 25, 2011, the parties met again. Curiale started the meeting by distributing a letter and a proposal he characterized as Respondent's last, best, and final offer. The letter called on the Union to have its members vote on the last, best, and final offer, which proposed a wage and benefit freeze for the life of the proposed 2-year contract. Curiale stated that Respondent had put all its money into the healthcare plan and that there was nothing more. He urged the Union to have its membership vote on the last, best, and final offer. Huber insisted that there was still $1.1 to $1.2 million available in new money. She stated that she did not think Respondent was taking negotiations seriously. The Union then gave Respondent a comprehensive bargaining proposal which included a wage increase. Curiale rejected the Union's proposal and again asked that the Union take the last, best, and final offer to its membership for a vote.

On February 2, 2011, the Union sent an email to Respondent asking to meet for further negotiations. After not hearing from Curiale, Huber sent another email on February 13. In this email Huber stated that the Union would submit Respondent's final offer to the employees but, that the Union needed to clarify the last, best, and final offer. Curiale responded by email that there was no need to meet and that he would send an errata sheet with corrections to the final offer.

On February 25 Huber received an email from Curiale clarifying certain aspects of Respondent's final offer. On March 7, Huber wrote Curiale and raised questions concerning the final offer and requested that the parties meet.

On May 20, the Union submitted Respondent's last, best, and final offer to its membership for a ratification vote. The offer was rejected by the union membership. Huber then contacted Curiale to resume bargaining.

The parties then meet on June 24. Huber stated that she wanted to talk about Respondent's last, best, and final offer and the Union's reaction to it. She also wanted to talk about her costing of the proposal, a new union proposal and the cost of the Union's new proposal. Curiale said that negotiations were

over and that he would focus on litigation. Huber had a new proposal to offer, but Curiale left the meeting before she could present it.

On June 27, Curiale sent Huber a letter stating that the parties were at impasse and that further negotiations would be futile. On July 9, Huber sent Curiale a letter which contained the Union's newest wage proposals. Respondent did not respond to this letter.

1. The 8(a)(1) allegations

On Friday, December 17, 2010, a group of employees presented a petition about collective bargaining to Respondent's managers. On the following Wednesday or Thursday, James Grant, Respondent's director of guest safety, called Eddie Leroy Johnson, gaming floor person, at home. Grant told Johnson that what the employees had done was not against the rules but that he would like to know in advance of any planned union activity so that Respondent could schedule it so that the employees did not inundate a particular manager. Grant admitted calling Johnson about the petition and telling him that the employees could do what they wanted as long as they followed proper guidelines.

On the morning of January 1, 2011, bargaining unit employee Nelson Yip was working as a cocktail server in the Casino. That morning Yip found a $100 bill on the floor and put that bill in with his cash tray. At about 2 a.m. that morning, Yip was called into an investigatory meeting by Peter Demarest, security manager, and Buddy Jah, security supervisor. Manager Felipe Guzman questioned Yip about whether he intended to keep the money. Guzman said that he was going to do an investigation and told Yip not to tell anybody and not to contact anyone about the investigation. Guzman admitted that he told Yip not to talk to any employees about the investigation.

In July 2011, several of Respondent's employees demonstrated in support of an employee who had been terminated. The next day, employee Isadoro Saravia Ramos was called into a meeting with Human Resources Manager Chris Mavroudis and Sous Chef Jaime Menjivar. Menjivar acted as an interpreter as Ramos only spoke Spanish. Mavroudis asked what had happened the day before. Ramos said that the union members were there to support an employee who wanted his job back, Mavroudis stated that he was concerned about the employees' safety and that he was worried that the Union could bring in people to make a ruckus. Ramos answered that as union members, the employees protested legally. Mavroudis then questioned what else the Union was going to do. Ramos did not answer that question.

The complaint alleges and Respondent admits that Respondent maintained the following rules in its employee handbook:

(a) *Unacceptable Behavior*

Gossiping about other Team Members (including supervisors, managers, directors, etc.)

(b) *Team Member Conduct and Work Rules*

The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

Insubordination or other disrespectful conduct (including failure to cooperate fully with Security, supervisors and managers'

(c) *Solicitation, Distribution and Bulletin Boards*

Team Members may not solicit or distribute literature in the workplace at any time for any purpose.

