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

CASINO PAUMA

and

Cases 21-CA-103026
21-CA-114433

UNITE HERE INTERNATIONAL UNION

Counsel for the General Counsel's Answering Brief to Respondent's Exceptions

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I. INTRODUCTION

On June 25, 2014, Administrative Law Judge Jeffrey D. Wedekind ("ALJ") issued his decision in this matter, making findings of fact and conclusions of law that: the NLRB had jurisdiction over Respondent's Casino; and 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.

On August 4, 2014, Respondent filed exceptions to the ALJ's decision, and a brief in support, challenging the ALJ's findings, credibility resolutions, and legal conclusions. For the reasons set forth below, the Board should reject Respondent's arguments.

II. OVERVIEW

Casino Pauma ("Respondent") operates a casino and entertainment venue ("the Casino") 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 operating in, and substantially affecting, interstate commerce, and the majority of Respondent's employees and patrons are not members of the Tribe.

Among its employees, Respondent employs service and maintenance employees, such as housekeepers, engineers, slot technicians, cooks, and food and beverage workers. Charging Party UNITE HERE International Union ("the Union") has been involved in an organizing drive for Respondent's employees. In May 2012, and in support of the organizing effort, some of Respondent's employees began wearing a small Union button at the Casino. In response,

Respondent threatened the employees with discipline if they continued to wear the Union button, and disciplined those employees who would not take the Union button off.

In April 2013, Respondent's employees decided to start wearing the Union button again at the Casino. During this time period, Respondent sent out an e-mail to its supervisors and managers, reminding them of the May 2012 events, and asking them to go and inspect their team members to see if they are wearing buttons. With regard to employees that were wearing the Union button, Respondent told them they could not wear Union buttons; threatened employees with discipline if they did not take off or continued to wear the buttons; and disciplined one employee (Victor Huerta) for having worn the Union button.

As the ALJ concluded, Respondent's employees have a statutory right to wear Union buttons under clear Board law. Respondent failed to establish any special circumstances that would enable it to strip the employees of their statutory right. Even though Respondent may provide these employees with a shirt (uniform), and even if some of these employees may, at times, come into contact with customers, neither of these facts establish special circumstances that would permit Respondent to prohibit the buttons.

Respondent, citing to an employee handbook provision, argues that it maintains a policy that prohibits all employees, at all times, from wearing Union buttons. Respondent explained that this policy is maintained because the Respondent is concerned that a Union button may "offend" its patrons. However, Board law makes clear that such reasoning does not constitute special circumstances so as to allow Respondent to prohibit Union buttons. Respondent's reasoning not only lacks legal support, but, and as noted by the ALJ, it is also undercut by the fact that many of its employees have limited contact or no contact with customers, and yet the policy applies at all times; and the record evidence as a whole reflects that Respondent's policy is not regularly enforced.

III. PROCEDURAL ISSUES

A. The Complaint

The underlying Consolidated Amended Complaint (GCx.1(k)),[1] which issued on November 22, 2013, was amended by the General Counsel at trial. Some minor amendments were made at the beginning of the trial (see Tr. 15-16); and then following Respondent's introduction of an employee-handbook policy, the General Counsel amended the complaint to allege that the policy was unlawful (Tr. 324-325). For the remainder of this brief, the General Counsel will refer to the Consolidated Amended Complaint, as amended at trial, as the Complaint.

B. Respondent's attempt to introduce evidence by way of its post-hearing brief

Along with its post-hearing brief, Respondent filed at the same time a declaration and various nonrecord documents (34 in all), and asked that the ALJ take judicial notice of the facts therein in support of Respondent's arguments as to the jurisdictional issue. The General Counsel and Charging Party each filed motions to strike the declaration and documents. The ALJ ultimately concluded that it was unnecessary to either take judicial notice of the documents, or to rule on the motions to strike. (ALJD 4).

IV. STATEMENT OF THE ISSUES

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

- The Board has jurisdiction over Respondent's Casino.

[1] In this brief, citations to the transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "GCx." followed by the appropriate exhibit number; Joint exhibits will be referred to as "Jx." followed by the appropriate exhibit number; Respondent's exhibits will be referred to as "Rx." followed by the appropriate exhibit number; and Charging Party exhibits will be referred to as "CPx." followed by the appropriate exhibit number. Citations to the ALJ's decision will be referred to as "ALJD" followed by the appropriate page number.

- In violation of Section 8(a)(1) of the Act, Respondent prohibited employees from wearing Union buttons.
- In violation of Section 8(a)(1) of the Act, Respondent threatened employees with discipline or future reprisals if they did not remove Union buttons or continued to wear the Union buttons.
- In violation of Section 8(a)(1) of the Act, Respondent disciplined (written warning) an employee (Victor Huerta) for wearing a Union button.[2]
- Respondent's maintenance of a handbook policy prohibiting employees from wearing buttons (including Union buttons) violates Section 8(a)(1) of the Act.
- In violation of Section 8(a)(1) of the Act, Respondent instructed its supervisors and managers to engage in surveillance of employees to discover their Union and/or protected, concerted activities.

V. STATEMENT OF THE FACTS

A. The Casino

A Joint Stipulation (Jx.1) filed in this matter details Respondent's operation of the Casino (discussed at ALJD 3). Briefly summarized, Jx. 1 explains that:

Respondent operates a gaming and entertainment establishment (the Casino) in Pauma Valley, California. The Casino has slot machines, 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).[3] However, there is no record evidence of any Tribal involvement in the day-to-day operation of the Casino.

