UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

CASINO PAUMA

and

Cases 21-CA-125450
21-CA-126528
21-CA-131428

UNITE HERE INTERNATIONAL UNION

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT CASINO PAUMA'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

On June 4, 2015, Administrative Law Judge Ariel L. Sotolongo ("ALJ") issued his decision in these cases, making findings of fact and conclusions of law that: the NLRB had jurisdiction over Respondent's Casino; Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in "guest areas," interfering with the distribution of Union literature by employees in the public or guest entrances to its Casino, threatening to discipline employees who distributed Union literature in these areas, photographing employees who distributed Union literature in these areas; and Respondent violated Section 8(a)(1) and (3) of the Act by issuing employee Audelia Reyes a written disciplinary warning for distributing Union literature on a nonworking area during nonworking time.

On July 30, 2015, Respondent filed 22 exceptions to the ALJ's decision, and a brief in support, challenging essentially all of the ALJ's findings of fact, credibility resolutions, and legal conclusions. However, the record and relevant Board precedent establish that the ALJ's decision is well-founded. Respondent's exceptions are without merit and should be rejected.

II. ISSUES PRESENTED

The issues before the Board are whether the ALJ properly concluded that:

1. The Board has jurisdiction over Respondent's Casino.

2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in "guest areas."

3. Respondent violated Section 8(a)(1) of the Act on December 14, 2013, by: prohibiting employees from distributing literature at the Casino's customer main

entrance; threatening to discipline employees who distributed Union literature in this area; and photographing employees who distributed Union literature in this area.

4. Respondent violated Section 8(a)(1) and (3) of the Act on March 6, 2014, by issuing a written warning to employee Audelia Reyes for distributing Union literature on a non-working area during non-working time.

III. STATEMENT OF FACTS

A. Background

Respondent operates a casino and entertainment venue in Pauma Valley, California. Respondent is owned and operated by the Pauma Band of Mission Indians ("the Tribe"). However, there is no evidence of any tribal involvement in the day-to-day operations of the Casino. Respondent is a typical commercial enterprise operation in, and substantially affecting, interstate commerce, and the majority of the Casino's employees and patrons are not members of the Tribe.

In approximately May 2012, UNITE HERE International Union ("the Union") initiated an organizing campaign involving Respondent's employees, including housekeepers, food and beverage workers, slot technicians, and maintenance workers. In a prior case that was litigated in February 2014, the Board affirmed the decision of ALJ Jeffrey D. Wedekind that the NLRB has jurisdiction over Respondent's casino, and that Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a rule prohibiting employees from wearing union buttons, threatening to suspend or terminate employees who wore a union button, and instructing its managers, supervisors, and agents to surveil employees to see if they were wearing a union button. *Casino Pauma*, 362 NLRB No. 52 (March 31, 2015).

B. Respondent's operations.

A Joint Stipulation (JX 1)[1] filed in this matter details Respondent's operation of the Casino (discussed at ALJD 3). In summary, JX 1 explains that:

Respondent operates a gaming and entertainment establishment (the Casino) in Pauma Valley, California. The Casino has slot machines and gaming tables; and various restaurants (The Deli & Pizzeria, The Buffet, The Noodle Bar).

Respondent is owned and operated by the Pauma Band of Mission Indians (the Tribe). However, there is no record evidence of any Tribal involvement in the day-to-day operation of the Casino.

Respondent is open 24 hours a day, 7 days a week, to members of the public; and the vast majority of its customers are not members of the Tribe, or members of any other Native American Tribe.

The vast majority of Respondent's employees, security guards, supervisors and managers are not members of the Tribe, or members of any Native American Tribe. Notably in this regard, of the 236 members of the Tribe, only 5 are actually employed by Respondent.

Respondent advertises its Casino using multiple sources (website, television, radio, mail, mobile billboards on buses), and advertises in various counties (San Diego, Riverside, San Bernardino, Orange, and Los Angeles).

[1] In this brief, references to the hearing transcript will be referred to as "Tr." followed by the page number. References to the exhibits presented at trial will be cited as "GCX" for General Counsel's exhibits, "JX" for Joint exhibits, and "RX" for Respondent's exhibits, followed by the exhibit number. Citations to the ALJ's decision will be referred to as "ALD" followed by the page number.

On a daily basis, Respondent provides free shuttle and bus services for its customers, which pick up and drop off customers at locations throughout Southern California, including in neighborhoods in Los Angeles.

The Casino property consists of various buildings and parking spaces. Approximately 35,000 square feet of the property is used for gaming purposes. Other buildings and spaces within the property are used for such things as administrative offices; storage warehouses; and a maintenance shop.

In addition to JX l, a stipulation was reached on the record that for 2013, Respondent's gross revenue was, *at least,* in excess of $50,000,000. (ALJD 2; Tr. 19-20).

In its Answer to the Consolidated Complaint, Respondent admitted that there is no federal treaty between the Tribe and the federal government. (GCX 1(m), GCX 1(o)).

C. Handbook rule

The following rule appears on page 24 of Respondent's employee handbook in JX 4:

> Circulation of Petitions
>
> No one shall be allowed to distribute literature in working or guest areas at any time. Team Members may not solicit other Team Members for any purpose during scheduled work time. Work time does not include break time. In addition a Team Member who is on his/her break may not solicit nor distribute literature of any kind to a Team Member who is working.[2]

D. Security Guards interfere with leafleting activities on December 14, 2013.

At various times throughout the day on December 14, 2013, groups of two to four off-duty employees distributed Union leaflets to customers in the outside area of the Casino's customer main entrance. The employees spread out, and stood on the sidewalk

[2] In its Answer to the Consolidated Complaint, Respondent admitted that it has maintained this rule in its handbook since about September 29, 2013 (GCX 1(m); GCX 1(o)).

without blocking any entrances or driveways. None of the employees littered on the premises. (Tr. 53-62, 75, 81-82, 118-129,138, 160-166, 174, 194-196, 210, 219, 224-229, 232, 243-245, 268-269).

Before leafleting that day, most employees met with Union Representative Pablo Aguilar ("Aguilar") at the parking lot of a local restaurant near the Casino, away from Respondent's property. Aguilar provided employees with copies of a blue flyer (GCX 2) to distribute at the Casino's main entrance. He also gave employees copies of a small, square-shaped piece of paper summarizing employees' rights to distribute leaflets (GCX 3) that employees could give to Respondent should employees be prevented from leafleting. (Tr. 220-222, 252-257, 286-290).

The blue leaflet that employees distributed is double-sided with one side in English and the other side in Spanish. The top of the flyer states:

> We the Casino Pauma Workers, call on our customers to join us in solidarity in support of our call for a Fair Process to form a Union, without Company intimidation and retaliation! (GCX 2)

The flyer has several pictures of employees. One picture depicts a group of 12 workers standing in two rows. A headline above this picture reads, "We are the Union Organizing Committee." Employees Audelia Reyes, Victor Diaz Huerta, James Bayton, and Catalina Gutierrez are among those depicted in this picture. (GCX 2; Tr. 51, 237, 277-278, 316).

