Flex Frac Logistics, LLC, and Silver Eagle Logistics, LLC, Joint Employers *and K*athy Lopez. Case 16–CA–027978

September 11, 2012

DECISION AND ORDER REMANDING

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On February 6, 2012, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief. The Acting General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.[1]

1. "[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)). We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule.

In the Respondent's one-page at-will-employment agreement that all employees must sign, a section entitled "Confidential Information" provides:

> Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; *personnel information and documents*, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any [of our] records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action. [Emphasis added.]

This provision, by its terms, prohibits employees from engaging in "[d]isclosure" of "personnel information and documents" to persons "outside the organization" on pain of possible "termination" or "legal action."

The Board has repeatedly held that nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act. See, e.g., *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011) (finding rule unlawful that prohibited "[a]ny unauthorized disclosure from an employee's personnel file"); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that stated all information about "employees is strictly confidential" and defined "personnel records" as confidential). We apply well-established precedent here in finding the Respondent's rule unlawful.

The Respondent contends that the judge erred because the rule only prohibited disclosure outside the company and because the Respondent had a legitimate business interest in the rule. We do not find merit in either contention. As to the first contention, a rule such as the Respondent's that prohibits disclosure to anyone outside the company necessarily prohibits employees from exercising their Section 7 right to discuss their terms and conditions of employment with union representatives. See, e.g., *Bigg's Foods*, 347 NLRB 425, 425 fn. 4 (2006). As to the second contention, the Respondent *admitted* during the hearing and in its briefs that it did not mean to prohibit employees from discussing wages, so it never asserted—nor, by its own admission, could it have—a legitimate business interest in a confidentiality rule that broadly prohibits the discussion of wages or other terms and conditions of employment. Cf. *Waco, Inc.*, 273 NLRB 746, 748 (1984) (absent a legitimate and substantial justification, a rule prohibiting employees from discussing their wages is unlawful).

Our dissenting colleague would find the Respondent's rule lawful, but his position cannot be squared with Board law. Citing *Lutheran Heritage Village-Livonia*, supra at 646–647, our colleague correctly acknowledges that this case involves a facial challenge to the rule, that the controlling standard is whether "employees would reasonably construe the language to prohibit Section 7 activity," and that the Board thus must evaluate the rule from the perspective of employees who might read the rule. But he errs to the extent that he suggests (1) that unspecified "objective evidence," apart from the rule's

[1] We shall modify the judge's recommended Order and substitute a new notice to conform to our findings, the Board's standard remedial language, and the Board's decision in *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

language, is required to find a violation; and (2) that the rule must be upheld if employees could reasonably construe its language *not* to prohibit Section 7 activity.

Neither proposition is supported by *Lutheran Heritage Village*. That leading decision distinguished *facial* challenges from cases in which a rule "was promulgated in response to union activity" or had "been applied to restrict the exercise of Section 7 rights," and it further explained that a rule would be upheld against a facial challenge if a coercive construction of the rule was "unreasonable," albeit "conceivabl[e]."[2] Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828; see also *2 Sisters Food Group*, 357 NLRB No. 1816, 1818 (2011). Despite the dissent's suggestion to the contrary, the Board's approach in this area has met with the approval of the U.S. Court of Appeals for the District of Columbia Circuit. See *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007) (enforcing Board decision that found unlawful employer rule requiring employees to maintain "confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters");[3] see also *Brockton Hospital v. NLRB*, 294 F.3d 100, 106 (D.C. Cir. 2002) (enforcing Board decision that found unlawful employer rule prohibiting discussion of "information concerning patients, associates, or hospital operations . . . except strictly in connection with hospital business").

Contrary to our dissenting colleague, we find that the context of the overall confidentiality rule here does nothing to remove employees' reasonable impression that they would face termination if they were to discuss their wages with anyone outside the company. The Respondent's confidentiality rule is broadly written with sweeping, nonexhaustive categories that encompass nearly any information related to the Respondent. Not only does nothing in the rule suggest that "personnel information and documents" excludes wages, one of the other categories—"financial information, including costs"—necessarily includes wages and thereby reinforces the likely inference that the rule proscribes wage discussion with outsiders. Nothing about the rule would reasonably indicate to employees that its prohibitions are as limited as our colleague suggests. "[E]mployees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." *Hyundai America Shipping*, supra at 1827. Here, as in *Cintas*, supra, the employer "has made no effort in its rule to distinguish [S]ection 7 protected behavior from violations of company policy." 482 F.3d at 469.[4]

2. The judge found that the Charging Party, employee Kathy Lopez, was terminated in violation of Section 8(a)(1) because the Respondent discharged her pursuant to the unlawful confidentiality rule "even though she was not terminated for discussing wages or other protected activity." In *Continental Group*, 357 NLRB 337 (2011), not cited by the judge, the Board clarified that discipline pursuant to an unlawful rule is not per se unlawful. Id. at 340. For discipline to be unlawful, the employee must have "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." Id. Thus, the judge erred by finding Lopez' discharge unlawful simply because the rule was unlawful. Accordingly, we shall sever and remand this allegation to the judge for analysis under *Continental Group*.