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[2] The ALJ found it unnecessary to decide whether Huerta's discipline also violated Section 8(a)(3) as it would not materially affect the remedy. (ALJD 7, fn. 19).

Respondent is open 24 hours a day, 7 days a week, to members of the public. 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, and 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).

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.1, 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, fn. 6; Tr. 28).

B. No federal treaty

There is no federal treaty between the Tribe and the federal government. (ALJD 2; Tr. 35).

[3] A list of all other names the same Tribe goes by is set forth on page 259 of the Transcript.

C. Respondent's Employees

1. Classifications

At the Casino, and among other classifications, Respondent employs slot technicians (who install, remove, and maintain slot machines); engineers (who perform miscellaneous maintenance work); housekeepers (who clean); and cooks and other food and beverage employees (who work at the Casino's restaurants or in the Casino kitchen). (ALJD 1; Tr. 57, 79-80, 110-112, 153, 179, 244).

2. The Casino provides employees with a shirt, and an ID badge

Respondent provides its employees with a shirt to wear, although different classifications of employees wear different kinds of shirts. Some employees are also given pants. Thus, and as the record reflects, appearances of the Casino's employees vary. (ALJD 6; Tr. 59, 60, 83, 113, 155, 180).

Some shirts given to Casino employees have pockets, and the record reflects that employees involved in repair work may wear their own pocket protectors to hold tools, pens, etc. (Tr. 60).

All of Respondent's employees are provided an ID badge (which are issued by the Pauma Gaming Commission). Employees clip the ID badge onto their shirts. Employees must wear the ID badge at all times, and even employees that handle food must wear the ID badge while they are handling food. (See GCx.6 (sample ID badge); Tr. 104, 180).

The record reflects that some of Respondent's employees have added items to their ID badges, such as badge reels,[4] and decorative backing (holders) for the ID badge, without objection from Respondent. (ALJD 6; See Tr. 84-85, 98, 101, 102-103, 164-165; GCx. 8; GCx. 9; GCx. 11).

[4] Some employees have put stickers on the badge reels like a heart or "clearly visible" happy faces). In making this argument, the General Counsel is referring to stickers placed on badge reels, not on to the ID badge.

The record also reflects that prior to the April 2013 events in this case, housekeepers had worn holiday-themed and other types of decorative pins on their shirts, or pinned to their ID badges, without objection from Respondent. (ALJD 6; See Tr. 92, 100, 119-121, 140, 200-27, 235-242; GCx. 4, GCx. 7).

3. Limited customer contact

During their shifts, Respondent's service and maintenance employees perform duties in part, or sometimes entirely, in non-public areas. (ALJD 6, fn. 17). In support, see, for example: (1) slot technician spends about 40% of his day working in the tech shop (Tr. 58); (2) housekeepers are assigned to clean administrative offices (Tr. 199, 234); (3) employees who perform work in the Casino kitchen don't see customers (Tr. 82, 179); (4) engineer work performed in various non-public areas (Tr. 110-112); (5) Buffet employees perform duties before the Buffet is open to customers. (Tr. 244).

Moreover, Respondent's employees eat at an employee-only cafeteria, which is located in the Casino. (Tr. 121).

D. Union organizing; Employees wear Union buttons

1. Background

Since about May 2012, the Union has been involved in an organizing campaign of Respondent's employees (ALJD 1), including the service and maintenance employees described above. (Tr. 48-49). In May 2012, the Union distributed a Union button for employees to wear in support of the organizing.

The Union button is small (about 1 inch in diameter); has the Union's name on it; has a "Yes" box checked; and has a picture of a fork, knife, and key. (ALJD 1; Tr. 49, 51, 61, 86, 114, 157, 181, 245; see also GCx.2 (the Union button)).

2. May 2012 events

In May 2012, some of Respondent's employees wore the Union button to work. Although some did not have anything said to them the few days they wore it that month, other employees were specifically told by Respondent's supervisors and managers to take the Union button off, and that they could not wear the Union button. The record reflects that employees who did not agree to take off the Union button were disciplined, and they were only permitted to return to work (following their suspension) if they agreed not to wear the Union button. (Tr. 63, 88-90, 114-115, 158-161, 169-170, 182-185, 245-246).

3. March 27, 2013 Union meeting

On March 27, 2013, during a Union meeting with employees, it was decided that employees would begin wearing the Union button again. (Tr. 49).

E. The April 2013 events

1. Respondent informs its agents to inspect uniforms for buttons

By e-mail dated April 4, 2013, Human Resources (HR) Director Annelle Lerner sent an e-mail to Respondent's supervisors and managers. The e-mail states, in relevant part:

> Recently several Guest Service Standards and policies have been found to be "relaxed" and needs to be addressed with our respective Team Members in addition to general cleanliness/sanitization and casino rules. As such, please review the following with all of your Team Members to ensure that we continue to improve and bring our property into alignment with our Guest's, Stakeholder's and OUR expectations:

> **Wearing of pins, etc. on badge or uniform**. Please be sure to visually inspect your Team Members to ensure they are not sporting pins or stickers on their licenses as recently a Lead was found to be sporting an "addition" to their badge. Kindly direct them to remove and refrain. *(Some of you may recall we addressed this topic last year when several Team Members were suspended...need your help again!*)(emphasis in original)
>
> (ALJD 1; GCx.5; GCx. 13).