As described in detail below, while employees attempted to leaflet, they were approached by Respondent's security guards who prohibited employees from leafleting and threatened to discipline them if they did not stop.

The security guards involved in this conduct are: Jacob Hanson ("Hanson"); Maxcimiliano (Max) Ortiz ("Ortiz"); Ricardo (Ricky/Enrique) Torres ("Torres");

Eugenio "Gene" Oceguera ("Oceguera"); Jesus Solis ("Solis"), Antonio Alcaraz ("Alcaraz"), Brian Linderman ("Linderman"), and a security guard whose name is unknown to the General Counsel, but who is identified as Security Guard #1 in the Consolidated Complaint. (Tr. 35-39). In the Joint Stipulation (JX 1, p. 3-4), Respondent admitted that all of these security guards are agents of Respondent within the meaning of Section 2(13) of the Act.

All incidents described below occurred on December 14, 2013, in the outside area of Respondent's customer main entrance, about 75-100 feet away from the actual door used by customers to enter the Casino. (Tr. 102). Pictures of the areas where the employees stood to leaflet are in the record as JX 2A – JX 2D. The pictures depict a semi-circular driveway directly in front of the main entrance. Customers enter on the right-hand side of the driveway and exit on the left-hand side when they valet their cars. (Tr. 58).

1. 11:30 a.m. – Conduct by Hanson, Ortiz, and Torres

At about 11:30 a.m., employees Victor Diaz Huerta ("Huerta"), Maria Ponce ("Ponce"), Maria Guadalupe Pineda ("Pineda"), and Raul Marquez ("Marquez")[3] positioned themselves at separate locations in the main entrance to leaflet. Huerta and Ponce stood on opposite corners of the driveway exit. Huerta was near the flagpoles and Ponce was at the end of the crosswalk, next to the flowerbed shown in JX 2A. (Tr. 59-60).

[3] Marquez did not testify at the hearing.

Pineda and Marquez stood on opposite corners of the driveway entrance. Pineda stood by the valet sign and Marquez stood near the palm tree to the right of the rear bumper of the white bus depicted in JX 2C. (Tr. 60-61).

Huerta testified that about 8 to 10 minutes after starting to leaflet, Security Officer Hanson approached Huerta. Ponce, who was across the driveway, walked over to join them. (Tr. 67). Hanson and Huerta spoke in English. (Tr. 62). Ponce only speaks Spanish. (Tr. 171).

Huerta testified that Hanson told him that he could not distribute flyers there, but that he could distribute them by the employee entrance, which is located in the back of the Casino. (Tr. 62-64, 75, 80).[4] Huerta replied that he had rights and showed Hanson a copy of the small, square-shaped paper in GX 3. Hanson refused to take the paper and repeated that Huerta could not distribute flyers there, that he could only do it in the back by the employee entrance. Huerta asked what would happen if he did not stop. Hanson replied that he would report Huerta to human resources, and that he could be disciplined. Huerta told Hanson that he would stop because he did not want to lose his job. (Tr. 62-65).[5] The group then walked to Pineda, who was on the other side by the driveway entrance. When they arrived, Security Officers Ortiz and Torres were engaged in a conversation in Spanish with Pineda and Marquez. (Tr. 70-71; 172-173).

Pineda testified that about 10-15 minutes after starting to leaflet, Security Guards Ortiz and Torres approached her. Ortiz told her in Spanish that she could not stand there to pass out flyers, and that she had to go to the back. He was referring to the employee

[4] Customers are not allowed to use the employee entrance in the back of the Casino. (Tr. 80).

[5] Ponce testified that she heard the conversation between Hanson and Huerta, but she did not understand what was said since she does not speak English. She also testified that she saw when Huerta tried to give Hanson a copy of GCX 3, but Hanson refused to take it. (Tr. 171-172).

entrance. Pineda asked what would happen if she did not leave. Ortiz repeated that she could go to the back. Pineda showed Ortiz a copy of the paper in GCX 3 concerning employees' rights to leaflet. Ortiz did not say anything about the paper. (Tr. 136-138). It was at about that time when the others (Huerta, Ponce, Marquez, and Security Officer Hanson) joined Pineda. (Tr. 135).

When all individuals were gathered together, both Huerta and Pineda asked the security guards in Spanish what would happen if they did not leave. (Tr. 71, 133-135, 173). According to Huerta, Ortiz replied that they would be reported to human resources and would be disciplined. (Tr. 70-71). Likewise, Pineda and Ponce recalled that Ortiz stated that they could be disciplined. (Tr. 135-136, 173). Ponce also recalled Ortiz telling them that they could not distribute flyers at that location, but that they could go to the employee entrance to do so.

Huerta, the only employee who was present who speaks English, also testified that he asked Hanson in English what would happen if they did not stop leafleting, to which Hanson replied that they could be reported to human resources and be disciplined. (Tr. 72). The employees then told the security guards that they would go away, and they left the Casino at about 11:45 a.m. (Tr. 72-73, 136).

At the hearing, Security Officer Hanson testified that he came into contact with individuals that morning regarding two leafleting incidents in the main entrance, but he did not recall who he dealt with during the first incident.[6] As to the second incident, Hanson said he confronted three employees who were trying to leaflet and he told them that they were not allowed to distribute in the front entrance. (Tr. 372-375). Hanson,

[6] Security Guards Ortiz and Torres did not testify at the hearing.

who is the security director, further testified that the security guards received a directive on how to handle the leafleting—guards were instructed to tell employees that they were not allowed to distribute leaflets in the public areas, but that they could distribute them in the smoking area in the back of the Casino, which is where the employee entrance is located. (Tr. 375). Hanson also stated that on December 14, 2013, the security officers were following Respondent's policy regarding the distribution of flyers; a policy which prohibits distribution in the public areas of the Casino. (Tr. 371, 389). Hanson did not deny telling employees that they could not distribute flyers or telling them that they would be reported to human resources and disciplined if they did not stop.

2. 12:20 p.m. – Conduct by Oceguera

Slot technician James Bayton ("Bayton") and his coworkers Maria Bolanos and Alvaro Bolanos ("the Bolanos") arrived at the Casino's main entrance at about 12:20 p.m. to leaflet.[7] (Tr. 224-226). Bayton stood by himself near the driveway exit at the end of the crosswalk next to the flowerbed shown in JX 2A. The Bolanos stood together near the driveway entrance, next to the valet sign shown in JX 2C. (Tr. 228).

Bayton testified that about 10 minutes later, Security Guard Oceguera approached him, and stated that they could not distribute the flyers.[8] Bayton asked what would happen if he did not stop. Oceguera replied that he would take their names down and turn them in to human resources. (Tr. 230-232).[9] This conversation was in English. The Bolanos do not speak English. Bayton then explained to the Bolanos in Spanish what

[7] The Bolanos did not testify at the hearing.

[8] Oceguera has known Bayton to be an employee of the Casino for many years. Both have worked at the Casino for many years and frequently greeted each other at work. (Tr. 233).

[9] Oceguera testified at the hearing. He did not deny making these statements. (Tr. 392-401).