(d) *Team Member Conduct and Work Rules*

The following are examples of rule violations that may result in disciplinary action, up to and including separation of employment:

Making false, fraudulent or malicious statements to or about a Team Member, a guest or San Pablo Casino.

(e) *Access*

Team Members are not permitted in the back of the house areas more than thirty (30) minutes prior to the beginning of their shift or longer than thirty (30) minutes following the end of their shift, except under the following circumstances:
1. To conduct business with Human Resources;
2. Pre-arranged training sessions or orientations;
3. With the approval of a director, manager or supervisor.

Respondent stipulated that the handbook contained these provisions from August 2010 until about May 2011, when the employee handbook was rewritten and redistributed. The new handbook does not contain these provisions.

2. The alleged changes to the Union's access to the Casino

The expired collective-bargaining agreement contains the following provision regarding union access to the Casino:

> Properly authorized Representatives of the Union shall be permitted to enter the Employer's premises through the team member entrance in order to investigate the status of all employees and to investigate the conditions to see that the Agreement is being enforced. Upon entering the premises, Union Representatives shall notify the management that they are on the premises. In the event it is necessary for the Union Representative to visit the premise outside the normal business hours (for example on the graveyard shift) the Representative shall provide management with reasonable advance notice of the visit.
>
> It is understood that the Union Representative shall not conduct business on the Casino floor other than to advise an employee that they are on the premises. At all times, Union Representatives shall conduct themselves in such a manner as to ensure that there is no unreasonable interruption or interfer-

ence with the duties of an employee or the Employer's operation.

During the period 2004 through December 2010, the union representatives entered through the front entrance of the Casino. Union representatives checked in at the security station when they entered the Casino and were escorted by a security officer to the employee cafeteria in the "back of the house." According to the Union's witnesses they were not required to have an escort to move around the back of the house.

On December 17, 2010, Union Rrepresentatives Andrew Dadko and Yulisa Elenes went to the Casino to meet with a group of off-duty employees. When Dadko and Elenes entered the Casino, they signed in at the security desk and obtained their visitor badges and were escorted to the employee cafeteria. None of the employees were in the cafeteria. Elenes called one of the employees and learned that the employees were on the second floor. Dadko and Elenes proceeded to the second floor employee breakroom. On the way, they passed by the security guard. Dadko and Elenes began a discussion with several employees. James Grant, Respondent's director of guest safety, entered the breakroom and asked Dadko and Elenes to step out of the room and talk to him. Dadko and Elenes refused this request. After several requests to go with Grant, Dadko and Ellenes finally left the breakroom and returned to the employee cafeteria.

Grant later spoke with Dadko and Ellenes in the cafeteria. Grant told them they had to stay in the cafeteria. Grant asked if they would stay in the cafeteria and Dadko answered, "[W]e'll see." Thereafter, Dadko and Ellenes left after returning their visitor badges.

On December 21, Curiale sent Huber a letter concerning Dadko's visit of December 17. Curiale stated that union representatives were barred from entering the Casino until the parties had a discussion regarding union conduct of visits. Curiale also threatened to have Dadko arrested if he entered the Casino again.

On December 27, Huber sent Curiale an email stating that she wished to meet with Respondent. She also stated that Respondent could not bar Dadko from its premises. Curiale responded that same day, stating that he would be out of the country and would not be able to meet until January 11, 12, or 13. Huber responded that the date was too far off and that someone else should appear for Respondent. Curiale responded that there was nothing he could do.

On January 11, 2011, Huber sent Curiale an email setting forth the Union's account of the December 17 incident. She denied that Dadko and Elenes had evaded security and denied that Dadko was intimidating. When Huber met with Curiale on January 11, Curiale stated that the union representatives needed to have an escort to move from one place to another in the Casino. Curiale stated that the Union would have to notify the Casino in advance of a visit; the union representatives would have to ask for an escort to move from one place to another; the Union would have to agree to Respondent's 30-minute rule; and that the Union agree not to assign Dadko to the Casino.

After a caucus, Huber said the Union would agree to advance notice and to getting an escort to move around the Casino but would not agree to the 30-minute rule. She also said the Union could not agree to barring Dadko from the Casino.