One of the recipients of this e-mail, Slot Tech Supervisor Richard Galvan, then forwarded the e-mail to some of the slot technicians (Tech Level II's) that work underneath him (Galvan), with instructions (from Galvan) for them to check the Tech I's (who are below the Tech Level II's). (GCx. 5).

On April 7, 2013, one of those Tech Level II's that received this e-mail and instruction from Galvan, asked a Tech Level I (James Bayton) to come over to the computer. There, the Tech Level II told Bayton that he wanted to draw his attention to a paragraph in the e-mail about wearing buttons. Bayton testified that he was called over and shown the policy because of his affiliation with the Union (i.e. Union supporter). (GCx. 5; Tr. 64-65; Tr. 76).

2. Respondent addresses organizing

In addition to the e-mail, and also in April 2013, Respondent began issuing various memos to employees, addressing the Union organizing going on in the Casino. In one memo, and in response to "numerous questions" it had received, Respondent informed employees that they have a policy that prohibits the wearing of buttons. (ALJD 1; See CPx. 6; CPx. 7).

3. Respondent prohibits employees from wearing Union buttons

On various dates in April 2013, Respondent prohibited employees from wearing Union buttons. (ALJD 1, ALJD 7, fn. 19)(Complaint paragraphs 6 and 8).

For example, on April 5, 2013, Respondent, by Housekeeping Department Supervisor Maria Rosa Silva, in Silva's office at the facility, told employees that they cannot wear anything on their badges or uniforms. (See Tr. 42 – Respondent admits allegation).

In or about April 2013, employee Catalina Gutierrez (housekeeper) was cleaning in an administrative office (non-public area), and wearing the Union button. There, Facilities Director Michael Chambers approached her and told her to remove the Union button. She asked why. He said please. She then removed the button. Later that day, Chambers saw Gutierrez (no longer wearing the Union button) and he told her thank you. (Tr. 234-235).

On April 12, 2013, slot technician James Bayton wore the Union button to work. At one point during his shift, he was called into the slot shift office. There, Assistant Manager George Staley told Bayton to remove the Union button. Bayton asked what would happen if he didn't. Staley said he was asking him to remove the button. (Tr. 67). Bayton said okay and left the office, although he did not take the button off (discussed more below).

On April 17, 2013, employee Victor Huerta (Lead Engineer) was wearing the Union button at work. At one point during his shift, he was standing outside the front of the Casino. There, Respondent, by Security Guard Donald Lougee, told Huerta to take the Union button off, that it doesn't go with the uniform, and that it was against the policy. Huerta then took it off. (Tr. 117-118). Thereafter, Lougee sent an e-mail to HR Director Lerner about this encounter. That e-mail is entitled "Union Pins" – and describes how Lougee had observed Huerta wearing a UNITE HERE pin. (GCx. 3). Lerner then forwarded the e-mail to Facilities Director Michael Chambers. (GCx.3)

4. **Respondent disciplines Victor Huerta, and threatens him with future reprisal if he wears a Union button in the future**

On Thursday, April 18, 2013, one day after Security Guard Lougee had told employee Victor Huerta to take off his Union button (described above), Huerta received an e-mail from Facilities Director Michael Chambers. (ALJD 1, ALJD 7, fn. 19; Tr. 119; GCx. 10 (the e-mail)).

The e-mail, entitled "Policy violation – Note to File" states, in relevant part:

> Victor,
>
> I received the report that Security approached you on April 17th for uniform policy violation. I also understand you remove (sic) the item from your uniform as asked by Security. I want to remind you that if a second incident of this nature occurs at anytime in the future, may be cause for Suspension pending.
>
> (GCx. 10)(Complaint paragraphs 5(a), 5(b), and 11).

Thus, and even though Huerta had taken the Union button off when asked, he was issued a written warning.[5]

5. **Respondent threatens employees with discipline or future reprisal if they wore or did not take off Union buttons**

On various dates in April, Respondent threatened employees with discipline or future reprisal if they wore or did not take off the Union button. (ALJD 1, ALJD 7, fn. 19)(Complaint paragraphs 9, 10(a), 10(b), and 11).

On April 10, 2013, food and beverage employee Veronica Gazcon wore the Union button at work. While working in the Casino kitchen (a non-public area) that day, she was called into a supervisory (kitchen) office by Sous Chef Supervisor Sergio Redona. There, Redona told Gazcon that she had to take the Union button off or the same thing that happened to her last year (as Gazcon had been suspended in May 2012) was going to happen. Gazcon said that although she believed she had rights, if she was going to get suspended, she would take it off. Redona told her

[5] Respondent submits that employees are only disciplined if they refuse to take off a button when asked. (Tr. 335, 354). Yet, it disciplined Huerta.

that he was not for or against the Union, but that it was the policy of the casino. Gazcon then took off the button. (Tr. 91-92).

As described earlier in this brief, and during his shift on April 12, 2013, slot technician James Bayton had been asked to take off the Union button he was wearing. But, he didn't immediately take it off. Later during the same shift, and while still wearing the Union button, he was performing work in the slot tech shop (a non-public area). While working in there, Assistant Manager George Staley and CEO Harry Taylor came into the tech shop to speak with Bayton. CEO Harry Taylor did the talking, and told Bayton that he had to take the Union button off. Bayton asked what would happen if he didn't. CEO Taylor told him he would be suspended. Bayton then took the button off. (Tr. 68).