Oceguera had stated. All three of them stopped distributing flyers and left the Casino at that time. (Tr. 231).

3. 1:00 p.m. – Conduct by Oceguera, Solis, and Security Officer #1.

At about 1:00 p.m., employees Maria Tavarez ("Tavarez") and Maria Alba ("Alba") began leafleting at the Casino's customer main entrance. Tavarez stood by the driveway entrance near the palm tree to the right of the rear bumper of the white bus shown in JX 2C (Tr. 194-195). Alba stood by the driveway exit near the flagpoles shown in JX 2A. (Tr. 195-196).[10]

Tavarez testified that about five minutes later, Security Guards Oceguera and Solis approached Tavarez. (Tr. 198, 209). Alba joined them when the two guards approached. Solis told Tavarez in Spanish that she could not be there distributing the flyers. (Tr. 199).[11] Thereafter, a third security guard arrived on a bicycle. (Tr. 199-200).

The guard on the bicycle is referred to as "Security Guard #1" in the Consolidated Complaint. Tavarez does not know his name, but described him as white, 35 years old, and a little heavyset. (Tr. 199-200). He wore an employee identification badge, but Tavarez did not pay attention to the name on the badge. (Tr. 199-200). Security Guard #1 also wore attire typically worn by guards who patrol the Casino parking lot on bicycles—black pants, a white shirt displaying the words "Casino Pauma," and a helmet. (Tr. 200-201, 203). Tavarez had seen this individual working as a security guard many times before. She usually saw him patrolling the parking lots on a bicycle when she arrived to work 15 minutes before her shift started. (Tr. 202).

[10] Alba did not testify at the hearing.

[11] Solis did not testify at the hearing.

In broken Spanish, Security Guard #1 stated that the employees already knew that they could not distribute flyers at the customer main entrance. Tavarez replied that employees had a right to do so, and showed him a copy of the paper in GCX 3 that discusses employees' rights to leaflet. Security Guard #1 said that he could not take the paper. Tavarez, who was wearing her employee identification badge on the upper left chest area of her shirt, asked how she would be disciplined if she did not stop leafleting. Security Guard #1 pointed at her employee identification badge and stated that he would take her name down and report her to human resources. (Tr. 203-206, 218-219). Tavarez responded by stating that they would leave.

Tavarez further testified that as she made this statement, Security Guard #1 snapped a picture of her and employee Alba, who was standing next to Tavarez. Tavarez stated that she saw Security Guard #1 holding a small black, compact-sized camera, which flashed as he took a picture from about two feet away. Tavarez and Alba then left the Casino. (Tr. 206-209, 217-218).

At the hearing, Respondent failed to produce photographs of its security guards subpoenaed by the General Counsel to help identify Security Guard #1. (Tr. 23-24, 192-193, 358). Instead, Respondent's counsel suggested that Security Guard #1 is the same person as Security Guard Oceguera. (Tr. 213). On both direct and cross-examination, Tavarez consistently testified that three (not two) security guards approached her—Oceguera, Solis, and Security Guard #1 who was riding the bicycle. Tavarez insisted that she was certain that Security Officer #1 is not the same person as Oceguera. (Tr. 198-199, 213-217).

On direct-examination, Security Guard Oceguera testified that he was on bike-patrol the day of the leafleting on December 14, 2013. (Tr. 393). However, employee

Bayton, who interacted with Oceguera earlier that day at 12:20 p.m., testified on cross-examination that he did not see Oceguera patrolling on a bicycle that day. (Tr. 237). Oceguera admitted that guards on bike-patrol carry small black, portable Sony cameras. (Tr. 394).

Oceguera further testified that at about 12:24 p.m. on December 14, 2013, he made contact with two employees passing out flyers at the Casino front entrance, a male and a female. (Tr. 395-396).[12] Oceguera did not specify whether any other security guards were with him during this interaction. As he began to tell the employees the areas where they were allowed to pass out flyers, an older while male interrupted stating that employees had the right to distribute flyers. When the older man refused to provide a form of identification, Oceguera asked him to leave. (Tr. 397).

Oceguera did not testify about the 1:00 p.m. interaction with employees Tavarez and Alba, who are both female. (Tr. 392-402). On direct-examination, Oceguera merely testified that although he had a camera with him that day, he did not take a picture of the older white man or any of the three people involved in the 12:24 p.m. encounter. (Tr. 398-399). Notably, Oceguera did not deny taking pictures of any other employees that day nor did he deny seeing any other security officers take a picture of employees who were engaged in leafleting that day. (Tr. 392-401).

4. 4:30 p.m. – Conduct by Linderman and Alcaraz

At approximately 4:30 p.m., employees Olivia Garcia ("Garcia"), Catalina

[12] The12:24 p.m. incident that Oceguera testified about may be the same incident described by employee Bayton, when Bayton and the Bolanos attempted to leaflet. As noted above, the Bayton-Oceguera interaction happened shortly after 12:20 p.m.

Gutierrez ("Gutierrez"), and Andres Ramirez ("Ramirez") began leafleting at the Casino main entrance. (Tr. 243-244, 267-268).[13] Garcia stood near the driveway entrance by the valet sign depicted in JX 2C. (Tr. 245). Gutierrez stood near the driveway exit by the flagpoles depicted in JX 2A. (Tr. 269).

About five to ten minutes later, a security guard who spoke English approached. (Tr. 247, 273). Gutierrez recognized the security guard as Brian Linderman.[14] Linderman left and returned a few minutes later with another security guard who spoke Spanish, Antonio Alcaraz.[15] (Tr. 247, 273-274). By then, all three employees had gathered together in the same spot. (Tr. 248-249, 273).

Garcia testified that Alcaraz told them in Spanish that they could not distribute flyers in that area, and asked them to leave. (Tr. 248). Gutierrez testified that Alcaraz said that they could not pass out flyers at the main entrance because the customers did not need to know the problems of the Casino. He told them that they could distribute flyers by the back doors. (Tr. 264). Gutierrez understood this to mean the employee back entrance. (Tr. 274). Garcia and Gutierrez asked what would happen if they did not leave. Garcia and Gutierrez both testified that Alcaraz replied that the situation could escalate, that upper management would be informed, and that someone could get fired, so it was best for them to leave. (Tr. 248-249, 275).[16] The employees then left the Casino at about 4:45 p.m. (Tr. 249, 275).

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[13] Ramirez did not testify at the hearing.

[14] Both Gutierrez and Linderman have been members of the Employer's Health, Safety & Wellness committee for a few years and often see each other at the committee meetings. (Tr. 278-282; GCX 5).

[15] Neither Linderman nor Alcaraz testified at the hearing.

[16] Gutierrez recalls that Linderman is the one who spoke during this interaction while Alcaraz translated what he said into Spanish. (Tr. 275-276). Garcia did not recall whether Linderman spoke during the interaction. (Tr.429).

E. Employee Audelia Reyes

Audelia Reyes ("Reyes") has been a buffet attendant at the Casino for about 12 years. She works the 8 a.m. to 4 p.m. shift (Tr. 304-305).