On January 18 Curiale sent Huber an email about the access issue. Curiale stated that he was not barring Dadko from participating as a union representative, but only barring him from the Casino. Curiale stated he would allow other union representatives to access the Casino if they advised Respondent in advance; they sign in; agree to be escorted to the place they wish to go; they agree to ask for an escort to go to another part of the Casino; and they agree to ask for an escort when they leave the Casino. Further, Curiale asked the Union to agree that its meetings would not require employees to enter 30 minutes before their shift or remain 30 minutes after their shift. Huber stated that she would discuss the proposal with her team.

Huber responded by email on January 25, agreeing that the Union would advise Respondent in advance of a visit; they would sign in; they would ask for an escort; they would ask for an escort to move from one place to another, and would ask for an escort to leave the Casino.

On January 25, 2011, the parties met at Respondent's training center. As this property is separate from the Casino, Dadko was permitted to attend.

On February 2, 2011, Huber sent Curiale an email, agreeing to advance notice and escort procedures but rejecting the 30-minute rule.

On March 10, 2011, Union Representative Max Alper called in advance and then checked in at the security desk. After being escorted to the employee cafeteria, Alper asked to be escorted to where the employee schedules were posted. The security guard stated that he had to check with management. Mavroudis came to the cafeteria and told Alper that he could not go to where the schedules were posted. Mavroudis offered to email Alper the schedules.

On March 21, 2011, Alper called in advance and was escorted to the employee cafeteria. Alper asked to be escorted to the employee breakroom. Security Supervisor Buddy Jah said he would have to check with Mavroudis. Jah returned and said that Alper could not go to the breakroom. When Alper inquired as to why he could not go, Jah said that was what he had been told.

On March 24, 2011, Alper called in advance and checked in with security when he arrived. Alper was met by Mavroudis and Grant. Mavroudis asked the purpose of the visit. Alper replied that he never in the past had to provide the purpose of the visit. Mavroudis stated that if Alper did not provide the purpose of the visit, he would not be allowed to enter the Casino. Alper stated that he believed this was an unfair labor practice. Mavroudis directed Alper to call the Casino's attorney if he had any more questions.

On March 30, 2011, Alper called Mavroudis to inform him that he would be visiting the Casino that day. Mavroudis asked the purpose of the visit. Alper answered that he did not believe that was a proper question. Alper informed Mavroudis that he had a meeting with an employee. Mavroudis asked the name of the employee and how long the meeting would last. Alper said he would not answer those questions. Mavroudis stated that if Alper did not tell him the purpose of the meeting, the name of the employee, and the length of the meeting, Alper

would be denied access. Alper said he believed this was an unfair labor practice.

On March 31, 2011, Alper and C-en Yu, a union intern, arrived at the facility. They planned to meet with employee Isadoro Ramos. Alper had called earlier and left a message that he was going to visit. Alper and Yu checked in at the security desk and were told to wait. Security Supervisor Alex Lanier told Alper that he had to speak with Mavroudis and that Mavroudis would not be in until 9 a.m. Alper said that he had called the day before and spoke with Mavroudis. Lanier said that he had spoken with Mavroudis and was just following orders. Alper and Yu gave back their visitor badges and went outside. Once outside, Alper called Ramos and told him that he was at the front entrance. Ramos was in uniform but not scheduled to work for 20 minutes. When Ramos arrived at the security desk, Alper stepped back inside to talk to him.

Lanier told Alper and Yu that they had to leave. Alper said that what Lanier was doing was unlawful. Lanier told Ramos to return to the Casino. Alper told Lanier that Ramos wanted to meet with the Union. Ramos' supervisor arrived and Ramos left. Lanier then told Alper that he had to leave and that if he did not, Lanier would call the police. Alper said that would be unlawful. Alper and Yu then walked outside and waited for the police.

When the police officer arrived he spoke with Lanier. Then the police officer told Alper and Yu that they had to leave and if they did not leave, Lanier would make a citizen's arrest. Alper and Yu left the property. Before they left, Lanier gave them a form letter stating that they were banned from the Casino.