On April 12, 2013, employee Alicia Andaluz (who works in the Pizzeria/Deli) wore the Union button to work. While walking in a hallway to clock in, Sous Chef Supervisor Jason Mosser saw Andaluz, and asked her to go to the kitchen office. There, and through an employee translator, Mosser told Andaluz that, like when she had worn the Union button in May 2012 (Andaluz was among the employees who wore the button and had been suspended in May 2012), wearing the Union button was insubordination. He said that if she did not remove it, the same thing that happened to her last year would happen again. Andaluz then removed the Union button. (Tr. 162-164).

In or about the middle of April 2013, employee Maria Tavarez (Pantry Attendant – who spends entire shift in Casino kitchen) wore the Union button to work. (Tr. 186). Tavarez has no customer contact with employees in the kitchen, and she did not go on the Casino floor during her shift that day. (Tr. 179, 191, 195-196). During her shift, Sous Chef Supervisor Jason Mosser called her into the kitchen office. There, and using an employee translator, Mosser told Tavarez that she would have to take off the Union button. She asked why. He said because they had

received an e-mail that employees can't have anything on their uniform, any button, pins, or anything like that. Tavarez asked what would happen to her if she did not take off the button. Mosser told her she would be sent home until she decided to come to work without the button. Tavarez then took the Union button off. (Tr. 187-188).

On April 20, 2013, Buffet waitress Maria Tavarez[6] wore the Union button to work. While attending a meeting being run by Supervisor Barbara Osuna with her co-workers, Osuna looked at her and then said, "Maria, take off that button." Tavarez asked what would happen if she didn't. Osuna said she will have to send her home and take her badge away. Tavarez took off the button. (Tr. 246-247).

F. Respondent's handbook policy

During the hearing, Respondent presented evidence that it maintains and distributes to employees (Team Members) a handbook.[7] (ALJD 6). Within this handbook, there is a section called *Personal Appearance Guidelines*, which contains the following language:

> The Pauma Gaming Commission ID badge is part of your uniform and must be visible at all times at work. Except for this badge, Team Members may not wear any badges, emblems, buttons or pins on their uniforms (unless designated by the Casino). (Rx.2)

Per a Respondent witness, and regardless of where an employee is at work, the rule applies at all times. Moreover, employees that violate the rule are subject to discipline up to and including termination. (Tr. 307).

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[6] Note, and to avoid confusion when reviewing the record, the General Counsel called two separate witnesses (both employed by Casino Pauma) during the hearing who have the same name.

[7] There is no evidence that this handbook is distributed/applied to Supervisors. CEO Taylor testified that this is a handbook for Team Members. (Tr. 299).

VI. ARGUMENT

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

In his decision, the ALJ concluded that the Board has jurisdiction over Respondent's Casino. (ALJD 2-5). The ALJ's conclusion is supported by record evidence and Board law.

1. Applicable law[8]

In *San Manuel Indian Bingo & Casino*, the Board set forth a two-phase analysis to determine when the Board should exert jurisdiction over Native American-run enterprises through its exercise of discretionary jurisdiction.[9] As the Act is a statute of general applicability,[10] 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.*[11] 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.[12]

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." [13] 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."[14] 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

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[8] The General Counsel speaks for itself. Thus, any assertions (mischaracterizations) by Respondent in its brief as to what the General Counsel's legal theories or legal positions should be disregarded.
[9] 341 NLRB 1055 (2004), enf'd, 475 F.3d 1306 (D.C. Cir. 2007).
[10] *Id.* at 1059 (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960).
[11] 751 F.2d 1113 (9th Cir. 1985).
[12] 341 NLRB at 1059 (citing *Coeur d'Alene*, 751 F.2d at 1116)
[13] *Id.* at 1062
[14] *Id.*

unique to its status as an Indian tribe.[15] 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.[16]

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.[17] 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.[18]

2. <u>The Board has jurisdiction over Respondent's Casino</u>

Applying the above law to the facts of this case, there is similarly no barrier to the Board's exercise of discretionary jurisdiction over Respondent's Casino because the *Coeur d'Alene* exceptions are inapplicable. First, Respondent does not contend that the Tribe is a party to any federal treaty guaranteeing rights which would be abrogated by the enforcement of the Act. Second, exerting jurisdiction over casinos operated by Native American tribes does not touch exclusive rights of self-government in purely intramural matters.[19] Moreover, as the Board held after an exhaustive analysis in *San Manuel*, there is no evidence in the statutory language or legislative history of the Act to indicate that Congress sought to exclude Indian Tribes from the Board's jurisdiction.[20]

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[15] *Id.* at 1063.
[16] *Id.*
[17] Id. at 1063-64.
[18] Id. at 1063-64.
[19] See *San Manuel*, 341 NLRB at 1063 (observing that the operation of a for-profit casino is not an exercise of self-governance because intramural matters generally are limited to topics involving "tribal membership, inheritance rules, and domestic relations" (quoting *Coeur d'Alene*, 751 F.2d at 1116)).
[20] *Id.* at 1058-60.

Finally, just as in *San Manuel*, there are no policy considerations that caution against exerting jurisdiction over Respondent. Like the employer in *San Manuel*, Respondent is a typical commercial enterprise operating in, and substantially affecting, interstate commerce, and the majority of the Casino's employees and patrons are not members of the Tribe. Accordingly, the Board should exert jurisdiction over Respondent.