1. Reyes' Union activities

From May 2012 to January 2014, Reyes distributed Union flyers to her coworkers in the employee entrance of the Casino on her own time about seven times. (Tr. 306-308). During this same period, on two occasions, she also wore a Union button at work. On the second time, in 2013, Reyes was taken to the human resources office where Human Resources Representative Maria Perez ("Perez") told her in Spanish that she was not allowed to wear the button. Reyes is pictured among the group of workers identified as the Union organizing committee in the Union leaflet in GCX 2—the flyer that was distributed in the front entrance of the Casino on December 14, 2013. (Tr. 316).

2. On January 24, 2014, Reyes passed out Union flyers to coworkers while waiting in line to clock out.

Reyes normally receives two 30-minute rest breaks per shift. Reyes' unrebutted testimony is that on January 24, 2014, she took her second rest break during the last half-hour of her shift, from 3:30 p.m. to 4 p.m. When the workload was too heavy, some employees in her department had no choice but to take their second break at the end of their shift. (Tr. 318-322). At 3:30 p.m., Reyes began taking her second break in the employee cafeteria. About 1-2 minutes before her normal quitting time of 4 p.m., she walked to the timeclock to punch out.

Reyes and other workers began gathering in front of the timeclock waiting in line to clock out. As they waited, Reyes handed out Union flyers to three of the workers who were in line. (GCX 6). This event was captured on video by Respondent's surveillance

camera. A videorecording of this event was shown at the hearing, and is in evidence as JX 9. The video has no audio and is about 3 minutes and 36 seconds long.

As shown in the video, the timeclock is attached to a wall in a hallway, away from employees' work stations. That hallway access is restricted to employees. (Tr. 344). About 30 seconds into the video, Reyes is the first one to arrive at the timeclock. Within a few seconds, a line of about six employees began forming, waiting for the clock to strike 4 p.m. to punch out. Reyes' payroll records show that she clocked at 4:00 p.m. on January 24, 2014. (JX 5). The video shows that Reyes is the third employee to clock out that day. The video also shows the following sequence of events:

- 45 seconds before Reyes clocks out, she out hands out a flyer to an employee in line named Griselda.[17]
- 35 seconds before Reyes clocks out, she hands out a flier to an employee in line named Adrian.
- 31 seconds before Reyes clocks out, she hands out a flyer to an employee in line named Inez. At about that same time, the video shows the first person in line clocking out. Griselda is the second person to clock out, followed by Reyes, Inez, and finally Adrian at the end of the video.

3. On February 20, 2014, Human Resources Director Lerner met with Reyes.

About a month after passing out flyers by the timeclock, Reyes was summoned to a meeting with Human Resources Director Annelle Lerner ("Lerner")[18] to discuss this

[17] While viewing the video at the hearing, Reyes identified most of the employees who were in line to clock out. (Tr. 338-344).

[18] In the Joint Stipulation (JX 1), Respondent admitted that at all material times Lerner has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

topic for the first time. Lerner did not testify at the hearing. Respondent has not explained why it waited this long to talk to Reyes.

The meeting took place in Lerner's office. Supervisor George Limper ("Limper") and Human Resources Assistant Maria Perez ("Perez") were also present. (Tr. 325-327). Perez translated during the meeting. Limper did not testify at the hearing either. Perez was the only witness who testified at the hearing for Respondent concerning this matter.

Lerner asked Reyes whether Reyes was authorized to pass out information in the Casino. Reyes was puzzled over the question, and initially replied that she was not. Lerner asked whether Reyes was sure, and reminded her that the Casino was surrounded [by video cameras]. Lerner said that she wanted Reyes to tell the truth. Reyes then remembered the day that she gave Union flyers to her coworkers by the timeclock, and she told Lerner about it. Lerner asked Reyes who authorized her to distribute those flyers, to which Reyes replied that the Union organizing committee had authorized her. (Tr. 327-330).

During the meeting, Lerner played the video in JX 9 for Reyes. Reyes apologized and explained to Lerner that since she was on break, it seemed "easy" for her to give out those fliers by the timeclock. (Tr. 332). Lerner instructed Reyes to write a statement. Reyes hand-wrote the following statement in Spanish and turned it in to Lerner:

> On January 24, I am aware that I passed out information to like three people. I apologize because the truth is I had not clocked-out yet. I was on my break. Like you say that it was still work time, I know I made a mistake.
> (Tr. 333-334; JX 7A -7B).

Lerner thanked Reyes for her honesty and told her that they would get back to her if anything else came up.

As previously noted, Lerner did not testify at the hearing. Perez, who translated during this meeting, testified that apart from acting as an interpreter, she did not have any involvement with the discipline issued to Reyes regarding the distribution of flyers by the timeclock. (Tr. 405).

4. On March 6, 2014, Reyes was issued a written warning.

On March 6, 2014, Reyes received a written Counseling Notice for distributing Union flyers by the timeclock. (Tr. 345; JX 6). Supervisor Dennis Von Rumund hand-delivered the warning to her.[19] The warning states:

> On 1/24/14, (and by your own admission), you were reported to have been distributing unauthorized (unapproved) material in working areas of the property (near F&B Time Clock, main hallway) while on duty; Your admitted conduct violates the casino's No Solicitation or Distribution Policy. Policy is excerpted below:
>
> No Solicitation or Distribution
>
> Casino Pauma wants to protect its Team Members from annoying interruptions, and to promote a proper and litter-free working environment. Therefore:
>
> - Solicitation of any type by Team Members during working time is prohibited.
> - Distribution of literature of any type or description by Team Members during working time is prohibited.
> - Distribution of literature of any type or description in working areas is prohibited.
>
> Violation of any of the above rules will result in immediate disciplinary action up to and including termination of employment.
>
> Audelia, going forward you must abide by the Casino's established rules including the No Solicitation or Distribution policy or you may be subjected to further disciplinary action up to and including termination.

[19] In the Joint Stipulation (JX 1), Respondent admitted that at all material times Dennis Von Rumund has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

It is undisputed that Respondent has not disciplined anyone else for violating its no-solicitation/no-distribution policy. (Tr. 22-23).

IV. ARGUMENT

A. The ALJ properly concluded that the Board has jurisdiction over Respondent.

1. The ALJ properly concluded that the issue of jurisdiction is *res judicata.*

In his decision, the ALJ noted that on March 31, 2015, the Board issued a decision involving this same Respondent in *Casino Pauma*, 362 NLRB No. 52, in which the Board concluded that it has jurisdiction over Respondent's Casino.[20] As further discussed below, since the underlying facts supporting the jurisdictional finding have not changed, the ALJ properly concluded that the issue of jurisdiction is *res judicata.* (ALJD 2)

2. The ALJ properly applied the Board's holding in *San Manuel.*

For many years, the Board has asserted jurisdiction over casinos, similar to the Respondent in this case, which are owned and operated by tribal governments and are located on reservation lands. See *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), reaffd. 345 NLRB 1047 (2005), enfd. 475 F.3d 1306 (D.C. Cir. 2007). In *San Manuel*, the Board set forth a two-phase analysis to determine whether the Board should exert jurisdiction over Native American-run enterprises through its exercise of discretionary jurisdiction. As the Act is a statute of general applicability,[21] the Board may exert jurisdiction subject to three exceptions the Board has adopted from the Ninth Circuit's decision in *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113 (9th Cir.