On January 31, 2012, Curiale sent an email to Alper stating that Union Representative Jessica Medina was barred from Respondent's property. Medina was barred based on an incident which occurred on December 7, 2011. A grievance meeting was held on December 7 at Respondent's training center, separate and apart from the Casino. Alper and Medina attended the meeting on behalf of the Union. After the meeting was over, Alper attempted to talk with Mavroudis. Grant walked over and Mavroudis walked away. Grant told Alper and Medina that they needed to leave. Grant asked Alper and Medina to leave four or five times before they finally left.

3. The information requests

The complaint alleges and Respondent admits that on the following dates, the Union requested in writing that Respondent furnish it with the following information:

(a) January 5, 2011
A copy of [the] security tape that shows the incident concerning employee Nelson Yip who was terminated for allegedly failing to turn in money that he found on the Casino floor.

(b) January 19, February 2, and March 7, 2011:
The method for calculating employee turnover and turnover rates for each year from 2005 to 2010.

(c) February 2 and 13, and March 7, 2011:
A copy of the security and badge procedures/requirements. . . . imposed by the City of San Pablo.

(d) February 13 and March 7, 2011:
(1) The total tip and service charge income for each worker for the entire calendar year 2010.
(2) All reports, worksheets, filings and other documents related to the December 2010 IRS tip rate and the IRS tips reported for all bargaining unit employees, including but not limited to gaming techs, gaming floor workers, bartenders, barbacks, servers, and porters.

(e) March 7, 2011:
(1) In order to access the impact of the proposal, please provide the total hours paid for Easter in 2010 and 2009 and the sign-in sheets or timecards for Memorial Day 2010 and 2009.
(2) Please provide daily sign in [sic] sheets or timecards for the period between November 2010 and February 2011, so we can assess how this change in benefits eligibility would impact employees,
(3) Job titles of four named employees (Melody Navarette Denate; Sachin Batajoo; Clayton Cox; Victor M. Figueroa) if they are bargaining unit employees.
(4) Please also provide the list of employees with their job titles and hire dates, who were enrolled in both medical and pension during the period immediately before January 2011.

(f) March 11, 2011:
(1) Schedules for all departments for the same period (December 1, 2010 through February 10, 2011).
(2) Copy of Nelson Yip's sales receipts for New Year's Day between 1a.m. and the end of his shift.
(3) An updated roster of employees with names, addresses, phone numbers, classifications, and date of hire.

(g) June15, 2011:
(1) Information regarding a grievance involving employee Peung Phontavy;
(2) Employee personnel file.
(3) All surveillance tapes related to the incident.
(4) All paperwork, documents e-mails, memos, notes and investigations related to all incidents related to listening, following instructions, timing and plate production and food quality from the past 12 months.

(h) June 15, 2011:
1. Information regarding a grievance involving employee Patricia Gomes
2. Schedules for all cocktail servers for the past 12 months
3. Section Assignments for al cocktail servers for the past 12 months.

(i) August 25, 2011:
1. Information regarding the same grievance involving employee Patricia Gomes:
2. Schedules for all cocktail servers for the past 12 months.

3. Section Assignments for all cocktail servers for the past 12 months.
4. Cash out slips for all cocktail servers for the past 12 months.

(j) July 6 and July 13, 2011:
1. Information regarding a grievance involving employee Nirmani Kalakheti:
2. All paperwork, documents, e-mails, memos, notes and investigations related to the separation.
3. All paperwork, documents, e-mails, memos notes and investigation related to all bereavement leaves from the past 3 years.
4. All paperwork, documents, e-mails, memos notes and investigation related to all personal leaves from the past 3 years.

(k) July 13 and 14, 2011:
Schedules for all unit employees for the months of June and July 2011.

(l) August 25, 2011:
1. Information regarding sonority-based job bidding and the hiring of part=time employees:
2. Schedules for all departments with Union represented employees for the past 12 months.

(m) August 25, 2011:
1. Information regarding a grievance about vacation pay:
2. A list of employees who took vacation in the past 3 years, including name, classification (job title) weekly base rate, average weekly pay for all weeks worked by the employee during the year preceding the vacation, amount paid for vacation.

(n) August 25, 2011:
1. Information regarding the hiring of part-time employees;
2. A list of all terminated employees in the past 12 months, including name, hire dates, termination dates, classification (job title) and status (PT or FT).
3. A list of all current employees.