In response to Respondent's arguments in its exceptions as to the ALJ's decision on the jurisdictional issue, the General Counsel submits the following:

- *San Manuel* is applicable and controlling Board precedent. By its exceptions, Respondent is essentially arguing that *San Manuel* was wrongly decided. However, the ALJ correctly applied the Board's holding in *San Manuel* to the facts of this case to reach his conclusion on the jurisdictional issue. Thus, whatever policy arguments Respondent wants to make to the Board, the ALJ did not error in correctly applying *San Manuel*. And, regarding Respondent's arguments about the soundness of the Board's decision in *San Manuel*, the D.C. Circuit enforced the decision.

- Respondent makes certain arguments about the impact of certain Board cases that have recently been vacated and remanded to the Board as a result of the Supreme Court's decision in *Noel Canning*. Those cases are *Chickasaw Nation d/b/a Winstar World Casino*, 359 NLRB No. 163 (2013); *Soaring Eagle Casino and Resort*, 359 NLRB No. 92 (2013); *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013)). The remanding of these cases does not alter the validity of the underlying complaint in this matter.

The underlying complaint in this matter is premised on the jurisdictional policy expressed in the Board's *San Manuel* decision and, in addition, is consistent with the General Counsel's position in the other three cases cited above, all of which, although issued by a panel that under *Noel Canning* was not properly constituted, are based on a reasonable construction of the Act.

Accordingly, the General Counsel urges that the Board adopt their rationale and rely on their reasoning in sustaining this complaint.

- *Bay Mills* does not alter the ALJ's conclusion regarding jurisdiction. Respondent's arguments regarding the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. ____ (May 27, 2014) are unpersuasive. *Bay Mills* 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.

- The ALJ's decision finding it unnecessary to take judicial notice of Respondent's post-hearing exhibits was proper : Respondent excepts to the ALJ's refusal to take judicial

notice of a sworn declaration and exhibits that Respondent referenced and attached to its post-hearing brief. The ALJ properly concluded that the judicial notice of the declaration and documents was not necessary because the Tribe's alleged prior history of poverty, or alleged dependence on Casino revenue to fund governmental functions, would not alter the outcome.[21] Furthermore, the ALJ properly concluded that judicial notice would be inappropriate (on the issue of how revenues are distributed) given Respondent's Counsel's representation at hearing that it would not put on such evidence. (ALJD 4, ALJD 4, fn. 9).

Finally, any argument by Respondent that the need to supplement the record with the declarations or exhibits was necessary because it was somehow caught off guard at the hearing should be rejected as disingenuous. The record in this matter supports the inference that this was instead a tactical decision, in order to avoid the various evidentiary and subpoena compliance pitfalls Respondent would have faced had it sought to introduce the same documents at hearing.

- No conflict with IGRA. There is no conflict between the NLRA and IGRA. Respondent failed to call any witness or produce any evidence in support of an argument that Board jurisdiction over tribal casinos would conflict with the federal Indian Gaming Regulatory Act of 1988 (IGRA). Moreover, the Board already concluded in *San Manuel* that there is no conflict between IGRA (a law which regulates gaming)[22] and the National Labor Relations Act (a law which regulates labor relations); nor does IGRA "preempt" the Act. *Id.* at 1064. Thus, any 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. 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

[21] For reasons similar to those discussed above, the ALJ's citation to the three 2013 cases does not alter the General Counsel's belief that the cases are based on a reasonable construction of the Act.
[22] Nothing in IGRA explicitly covers labor relations.

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.

- No state compact introduced. Respondent did not present evidence at hearing of any alleged compact that the Tribe may *currently* have with the State of California. By failing to introduce evidence of any alleged existing compact, Respondent has therefore waived its right to argue the existence or relevancy of any such compact. By not seeking to introduce such a compact at trial, Respondent has foreclosed the General Counsel from objecting to the authenticity and/or relevance of any such compact, or asking questions about the terms of the compact, and/or the possible voiding, amending, etc., of any such compact.

- Assuming arguendo that any alleged state compact arguments are taken into consideration, the General Counsel briefly submits the following arguments:

(1) 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."[23]

(2) Any state-created law or regulation (i.e. a model labor relations act set forth within the compact) would be pre-empted by the Act, in any event. 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).

(3) In *San Manuel*, the existence of a model tribal labor relations ordinance did not impact or alter the Board's exercise of jurisdiction.

(4) Administrative deferral to a state compact under the *Collyer* line of cases would also not be appropriate. 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.

- Commercial operation. Any claim by Respondent that under IGRA, that the use of casino revenues to fund the Tribe's governmental services (and to make cash payments to tribal members) transforms the gaming operation into an intramural activity or governmental entity,

[23] 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).

should be rejected. However the money is spent, the Tribe earns it by running a multi-faceted commercial business that employs hundreds of non-Indian workers entitled to federal protections.

- To the extent the Respondent argues that the Board lacks jurisdiction based on the view (decisions) of the 10th Circuit, the Board, in *San Manuel*, expressly noted that although the 10th Circuit disagrees with the jurisdictional test it was adopting, it "stands in contrast to the other courts of appeals that have examined the issue." *Id.* at 1060 n.16.