[20] Respondent did not appeal the Board's decision in *Casino Pauma*, 362 NLRB No. 52 (2015).

[21] *Id.* at 1059 (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).

1985). These exceptions apply when: (1) the law "touches exclusive rights of self government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. *San Manuel,* 341 NLRB at 1059 (citing *Coeur d'Alene*, 751 F.2d at 1116).

If none of the *Coeur d'Alene* exceptions apply, the Board then moves to the second prong of its inquiry: determining whether the Board should exert jurisdiction. This "final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *Id.* at 1062. At this juncture, the Board balances its "interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." *Id.* The Board's interest in exerting jurisdiction will be at its lowest when a tribe is conducting activities that fulfill traditional tribal or governmental functions that are unique to its status as an Indian tribe. *Id.* at 1063. Conversely, the Board's interest in exerting jurisdiction will be at its peak when a tribe operates a commercial enterprise that significantly involves non-Indians and substantially affects interstate commerce. *Id.*

In *San Manuel*, the Board held that a commercial casino owned and operated by a federally recognized Native American tribe exclusively on tribal lands fell within the Board's discretionary jurisdiction. After finding the *Coeur d'Alene* exceptions inapplicable, the Board found that policy considerations did not prevent it from exerting discretionary jurisdiction even though the casino was located on tribal lands. *Id.* at 1063-64. Significantly, the Board observed that the casino operated like a typical commercial enterprise: employing non-Indians, catering to non-Indian customers, and competing with non-Indian businesses that were subject to the Board's jurisdiction. *Id.* at 1063-64.

San Manuel is applicable and controlling Board precedent. In more recent cases, the Board has continued to apply *San Manuel* to assert jurisdiction over Indian-owned and operated casinos like Respondent. See *Soaring Eagle Casino and Resort*, 361 NLRB No. 73 (October 27, 2014); *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (September 15, 2014);

As noted by the ALJ in his decision, the casinos at issue in the above cases are undistinguishable from the Respondent's Casino. (ALJD 2). Similar to the casinos in those prior cases, Respondent's Casino is a typical commercial enterprise, operating in, and substantially affecting, interstate commerce, with gross revenue of over 50 million in 2013. Likewise, the vast majority of Respondent's employees and patrons are not members of the Tribe. In addition, the Tribe is not a party to any federal treaty guaranteeing rights which would be abrogated by the enforcement of the Act. Furthermore, since there have been no changes to Respondent's operations since the prior case in *Casino Pauma*, was litigated, there is no reason to differ from the Board's prior finding that the Board has jurisdiction over Respondent's casino pursuant to *San Manuel*.

By its exceptions, Respondent is essentially arguing that *San Manuel* was wrongly decided, and it claims that the NLRA does not apply. However, the ALJ correctly relied on the Board's holding in *San Manuel* to find that jurisdiction is appropriate in this case. Thus, whatever policy arguments Respondent wants to present to the Board, the ALJ did not err in correctly applying *San Manuel*. The Board has followed this precedent in recent cases such as *Little River* and *Soaring Eagle*. Respondent has not offered compelling policy reasons for the Board to deviate from applying *San Manuel* in this case.

Respondent's reference to the Board's regulatory decision to decline

jurisdiction over the horseracing and dogracing industries is misplaced. As noted in *Chicago Mathematics,* 359 NLRB No. 41, slip op. at 13 (December 14, 2012), "[t]hat decision--which codified, through notice-and-comment rulemaking, the holding of prior cases-- was tailored to the unique circumstances of the horseracing and dogracing industries, including, notably, the pattern of short-term employment, which minimized the industries' impact on commerce and posed obstacles to the potential effectiveness of the Board's oversight. The Board did not establish any general standard for the exercise of [its] discretion to decline jurisdiction." Here, Respondent is in business year-round, 24-hours a day, and is part of an industry that has a significant impact on interstate commerce. Therefore, Respondent's assertion that the Board should decline jurisdiction over its Casino should be rejected.

3. The ALJ properly concluded that the Tribal Labor Relations Ordinance is preempted by the Act.

At the hearing, the ALJ allowed Respondent to introduce certain documents into the record, including a Tribal-State Compact between the State of California and the Tribe, a copy of a Tribal Labor Relations Ordinance (which is part of the Compact), and correspondence between Respondent and the Union indicating that the Union invoked the dispute-resolution procedure of the Tribal Labor Relations Ordinance (TLRO) in May 2012, concerning employees that were suspended for wearing union buttons. (RX 4- RX 13).

Respondent argues that the Tribal-State Compact and its TLRO, which was negotiated under the auspices of the federal Indian Gaming Regulatory Act of 1988 (IGRA) is controlling in this case, and that the Act is inapplicable. However, as

discussed below, the ALJ properly concluded that the NLRA preempts the State Compact and the TLRO. (ALJD 3).

- No conflict with IGRA. There is no evidence to establish that Board jurisdiction over tribal casinos would conflict with the IGRA. Moreover, the Board already concluded in *San Manuel* that there is no conflict between IGRA (a law which regulates gaming) and the National Labor Relations Act (a law which regulates labor relations); nor does IGRA "preempt" the Act. *Id.* at 1064. Furthermore, nothing in IGRA explicitly covers labor relations. Thus, arguments by Respondent of a conflict between the two laws, a need to accommodate the two laws, or preemption, should be rejected as without evidentiary or legal support.

- The NLRB has exclusive jurisdiction. Respondent claims that its employees' right to organize is governed by the TLRO, not by the NLRA. However, any argument by Respondent that the NLRB does not have subject matter jurisdiction over the underlying unfair labor practice allegations should be rejected. The plain language of Section 10(a) of the Act confers upon the Board alone the exclusive power to decide unfair labor practices affecting interstate commerce. Moreover, Section 10(a) empowers only the Board to cede its jurisdiction over unfair labor practices to a state or territory. Parties and/or states may not privately agree to divest the Board of its exclusive jurisdiction.

Nothing in IGRA explicitly divests the Board of its/this exclusive jurisdiction, or specifically provides that tribes or states have a right to enter into private agreements to "opt out" of the NLRA, or to divest the Board of its exclusive jurisdiction.

Thus, and in passing the NLRA, Congress has preempted the field of labor relations affecting interstate commerce and has established the Board as the exclusive

tribunal for labor relations matters, thereby explicitly divesting all other tribunals (states, tribal courts, etc.) of jurisdiction.