Respondent had a security tape recording regarding the termination of employee Nelson Yip. Dadko requested to see the tape recording in support of a grievance concerning the termination—Curiale and Mavroudis refused to turn over the tape.

In January, February, and March 2011, the Union requested the method for calculating employee and turnover rates for each year from 2005 to 2010. That information was not turned over to the Union until February 2012.

The Union requested the security and badge procedures/requirements imposed by the city of San Pablo. Respondent is an Indian Casino and there are no city of San Pablo procedures or requirements.

The Union requested information relating to the IRS' tip rate. Respondent turned over the tip rate negotiated with the IRS but did not turn over the rest of the requested information.

The Union requested information regarding holiday pay. Respondent provided some but not all of the information requested on June 15. With respect to the Phontavy grievance, the Respondent provided the information that it had. Respondent did not provide information regarding the Gomes grievance. Respondent provided the information regarding the Kalakheti grievance. Respondent did not supply the schedules for employees for June and July 2011. Further, Respondent did not furnish the schedules for all departments that were requested in August 2011. Respondent did not furnish the information requested about vacation pay. Finally, Respondent did not furnish the information requested about the hiring of part-time employees.

4. The alleged unilateral changes

In June 2011, Respondent distributed to part-time employees a memorandum which, among other things announced that beginning on July 1, 2011, these employees would be receiving new benefits, including holiday pay and additional days off without pay. After July 1, 2011, part-time employees began receiving holiday pay for the first time. Respondent did not notify the Union or afford the Union the opportunity to bargain over this matter.

Respondent did not provide health benefits from March to September 2011, to bargaining unit employees Isabel Garrido, Al Balbuena, Rodolfo Trinidad, and Ali Challal. These employees worked 16 shifts a month during that period. The collective-bargaining agreement states that Respondent must provide healthcare benefits to employees who work more than 16 shifts a month in the month preceding the month in which contributions are due. When Respondent was notified by the Union of its failure to provide benefits for these employees, Respondent reduced the number of shifts to 15 for these employees. Respondent contends that it never provided such benefits for part-time employees.

B. Respondent's Defense

Respondent contends that impasse was reached after the Union rejected its last, best, and final offer. Respondent contends that the Union brought a barrage of information requests and filed grievances to harass Respondent. Respondent contends that its access rules and policies are for a legitimate business reason.

III. ANALYSIS AND CONCLUSIONS

A. Respondent was Obligated to Bargain

The general rule is that when parties are engaged in negotiations for a new agreement an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home*, 335 NLRB 96 (2001)*;* citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). In *Bottom Line Enterprise*, the Board recognized only two exceptions to that general rule: "when a union engages in bargaining delay tactics and "when economic exigencies compel prompt action," 335 NLRB at 374.

A genuine impasse exists when there is no realistic possibility that continuation of negotiations would be "fruitful" and both parties believe that they are "at the end of their rope." *Pratt Industries*, 358 NLRB 414, 419 (2012). "Whether a bargaining impasse exists is a matter of judgment, and bargaining history, the good faith of the parties in negotiations, the length of the negotiations . . . [t]he importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding to the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). Since impasse is a defense to allegations of bad-faith bargaining, it must be proven by the party asserting it and it will not be lightly inferred. *Sacramento Union*, 291 NLRB 552, 556 (1988).

In the instant case, the parties bargained for 14 sessions from November 2009 to January 2011. It was not until November 18, 2010, that the parties reached agreement on the healthcare plan. At that time the Union told Respondent that it was only agreeing to the healthcare plan and that all other issues were still on the table. During the negotiations on November 24 and December 16, 2011, there was no substantive discussion of wages. The Union had come to the January 25, 2011 session with the intent to bargain over wages and benefits. Respondent had determined that it would demand a wage freeze and that it would not move from that position. Respondent had determined that the Union would never agree to that wage proposal and thus Respondent offered its last, best, and final offer. Respondent assumed the parties were at impasse. The Union, on the other hand, did not believe the Parties were at impasse and wished to negotiate over wages and benefits. Respondent refused to meet and bargain. Finally, on May 20, the Union placed the last, best, and final offer to a membership vote. The last, best, and final offer was rejected. The Union attempted to bargain and Respondent refused.

Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if that issue is of such overriding importance to the parties that the impasse on that issue frustrates the progress of further negotiations. *CalMat Co.*, 331 NLRB 1084, 1087 (2000). The party contending that an impasse on a single critical issue justified its declaration of impasse must demonstrate three things:

> [F]irst the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on the critical issue led to a breakdown in the overall negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. [*Richmond Electrical Services*, 348 NLRB 1001, 1003 (2006), citing *CalMat Co.*, 331 NLRB at 1097.]

Here the parties put off negotiations on wages until the issue of healthcare was resolved. In January 2011, when the Union was prepared to bargain over wages and benefits, Respondent made its last, best, and final offer. While the Union was willing to negotiate, Respondent refused to negotiate any further. While the parties may have been deadlocked on wages, Respondent prematurely declared an impasse, while the Union was still negotiating. I find that Respondent declared an impasse prior to reaching impasse with the Union.

As stated above, the fact that Respondent believed that the Union would never agree to Respondent's wage proposals does not establish an impasse. In light of the limited bargaining about wages and the Union's willingness to continue bargaining, I cannot find the parties had reached a deadlock regarding this issue.

When the union members rejected Respondent's last, best, and final offer, the parties were still not at impasse. The Union clearly indicated it was willing to bargain. However, when the parties met on June 24, Respondent refused to listen to any union proposals.

1. The information requests

The general rule is that an employer has a statutory obligation to supply requested relevant information which is reasonably necessary to the exclusive bargaining representative's performance of its responsibilities. *Boise Cascade Corp.*, 279 NLRB 429 (1986).

It is well established that a union is entitled to whatever information is relevant and necessary to its representation of the bargaining unit, not only for collective bargaining but for grievance adjustment and contract administration. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *SBC Midwest*, 346 NLRB 62, 64 (2005). In *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), citing *General Electric Co.*, 290 NLRB 1138, 1147 (1988), the Board held that "Once a union has made a good-faith request for information, the Employer must provide relevant information promptly, in useful form." The test used by the Board for determining whether a respondent has supplied the information in a reasonable amount of time is set forth in *West Penn Power Co.*, 339 NLRB 587 (2003) enfd. in pertinent part 349 F.3d 233 (4th Cir. 2005). Accord: *Earthgrains Co.*, 349 NLRB 389 (2007):

> In determining whether an Employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.

Respondent contends that the Union filed grievances and information requests to harass Respondent. However, the evidence establishes that the information sought was reasonably related to the union grievances.

The tape recording regarding the termination of employee Nelson Yip would be relevant to a grievance concerning the termination. Respondent did not turn over the tape recording because it believed it was irrelevant. However, Respondent could not unilaterally make that determination. The information concerning employee turnover was not given to the Union for over a year. Respondent does not contend that the information was not provided due to a mistake. The Union

requested information regarding the requirements of the city of San Pablo. However, no such requirements exist. Thus, Respondent had no information to provide.

The Union requested documents related to the IRS' tip rate. Respondent did not provide the requested documents. The Union sought information in regard to bargaining over holiday pay and medical benefits. Respondent did not provide the information because it felt that it was being harassed. The Union sought information regarding employee schedules. The Union sought such information to investigate a potential grievance. Further, the Union sought an updated roster of employees. Respondent failed to furnish such information.

The Union requested information regarding a grievance involving employee Peung Phontavy. Respondent only provided what it deemed relevant and did not provide all the information. Respondent could not unilaterally decide what is relevant. The Union sought information regarding the grievance of employee Patricia Gomes. Respondent did not provide the information, allegedly, because it provided an email allegedly establishing that Gomes was not discriminated against. Again, Respondent cannot unilaterally determine the relevance of the information sought.

The Union sought information regarding the grievance of employee Kalakheti. Respondent again unilaterally decided that the information was not relevant. The Union requested the schedules for the months of June and July 2011. Such information is presumptively relevant. Respondent refused to provide the information unless the Union alleged a violation of the contract. The Union could request the information to determine whether or not to file a grievance.