- For the reasons set forth by the ALJ in his decision (ALJD 3, fn. 7), Respondent's arguments about Respondent's own statements to employees (telling them that they are protected under the NLRA), was properly taken into consideration by the ALJ during his jurisdictional discussion. Respondent's admissions may be received into evidence, even if in the form of an opinion or conclusion of law. The evidence, at a minimum, reflects Respondent's disingenuousness of its claims. Finally, the ALJ's decision makes clear that even in the absence of such statements, the Board would have jurisdiction over Respondent's casino.

B. The ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing the Union button; and by threatening employees with future discipline if they wore or did not take off the Union button.

In his decision, the ALJ properly concluded that Respondent violated the Act by prohibiting employees from wearing Union buttons and threatening employees with future discipline if they wore or did not take off the Union buttons. The ALJ's decision is supported by Board precedent and the record evidence.

1. Applicable law

Section 7 of the Act protects the right of employees to wear attire and insignia addressing employment-related issues while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-04 (1945)(upholding right of employees to wear union buttons while on the job); *AT&T Connecticut*,

356 NLRB No. 118, slip op. at 1 (Marc. 24, 2011)(upholding right of employees who enter customers' homes to express employment-related grievances by wearing "prisoner" T-shirts reading "Inmate #" and "Prisoner of AT$T [the employer]").

An employer may only restrict such activity by presenting "substantial evidence of special circumstances" sufficiently important to outweigh Section 7 guarantees. *Government Employees*, 278 NLRB 378, 385 (1986)(explaining that "[t]he law is clear that substantial evidence of special circumstances . . . is required before an employer may prohibit the wearing of union insignia, and the burden of establishing those circumstances rest[s] on the employer" and holding that an employer's "generalization and conclusions" are insufficient to establish special circumstances); see also *Albertsons, Inc.*, 351 NLRB 254, 256-57 (2007)(general testimony from labor relations department counsel was insufficient to meet burden); and *Albis Plastics*, 335 NLRB 923, 924-925 (2001)(discussion of Board cases therein demonstrates the evidentiary burden an employer has to prove special circumstances (in the particular cases, the alleged special circumstance was safety concerns)).

The Board has found special circumstances when the display of union insignia would likely jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image the employer has established as part of its business plan. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007)(finding no special circumstances despite nondiscriminatory nature of employer's prohibition on buttons and fact that employees had customer contact and were required to wear uniforms).

The mere fact that an employer has a dress code or policy is not a special circumstance that warrants depriving employees of their right to wear union-related insignia at work. *Woonsocket Health Center*, 245 NLRB 656, 659 (1979); *P.S.K Supermarkets*, supra at 35; *Quantum Electric, Inc.*, 341 NLRB 1270, 1274, 1280-81 (2004)(finding unlawful employer's discharge of employee

for wearing union shirt because ban on all shirts with graphics or printed text other than company-issued shirts was not justified by special circumstances); *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993)(finding unlawful employer's prohibition of union jackets, as no special circumstances were demonstrated).

Moreover, the fact that a policy applies to all buttons, not solely union buttons, is not a special circumstance. *Harrah's Club*, 143 NLRB 1356, 1356 (1963), enf. denied 337 F.2d 177 (9th Cir. 1964); *Floridan Hotel of Tampa*, 137 NLRB 1484 (1962), enfd. as modified 318 F.2d 545 (5th Cir. 1963).

Next, the fact that employees come into regular contact with customers or that customers may be displeased by employees' wearing of union-related insignia is insufficient to establish special circumstances. *P.S.K. Supermarkets*, 349 NLRB at 35; *Howard Johnson Motor Lodge*, 261 NLRB 866, 868 n.6 (1982) (employer not justified in prohibiting union buttons in order to avoid potentially adverse reaction by customers because employees' rights do not depend on "the pleasure or displeasure of an employer's customers"), *enforced*, 702 F.2d 1 (1st Cir. 1983); *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982) (employer's desire to avoid creating controversy among customers insufficient justification for ban on union insignia); *Eckerd's Market, Inc.*, 183 NLRB 337, 337–38 (1970) (general evidence of customer displeasure with union buttons insufficient to establish special circumstances); *Floridan Hotel of Tampa, Inc.*, supra at 1486 (fact that employees "come in contact with . . . customers does not constitute such 'special circumstances' as to deprive them of their right, under the Act, to wear union buttons at work").

Instead, the Board will find special circumstances in cases involving employees with customer contact only where there is substantial evidence that the display of union insignia "unreasonably interefere[s] with a public image which the employer has established, as part of its business plan" through strict dress code requirements. *Meijer, Inc.*, 318 NLRB 50, 50 (1995)

(internal quotation marks omitted) (citing *United Parcel Service*, 312 NLRB 596, 597 (1993), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994)) (employer's ban on union pins unlawful where employer offered no evidence that pins interfered with company's public image and did not enforce its policy in a consistent and nondiscriminatory manner), *(Meijer) enforced*, 130 F.3d 1209, 1217 (6th Cir. 1997); *W San Diego*, 348 NLRB 372 (2006)(Board held that the employer, a high-end hotel chain, could prohibit in-room delivery servers from wearing union-related buttons where it had established special circumstances because it sought to provide a unique "trendy, distinct, and chic" "Wonderland" experience to customers).

2. <u>Respondent's prohibitions and threats unlawful – no special circumstances</u>

Applying the above law to the facts of this case, the ALJ properly concluded that Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing the Union button; and by threatening employees with future discipline or reprisal if they did not take off or continued to wear the Union button. Respondent's employees have a statutory right to wear the Union button, and the fact that they are given a shirt by the Casino, or have some customer contact, does not establish special circumstances.