- The State Compact is irrelevant. The State Compact and the TLRO have no bearing on the jurisdictional issue in this case. As described above, nothing in IGRA specifically provides that Respondent and the State of California would have the authority to enter into a private agreement that divests the Board of exclusive jurisdiction to resolve unfair labor practices. In order to accept an argument by Respondent that a compact (upon approval by the Secretary of Interior) may oust the Board of its jurisdiction, one would have to read the IGRA as containing an implicit repeal of Section 10(a). However, and as the Supreme Court has stated, "[i]t is a familiar doctrine that repeals by implication are not favored." See, e.g., *Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n. 43 (1972); Cf. *Bowrin v. U.S. INS*, 194 F.3d 483, 489 (4th Cir. 1999)(applying "long-standing rule disfavoring repeal of jurisdictional provisions by implication," court held federal immigration statutes did not impliedly repeal jurisdiction of federal courts over habeas corpus petitions in deportation cases).

The TLRO and any state-created law or regulation (i.e. a model labor relations act set forth within the compact) is pre-empted by the Act. See e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-243, 244 (1959); *Machinists Lodge 76 v. Employment Relations Comm.*, 427 U.S. 132, 150-151 (1976). Once the Board validly asserts jurisdiction, any state or local system of labor relations that governs the same employers or employees must yield. See *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767, 773-774, 746 (1947); *Garner v. Teamsters, Local 776*, 346 U.S. 485, 490-491 (1953). Furthermore, in *San Manuel*, the existence of a model tribal labor relations ordinance did not impact or alter the Board's exercise of jurisdiction.

Therefore, Respondents argument that the ALJ erred in finding that the Tribal-State Compact is preempted should be rejected.

4. Deferral is not appropriate.

Respondent argued deferral as one of its affirmative defenses. However, administrative deferral to a state compact under the *Collyer* line of cases would also not be appropriate. Thus, any documents suggesting that the Union has utilized the dispute-resolution procedure under the compact are likewise irrelevant. In this regard, a state compact is not a collective-bargaining agreement. Thus, a contract and its interpretation are not at the center of the dispute. Moreover, the Union is not the exclusive collective-bargaining representative of Respondent's employees at this time; and there is no history of long and productive bargaining relationship between Respondent and the Union. Thus, none of the *Collyer* factors are present here.

5. *Bay Mills* does not alter the ALJ's conclusion regarding jurisdiction.

In its exceptions, Respondent objects to the ALJ's conclusion that *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024 (May 27, 2014) is not applicable. However, Respondent failed to provide any legal argument in support of this assertion. *Bay Mills* does not alter the ALJ's findings. That case involved a very different factual scenario and legal issues distinct from those in this matter. In *Bay Mills*, the Supreme Court held that sovereign immunity protected an Indian tribe from a lawsuit by the State of Michigan alleging that the tribe's casino was unlawful because it was located outside of Indian lands. In doing so, the Court applied the well-established principle that tribal sovereign immunity may be abrogated only by unequivocal congressional action. The Court held that Congress had expressly abrogated tribal immunity under the Indian Gaming & Regulatory Act ("IGRA"), but only with respect to casinos on Indian lands.

Those sovereign-immunity principles do not apply to the Board's assertion of jurisdiction over Respondent's on-reservation casino's labor relations with its employees under the NLRA. Sovereign immunity is distinct from sovereign authority, and Indian tribes do not enjoy sovereign immunity against the federal government and its agencies.

Bay Mills' sovereign-immunity analysis references the Supreme Court's longstanding reluctance to assume congressional intent to undermine Indian self-government. However, the Court did not call into question its Indian-law jurisprudence supporting the Board's position that not all attributes of tribal sovereign authority are entitled to the same protection; nor did it call into question the legal framework for application of general federal laws, like the NLRA, to Indian tribes.

Based on the above, the ALJ properly concluded that the Board has jurisdiction over Respondent.

B. The ALJ properly concluded that Respondent violated the Act by maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in "guest areas."

Work rules that explicitly restrict activities protected by Section 7 are unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If the rule does not explicitly restrict activity protected by Section 7, it nonetheless violates Section 8(a)(1) if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

The Court and Board have long established that, absent special circumstances, employees have the right to distribute union literature on their employer's premises during nonwork time in nonwork areas. *Republic Aviation Co. v. NLRB*, 324 U.S. 793,

803-804 (1945); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110-111 (1956); *Central Hardware Co., v. NLRB*, 407 U.S. 539, 543 (1972); *Stoddard-Quirk Mfg. Co.,* 138 NLRB 615, 621 (1962).

In addition, the Board has long held that gambling casinos, like the one operated by Respondent, are analogous to retail stores when evaluating the legality of no-solicitation/no-distribution rules. *Santa Fe Hotel & Casino,* 331 NLRB 723, 729 (2000), citing *Dunes Hotel*, 284 NLRB 871, 875 (1987) and *Barney's Club*, 227 NLRB 414, 417 (1976). While solicitations/distributions may be banned in gambling areas (a space that the Board equates with a retail store's selling floor) prohibiting this activity in other areas such as the public restrooms is unlawful. *Santa Fe Hotel & Casino,* 331 NLRB at 729-720; *Double Eagle Hotel,* 324 NLRB 112, 113 (2004).

Furthermore, in *Santa Fe Hotel & Casino,* 331 NLRB at 723, the Board found that the respondent hotel-casino violated Section 8(a)(1) of the Act by restricting its off-duty employees from distributing literature at the main entrance of its facility. The Board reasoned that work functions at casino entrances such as security, maintenance, and gardening are merely incidental to the casino's main function to allow patrons to gamble. Such space therefore cannot be designated as a working area for the purpose of restricting employee distribution/solicitation activity. *Id.*

Here, Respondent has a handbook rule that prohibits the distribution of literature "in working or guest areas at any time." The policy does not define guest areas. The rule is overbroad because employees could reasonably interpret this rule as prohibiting them from distributing in non-work areas of the Casino such as Casino entrances, sidewalks, restrooms, and parking lots, since those areas are utilized by guests. The Board has found similar rules to be unlawful. See *Flamingo Hilton-Laughlin,* 330 NLRB 287, 288 (1999)

(holding that rule banning off-duty employee distribution in "public areas" of employer's facility other than gambling areas was unlawful); *Dunes Hotel*, 284 NLRB at 874-875, 878 (rule prohibiting employee distribution in "areas open to guests or the public" was found unlawful). Furthermore, as discussed below, Respondent applied the above rule to restrict employees from lawfully distributing Union leaflets in the front entrance of the Casino on December 14, 2013.

Under the above law, and for the reasons discussed below, the ALJ properly found that Respondent's maintenance and enforcement of a handbook policy banning distribution in all "guest areas at any time" constitutes a violation of Section 8(a)(1) of the Act. (ALJD 11-12).

C. The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by prohibiting employees from leafletting at the Casino's customer main entrance, threatening to discipline employees if they did not stop, and photographing employees who engaged in leafletting.

Applying the above law to the facts of this case, Respondent has violated Section 8(a)(1) of the Act by prohibiting employees from leafleting at its customer main entrance; and by threatening employees with discipline and termination if they did not stop leafleting. Respondent's off-duty employees have the statutory right to leaflet outside in the main entrance of the Casino, and to communicate with their employer's customers about their working conditions. See *Santa Fe Hotel & Casino*, 331 NLRB at 723; *Handicabs, Inc.* 318 NLRB 890, 896 (1995), enfd. 95 F.3d 681 (8th Cir. 1996). As discussed below, Respondent failed to establish a showing that the ban was required to maintain the operation of the business.