The Union sought information regarding seniority-based job bidding in support of a grievance. Respondent did not supply this information. The Union sought information regarding the payment of vacation pay for grievance purposes. Respondent did not provide this information.

The Union sought information regarding a grievance concerning the hiring of part-time rather than full-time employees. Respondent determined that there was no merit to the grievance and did not furnish the information. Respondent could not unilaterally make that determination.

In summary, after January 31, 2011, Respondent did not provide information because it believed the requests were made for harassment purposes.

2. The unilateral changes

Respondent issued a memorandum on June 8, 2011, granting part-time employees holiday pay and additional days off without pay. Respondent did not notify or bargain with the Union about these changes.

Under the Act, before an employer may effect a material and substantial changes in the employees' wages, hours, and other conditions of employment, it must notify the employees' collective-bargaining representative and afford the representative an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1237–1238 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996). The notice given to the union must be sufficient to allow a meaningful chance to bargain before the change is implemented. *Mercy Hospital of Buffalo*, 311 NLRB 869. 873 (1993); *Intersystems Design Corp.*, 278 NLRB 759 (1986). Accordingly, I find that Respondent violated Section 8(a)(5) and (1) by instituting these changes.

During the period from March to September 2011, four employees who were classified as part-time employees worked 16 or more shifts per month. Respondent contends that these employees were part-time employees and therefore, not eligible for health benefits. The Agreement provided that Respondent provide healthcare benefits to employees who work more than 16 shifts a month, in the month preceding the month in which contributions are due. When the Union questioned the status of these employees, Respondent unilaterally reduced the number of shifts worked by the employees. Respondent did so without notice to or bargaining with the Union.

3. Union access

Board law is well settled that a union's access to represent employees on an employer's premises is a mandatory subject of bargaining. *American Commercial Lines*, 291 NLRB 1066, 1072 (1988). In addition, a union access provision in a collective-bargaining agreement is a term and condition of employment that survives the agreement's expiration. *Turtle Bay Resorts*, 353 NLRB 1242 (2009).

Here, the Respondent had a legitimate rule requiring an escort to move around the Casino. However, Respondent unilaterally required the Union to notify it of the purpose of the meeting. Respondent unilaterally conditioned access on the Union having a scheduled meeting with an employee.

C. The 8(a)(1) Allegations—Interrogation

The Board's test for determining whether interrogation of employees concerning their union activities or the union activities of other employees is set out in *Rossmore House*, 269 NLRB 1176, 1177 (1984):

> Whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The Board has said that a totality of the circumstances test must be applied, even when the interrogation is directed to unit members whose union sympathies are unknown to the employer. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Some of the considerations taken into account by the Board in determining whether, under the totality of the circumstances, the interrogation was coercive include: Whether the employee interrogated was an open and active union supporter; whether there is a history of employer hostility towards or discrimination against union supporters, whether the questions were general and nonthreatening, and whether the management official doing the questioning had a casual and friendly relationship with the employee being questioned. *Sunnyvale Medical Clinic*, supra at 1218:

> I find that the interrogation of employee Isadoro Ramos, violated Section 8(a)(1) of the Act. Here, the employees had engaged in protected action and the questions pertaining to the Union's future action tended to restrain and coerce employees in violation of Section 8(a)(1). I find by this conduct, in the

context of unlawful suspensions, Respondent violated Section 8(a)(1) of the Act.

Security Manager Felipe Guzman instructed employee Nelson Yip not to talk to anyone about the investigation affecting his appointment. This action violated the Act because it tended to interfere with Yip's right to concertedly act with other employees concerning his possible discipline. *Fresenius USA Mfg. Co.*, 358 NLRB 1261 fn.1 (2012); *Mobil Oil Exploration & Producing, U.S.*, 325 NLRB 176, 178 (1997).

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union.

4. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally establishing rules that prohibit union access to the Casino.

5. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally announcing and implementing new benefits for part-time employees.

6. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide contractual health benefits for four unit employees.

7. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide relevant information necessary for bargaining and grievance handling.

8. Respondent violated Section 8(a)(1) of the Act by coercively interrogating an employee.

9. Respondent violated Section 8(a)(1) of the Act by telling an employee not to discuss his investigation with other employees.

10. Respondent's conduct above is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

[Recommended Order omitted from publication.]