Respondent's sole argument in support of its policy, prohibitions, and threats is that it speculates that the Casino's customers may be offended by the/a Union button. First, Respondent's assertion is speculative. No evidence was introduced to substantiate Respondent's claims beyond Respondent's CEO's speculative opinion.

Second, Respondent's asserted special circumstances fail as a matter of law in any event. Respondent cannot establish special circumstances by arguing that its customers may not like unions, or be offended by the Union button. *P.S.K. Supermarkets*; *Howard Johnson Motor Lodge*, *Nordstrom, Inc.*, *Eckerd's Market, Inc.*, *Floridan Hotel of Tampa, Inc.*, supra.

Respondent's special circumstance defense is further undercut by the following facts:

1. Respondent's employees have limited (and some have no) contact with customers. The undisputed evidence in this case establishes that Respondent's prohibitions and threats included times in which employees were working in non-public areas. And, its handbook policy applies to employees at all times and in all locations. Such a blanket prohibition (which apparently even includes when employees are walking into the Casino from the employee parking lot) undercuts Respondent's claims that the policy is due to its fears that customers may be offended. If that were truly the case, Respondent's policy would not apply to times in which employees are working in non-public areas. In any event, Board law makes clear that even assuming arguendo an employer can establish special circumstances (i.e. based on public image), an employer cannot apply a prohibition to times when employees are working in nonpublic areas. See *W Hotel*, supra. Thus, Respondent may not prohibit or threaten employees (as it did in this case) from/for wearing the Union button during times in which the employees are in non-public areas.

2. The Union button that was involved in this case is small, and there is nothing in the message of the Union button that is provocative. This further undercuts claims by Respondent of special circumstances. See *United Parcel Service*, supra at 597 (small, neat, inconspicuous pin free of any provocative message did not interefere with the desire image as neatly attired); *Nordstrom, Inc.*, supra at 701-702 (customer exposure to discreet, inconspicuous union insignia, standing alone, is not a special circumstance); *Waterbury Hotel Management LLC*, 333 NLRB 482, 546 (2001)(employer failed to establish special circumstances where button was small, discreet, non-confrontational, tasteful, and likely to blend in with uniform).

3. Evidence presented during the hearing reflects that in similarly-run casinos, with similar clientele, and involving similar classifications of employees, Union buttons are being worn, without there being any evidence of objection or complaints by casino patrons. (CPx. 1-5, Tr. 368-

413). This evidence further undercuts Respondent's speculative claims that casino patrons will be offended by a Union button. See similar analogy in *Meijer, Inc.*, supra at 50 (employer permitting union buttons to be worn at its union stores, but not at its non-union store, undercut the employer's claims of special circumstances at non-union store).

4. Respondent's policy is not consistently enforced. By Respondent's own admission (in the April 4th e-mail from HR Director Lerner), Respondent had been lax in enforcing its no-button policy, except when it had last enforced the policy in May 2012 (the first time the Union button was worn). Moreover, and in a memorandum to employees addressing Union organizing, Respondent states that in response to "numerous questions" it had received from employees, that Respondent does not allow employees to wear pins or buttons on their shirts. And the evidence reflects that Respondent's employees have worn other items, including additions to their ID badges, and/or pocket protectors that would violate Respondent's policy, without objection from Respondent. And the only evidence of any employees being disciplined is during the two time periods in which the Union button was worn by employees. (See Tr. 415). All of this record evidence reflects that Respondent had not regularly enforced or promulgated its no-button policy.

The Board rejects special circumstances defenses where an employer has not consistently enforced its ban on union insignia.[24] Thus, Respondent's special circumstances defense is further undercut by this evidence that Respondent was not regularly enforcing or promulgating its no-button policy.

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[24] *AT&T Connecticut*, supra, at slip op. 1, 13–14. *See also Saint John's Health Center*, 357 NLRB No. 170, slip op. at 1–3 (Dec. 30, 2011) (hospital's special circumstances defense related to patient care undermined by selective enforcement of formally strict ban on ribbons and buttons); *United Parcel Service*, supra at 597 (rejection of special circumstances defense buttressed by employer's toleration of uniformed, customer-contact employees wearing various non-union pins); *Boise Cascade Corp.*, 300 NLRB 80, 84 (1990) (fact that employees wore stickers and T-shirts related to labor dispute for six months before they were banned weakened employer's special circumstances claim that banned items adversely affected discipline and production); *Holladay Park Hospital*, 262 NLRB 278, 278–79 (1982) (no special circumstances justified employer's ban on nurses wearing yellow 3½-by-2½-inch ribbons indicating support for union; employer tolerated various other buttons, pins, ribbons, and corsages, and no interference with patient care was shown).

Any argument by Respondent that Casino employees wearing of these other types of pins or additions may not have been seen by their supervisors should be rejected; or that some buttons and pins are okay if decorative (and not emblematic) should also be rejected. First, Respondent failed to call any of the direct supervisors of any employees involved in this case to address what they have or have not seen. An adverse inference should be drawn from Respondent's decision not to call those supervisors to testify. This is especially true for Respondent's decision not to call Housekeeper Supervisor Maria Silva (to address the housekeeper pins), and Slot Tech Supervisor Richard Galvan (to address the fact that slot technician James Bayton wears a pocket protector that contains language which violates Respondent's policy). (Tr. 200, 207 (housekeepers); Tr. 310 (CEO acknowledges Bayton's pocket protector violates policy)).