The uncontroverted record evidence shows that throughout the day on December 14, 2013, Respondent's security officers prevented twelve off-duty employees from

distributing Union literature outside by the customer main entrance, to patrons walking to the Casino. The employee witnesses testified that after leafleting for about five to ten minutes, Respondent's security guards approached them, and stated that employees were not allowed distribute flyers in that area, that they could do so in the employee entrance in the back of the Casino, and demanded that they leave. When employees asked what would happen if they did not leave, the security guards threatened that employees would be reported to human resources, that they could be disciplined, or that they could terminated. Thereupon, the employees left the premises.

Respondent does not dispute that its security guards engaged in this conduct. Rather, Respondent's security guards testified that they were merely enforcing the no-distribution rule discussed above. However, since the leafleting took place on non-working time and in non-working areas, Respondent's prohibition of this activity is unlawful under Section 8(a)(1) of the Act. *Santa Fe Hotel & Casino,* 331 NLRB at 723 (entrance not a work area where activities performed there, such as security and maintenance, are incidental to the main function of the hotel and casino). Any contention by Respondent that the customer main entrance constitutes a working area because of the work performed there by security officers, gardeners, or valet drivers, should be rejected. The Board has held that such a contention would "effectively [destroy] the rights of employees to distribute literature." *Id.* at 730, quoting *United States Steel Corp.*, 223 NLRB 1246, 1248 (1976).

Respondent failed to demonstrate any special circumstances to justify restricting employees from leafleting on December 14, 2013. There is no record evidence that preventing employees from leafleting was necessary for the operation of Respondent's gambling business or the maintenance of security or discipline. The passage of patrons

was not adversely affected. Employees did not block entrances or driveways. Nor did they litter on the premises while leafleting. In addition, Respondent has no rule denying access to off-duty employees. Rather, employees are allowed to patronize the Casino on their own time.

Respondent relies on *Water Wheel Camp Rec. Area Inc. v. Larance, 642 F.3d 802 (9th Cir. Ariz. 2011),* to argue that Indian tribes like Respondent have a unique authority to control who enters their reservation land, and thus may restrict off-duty employees from soliciting on its property. While that case might be relevant if the Board did not have jurisdiction over Respondent, it is not applicable here since Respondent is subject to the Act. The ALJ properly noted that there is no support under Board law for Respondent's proposition that special rules allow Respondent to bar its off-duty employees from its property. (ALJD 13 fn.23). Moreover, in *Soaring Eagle*, the Board found that the respondent, an Indian casino (similar to Respondent) located on reservation land, violated Section 8(a)(1) of the Act by maintaining and enforcing a no-solicitation rule prohibiting the distribution of literature of campaign paraphernalia during nonworking time in nonwork areas. 359 NLRB No. 92, slip op. at 1 (2013). Accordingly, contrary to Respondent's assertions, its conduct in restricting employees from distributing Union literature during nonworking time in a nonworking area, violates Section 8(a)(1) of the Act.

The record also shows that Respondent, by Security Guard #1, confronted employees Maria Alba and Maria Tavarez while they were distributing Union flyers on December 13, 2013, and took a picture of them at about 1 p.m. It is well settled that, absent legitimate justification, photographing of employees engaged in union activities violates Section 8(a)(1) of the Act because such surveillance has the tendency to

intimidate employees in their efforts to engage in protected union activities. *F.W. Woolworth Co.*, 310 NLRB 1197, 1197 (1993).

At the hearing, Respondent suggested that Security Guard #1 is the same person as Oceguera. However, Tavarez repeatedly denied this claim, and credibly stated that she was certain that Oceguera was not the same person as the guard who took the picture. In addition, even though Oceguera testified at the hearing, he did not deny being present during this 1:00 p.m. interaction with Tavarez and Alba, nor did he deny seeing another security guard take a picture of the employees. Oceguera merely stated that he did not take pictures of the three individuals that he interacted with earlier that day, at 12:24 p.m.

Furthermore, since Respondent failed to provide photographs of its security guards subpoenaed by the GC to assist in identifying Security Guard #1, Respondent's noncompliance warrants an adverse inference against Respondent. See *ADF, Inc.*, 355 NLRB 81, 84-85 (2010), affd. 355 NLRB 351 (2010). Under these circumstances it is proper to conclude that Respondent, by Security Officer #1, surveilled employees engaged in union activity by photographing them, in violation of Section 8(a)(1) of the Act.

Based on the above, the ALJ properly concluded that Respondent's prohibition on the distribution of literature outside its main entrance, its threats to discipline and terminate employees who did not stop leafleting, and the photographing of employees engaged in protected activity constitute violations of Section 8(a)(1) of the Act. (ALJD 12-13).

D. The ALJ properly concluded that Respondent violated Section 8(a)(1) and (3) by issuing a written warning to employee Audelia Reyes for distributing Union literature on a nonworking area during nonworking time.

1. Applicable law

An employer violates the Act when it discriminates against employees for engaging in union or other protected concerted activities, and has no other basis for the adverse employment action, or the reasons proffered are pretextual. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel has the initial burden of establishing that antiunion sentiment was a motivating factor in the employer's adverse employment decision. *Id.* The elements commonly required to support such a showing are employee union activity, employer knowledge of that activity, and antiunion animus by the employer. *Wal-Mart Stores,* 340 NLRB 220, 221 (2003). Once a *prima facie* case of discrimination has been established, the burden shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the same action in the absence of the union or other protected activity. *Wright Line,* 251 NLRB at 1087.

2. Reyes engaged in Union activities and Respondent had knowledge of those activities.

Reyes was an open Union supporter. From 2012 to 2014, she distributed Union flyers to her coworkers at the employee entrance of the Casino at least seven times. In 2013, when Reyes wore a Union button at work, she was summoned to the human resources office, where Perez told her that she was not allowed to wear the button. Perez did not deny this at the hearing. Since Perez is an agent of Respondent, her knowledge

may be imputed to Respondent. *State Plaza, Inc.* 347 NLRB 755, 756-757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001).

Further, it is undisputed that Respondent was well-aware that Reyes distributed Union fliers to employees by the time clock on January 24, 2014, which resulted in Reyes receiving the written warning. In a meeting with Lerner on February 20, 2014, Reyes admitted that she distributed Union flyers by timeclock. Thus, Respondent had knowledge of Reyes' involvement in the organizing campaign.

3. Respondent exhibited anti-Union animus.

The record shows ample evidence of anti-Union animus by Respondent. The multiple 8(a)(1) violations discussed above demonstrate animus by Respondent. The violations found in the earlier case against Respondent further support a conclusion that Respondent harbored anti-Union animus.

4. Respondent failed to prove its *Wright Line* defense.

On March 6, 2014, Responded issued a written warning to Reyes stating that she violated the no-solicitation/no-distribution policy by distributing unauthorized material while on duty near the time clock. Respondent contends that Reyes' actions violated its policy because she engaged in distribution during working time and in a working area. However, in its brief in support of its exceptions, Respondent failed to cite to any authority to support this argument. Contrary to Respondent's assertions, the Board and court law discussed below establish that the distribution of flyers at issue occurred during "nonworking time" and in a "nonworking area."

In recognizing inherent differences between solicitations and distributions, the Board allows greater restrictions on Section 7 distributions than solicitations. *Eastex,*

Inc., 215 NLRB 271, 274-275 (1974), enfd. 550 F.2d 198 (5th Cir. 1977), affd. 437 U.S. 556 (1978). Thus, while a rule restricting solicitation generally must be limited to working time, a no-distribution rule may properly extend to working areas even on nonworking time. *Eastex*, 215 NLRB at 275, citing Stoddard-Quirk Mfg. Co., 138 NLRB at 615. However, as noted in *Eastex*, 215 NLRB at 275:

> [T]he term "working time" for this purpose "connotes the period of time that is spent in the performance of actual job duties, which would not include [for instance] time allotted for lunch and break periods." *Essex International, Inc.*, 211 NLRB 749 (1974). The term "working areas" embraces only those portions of a plant where production tasks actually are performed and does not include separate time-clock areas (*Massey-Ferguson, Inc.*, 211 NLRB 487 (1974)), much less parking lots and other areas outside the plant.

Here, Reyes handed out Union leaflets to coworkers while both she and those workers were in line waiting to clock out for the day. Reyes was on her rest break at that time. But, even if she had not been on break, the period of time when this activity occurred does not amount to "working time" since neither Reyes nor the other employees were engaged in performing actual job tasks.

Furthermore, the Board has found union solicitation occurring while employees are waiting in line to punch the timeclock to be protected because this period does not constitute "working time." See *Exide Alkaline Battery Division of ESB*, 177 NLRB 778, 778, n. 25 (1969). In *Exide*, the Board concluded that the termination of an employee who engaged in union solicitation while both employees stood in line waiting to punch out for the day violated Section 8(a)(1) and (3) of the Act. *Id.* at 778.

Likewise, in *Mueller Brass*, 204 NLRB 617, 619 (1973), the Board affirmed an ALJ's finding that an employer's application of its no-solicitation policy to employees who were "standing around waiting for their work assignments" was unlawful. *Id.* at 620. An employee in *Mueller Brass* (Blanton) testified that he distributed a Union button

to a fellow coworker (Reich) in an area near the timeclock after punching in at the start of his 11:00 p.m. shift, but his employer claimed that this happened at the control panel where employees were waiting for their work assignments. The Board found that even accepting the employer's version of events, the suspension for this conduct constituted a violation of Section 8(a)(1) and (3) of the Act. *Id.* at 619-620. The Board reasoned that since "Blanton and Reich were not expected to and could not have been working prior to receiving their work instructions, the time, 11:02 p.m, when [the respondent's witness] says he saw something pass between them, cannot truly be regarded as working time." *Id.* at 620. Thus, the ALJ properly concluded that Reyes and her coworkers were not on "working time" during the distribution of the flyers. (ALJD 16).

The ALJ also property concluded that the area by the timeclock where the distribution of flyers took place does not constitute a "working area." *Eastex,* 215 NLRB at 275. The Board has found that an employee hallway with several timeclocks and entrances to the restrooms and to several employee offices constituted a nonworking area even though employees walked through it to use the bathroom, locker room, and food-service area. *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (2013), decision reaffd. 361 NLRB No. 73 (2014).

The situation here is analogous to the events in *Mueller Brass* and *Exide.* Similar to the employees in *Mueller Brass* and *Exide*, Reyes and her coworkers, who were standing in line waiting to clock out, were not expected to and could not have been working seconds before their normal quitting time of 4:00 p.m. when Reyes passed out the Union flyer. Indeed, Reyes and her coworkers clocked out immediately after Reyes gave them the flier. Like the situation in *Mueller Brass* and *Exide,* the interaction here was of very brief duration lasting no more than a few seconds. It neither interfered with

nor delayed work production since the timeclock is located in a hallway restricted to employees, away from employees' work stations. The occurrence of any work activity at that hallway is merely incidental to the Respondent's main function, and is insufficient to designate that area as a "working area." See *Soaring Eagle*, 359 NLRB at 17, citing *Santa Fe Hotel & Casino*, 332 NLRB at 729 and *US Steel Corp.*, 223 NLRB at 1247-1248. Therefore, Reyes' distribution of leaflets by the timeclock, seconds before punching out, was protected because it took place during nonworking time in a nonworking area. *Massey-Ferguson, Inc.*, 211 NLRB at 487.

In addition, the issuance of Reyes' warning is wholly unprecedented. There is no evidence that anyone else was ever disciplined by Respondent for violating the no-solicitation/no-distribution rule. These circumstances, along with Respondent's anti-Union animus warrant a finding that Respondent would not have applied its no-solicitation/no-distribution policy so broadly as to prohibit Reyes from handing out a few flyers at a time when none of the employees were supposed to be working. See *Mueller*, 204 NLRB at 620. See also, *Shenango Inc.*, 237 NLRB 1355, n. 3, 1356-1357 (1978)(employer unlawfully suspended employee who distributed union leaflets by timeclock); *Conolon Corp.*, 175 NLRB 27, 28 (1969) (employer unlawfully reprimanded an employee who passed out union literature as she waited in line to punch out at the timeclock).

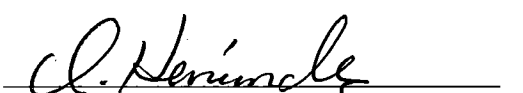
Therefore, the ALJ properly concluded that Respondent violated Section 8(a)(1) and (3) of the Act by issuing Reyes a written warning on March 6, 2014. (ALJD 16-17).

V. CONCLUSION

The record and Board precedent provide abundant support for the ALJ's credibility determinations, findings, and conclusions that the Board has jurisdiction over Respondent, and that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in "guest areas;" by interfering with the distribution of Union literature by employees in these areas, including the public or guest entrances to its Casino; by threatening to discipline employees who distributed Union literature in these areas; and by photographing employees who distributed Union literature in these areas. The record and Board law also support the ALJ's finding that Respondent violated Section 8(a)(1) and (3) of the Act by issuing employee Audelia Reyes a written disciplinary warning for distributing Union literature on a non-working area during non-working time.

Accordingly, it is recommended that the ALJ's rulings, findings, and conclusions be affirmed and that Respondent's exceptions be rejected.

Respectfully submitted,



Irma Hernandez
Counsel for the Acting General Counsel
National Labor Relations Board
Region 21

Dated at Los Angeles, California, this 4th day of September, 2015.

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Answering Brief to Respondent Casino Pauma's Exceptions to the Administrative Law Judge's Decision** in Cases 21-CA-125450, 21-CA-126528, and 21-CA-131428, was submitted by E-filing to the Office of the Executive Secretary of the National Labor Relations Board, on September 4, 2015. The following parties were served with a copy of the same document by electronic mail.

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Dated at Los Angeles, California, this 4th day of September, 2015