Moreover, and as the ALJ noted, Respondent's claims that it did not notice these other items is undercut by evidence from the Respondent's General Manager and HR Representative that they are on the floor and walk the Casino on a regular basis. (ALJD 6, and transcript citations therein).[25]

Next, Respondent's attempt to try and explain the lack of policy enforcement for non-Union-insignia items, by contending, at hearing, that "decorative" or "non-emblematic" additions are okay, should be rejected. Documents in existence prior to Respondent's testimonial explanation do not reflect this exception. (Rx. 2; CPx. 7).

Finally, Respondent's assertion about non-discriminatorily enforcing its policy is undercut by the fact that it disciplined employee Victor Huerta. Although Respondent argues that it will not discipline an employee if they agree to take off the item, it went ahead and issued Victor Huerta a

[25] With regard to Respondent's attacks on the ALJ's credibility resolutions pertaining to this finding, or the Casino's lack of enforcement of the policy, it is established Board policy not to set aside an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Here, there is no basis to set aside the ALJ's credibility resolutions because they are based on his observations of the witnesses' demeanor, and the record evidence (ALJD 2, fn. 4).

written warning even though he agreed to remove his button. The e-mail that led to him receiving a written warning (from Security Guard Lougee to HR Director Lerner) also specifically referenced how Huerta had been wearing a *Union* button.

5. Respondent admits that the Pauma Gaming Commission distributed badge reels to Respondent's employees, which some employees now wear, that have content on them that violates Respondent's policy. (Tr. 350; see Rx. 3 (badge reel)). Although Respondent argues that it has no control over what the Pauma Gaming Commission does, the fact remains that the Casino therefore allows employees to wear content-based items (that violates its policies).

6. Respondent did not raise any "safety" issue in the wearing of buttons. In the event it attempts to raise that argument in the future, the argument would be undercut by the fact that employees wear ID badges at all times, including food-and-beverage employees and cooks.

C. Respondent violated the Act by disciplining employee Victor Huerta.

For the same reasons described above, the ALJ properly concluded that Respondent violated the Act when it enforced its policy by issuing employee Victor Huerta a written warning for wearing the Union button.

Any argument by Respondent that the e-mail Huerta received is not a written warning is undercut by the very document itself, especially given that the subject heading of the e-mail is "Policy Violation – Note to File." Respondent did not call any witness to testify as to what this e-mail would be if not a written warning, or to otherwise explain why it was entitled "Note to File."

D. The ALJ properly concluded that Respondent's handbook policy violates Section 8(a)(1) of the Act.

In his decision, the ALJ concluded that Respondent's handbook policy violates the Act. That decision is supported by Board law.

A workplace rule is facially unlawful if it "would reasonably tend to chill employees in the exercise of their Section 7 rights."[26] The Board has developed a two-step inquiry to determine if a particular workplace rule violates Section 8(a)(1).[27] First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict Section 7 activities, 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."[28]

Under the above law, and for the same reasons discussed above, Respondent's handbook policy is unlawful because on its face the rule prohibits the wearing of any buttons, which would include the Union button, or any other union buttons. Next, the rule is blanket prohibition, i.e. it applies to all employees, at all times. For these reasons, Respondent's handbook policy is overly broad and unlawful. For the same reasons, Respondent's arguments about the proposed remedy are without merit.

E. The ALJ properly concluded that Respondent unlawfully instructed its supervisors and managers to engage in the surveillance of its employees' Union and protected concerted activities

The record evidence supports the ALJ's finding that Respondent, by its April 4th e-mail, was instructing its supervisors and managers to engage in the surveillance of its employees' Union and protected concerted activities by advising supervisors and managers to closely monitor employees and to specifically look out for employees who were wearing the Union button as they did in the past. The e-mail specifically references the May 2012 suspensions that were imposed on employees for wearing the Union button in 2012. Thus, the e-mail reflects that Respondent was

[26] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf'd, 203 F.3d 52 (D.C. Cir. 1999).
[27] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)
[28] *Id.*

specifically targeting employees who were engaging in Union activities by wearing the Union button.

This instruction to surveil Union activity is supported by the admission in the e-mail that Respondent had been not been regularly enforcing its policies, and as well as by the subsequent events following the e-mail: (1) Security Guard Lougee's e-mail to HR Director Lerner, reporting to her that Huerta had been spotted wearing a Union button; (2) Huerta being disciplined for wearing the Union button (even though he agreed to take it off); and (3) slot technician and union supporter James Bayton being directed to (just) review the paragraph in the e-mail about not wearing buttons.

Based on the above, the ALJ properly concluded that Respondent has violated Section 8(a)(1) of the Act, by instructing its supervisors and managers to engage in surveillance of its employees' Union and protected concerted activities.

VII. CONCLUSION

Based on the above facts and applicable law, the General Counsel submits that the Respondent's exceptions are without merit, and should be rejected.

Dated this 5th day of September, 2014

Respectfully submitted,

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National Labor Relations Board

STATEMENT OF SERVICE

I hereby certify that a copy of **Counsel for the General Counsel's Answering Brief to Respondent's Exceptions** was submitted for E-filing to the Board on September 5, 2014.

The following parties were served with a copy of said document by electronic mail on September 5, 2014.

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