On remand, the judge shall make detailed findings on whether Lopez engaged in protected activity or activity otherwise implicating the concerns underlying Section 7 when she violated the Respondent's confidentiality rule. In her original decision, the judge found that Lopez was terminated not for discussing wages with other employees but, instead, for disclosing the Respondent's profit margin by revealing the rates that the Respondent charged client energy companies to deliver loads of frac sand in relation to what the Respondent paid drivers. On remand, the judge shall explain whether Lopez' discussions constituted protected activity and, if not, whether

[2] Id.

[3] In *Cintas*, supra, the District of Columbia Circuit explained that the Board's approach "focuses on the text of the challenged rule, and that if the Board's "textual analysis is 'reasonably defensible,' and 'adequately explained,'" extrinsic evidence, such as evidence of employees' actual interpretation of the rule or enforcement of the rule by the employer against employees engaging in Sec. 7 activity, is not required to find a violation. 482 F.3d at 467 (citations omitted).

[4] *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), cited by our colleague, involved a handbook rule with a much clearer context that would, unlike here, reasonably inform employees that the rule was not as broad as certain language read in isolation might suggest. The rule included "customer and employee information, including organizational charts and databases" in a list of "intellectual property" that was "proprietary information" that employees could not disclose. Id. at 278–279. The Board upheld the rule, reasoning that employees reading the entire rule would not believe that wages were the kind of "employee information" that fell within the scope of "intellectual property." Id. at 279.

those discussions otherwise implicated the concerns underlying Section 7.

ORDER

The National Labor Relations Board orders that the Respondents, Flex Frac Logistics, LLC, and Silver Eagle Logistics, LLC, Joint Employers, Fort Worth, Texas, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad and ambiguous confidentiality rule that prohibits or may reasonably be read to prohibit employees from discussing wages or other terms and conditions of employment.

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

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

(a) Rescind or revise the existing overly broad confidentiality rule to remove any language that prohibits or may be read to prohibit employees from discussing wages or other terms and conditions of employment.

(b) Notify all employees in writing that the overly broad confidentiality rule that was promulgated on May 10, 2010, has been rescinded or modified and that the Respondent will not prohibit employees from discussing their wages or other terms and conditions of employment.

(c) Within 14 days after service by the Region, post in its facility in Fort Worth, Texas, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 10, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certificate of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Kathy Lopez is severed and remanded to Administrative Law Judge Margaret G. Brakebusch for further appropriate action as set forth above.

IT IS FURTHER ORDERED that the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order. Copies of the supplemental decisions shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER HAYES, dissenting.

The Respondent reasonably tried to ensure its ability to bid for contracts without its competitors discovering its cost structure by banning disclosure to third parties of confidential information discovered in the course of employees' official duties. The rule does not on its face or in practice prevent employees from discussing their wages with each other or with third parties. The rule does prohibit employees, such as Charging Party Kathy Lopez, from disclosing the differential between rates the Respondent charged its clients and what it was paying its nonemployee contract drivers. Instead of reading the entire rule in context and with appropriate consideration of its obvious legitimate business justification, the judge and my colleagues have taken a single illustrative phrase from the rule and deemed it to be an invalid restriction of activity protected by Section 7 of the Act. They thereby raise the prospect, if not likelihood, that the Respondent's discharge of Lopez for clearly unprotected activity will also be found to be unlawful. I respectfully dissent.[1]

The Respondent's confidentiality rule states

> Employees deal with and have access to information that must stay within the Organization. Confidential information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics, LLC organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs,

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Inasmuch as I would find that the Respondent's confidentiality rule is lawful, I would find Lopez' discharge lawful without the need for any remand and analysis under *Continental Group, Inc.*, 357 NLRB 337 (2011).

> prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

The rule does not expressly restrict activity protected by Section 7 of the Act, it was not promulgated in response to such activity, and it has not been applied to restrict the exercise of such activity. Thus, the only question before us is whether there is objective evidence that the Respondent's employees would reasonably construe the rule to prohibit Section 7 activity.[2] There is none.

The judge and my colleagues, substituting their perspective for that of the employees involved, hone in on a single item in the litany of what even they apparently would construe as a legitimate description of what information employees might "deal with and have access to" in the course of their work that must "stay within the Organization." In their view, the reference to "personnel information and documents" reasonably tends to interfere with employees' statutory rights to discuss their wages.

I do not know the Respondent's employees, any more than do my colleagues and the judge, but I fail to see anything in the record to indicate why they would reasonably be inclined to so contort the context and stated purpose of the confidentiality rule as to preclude the discussion of wages. Every other item listed in the rule is undisputedly confidential. As for "personnel information and documents," it is beyond cavil that an employer—and its employees, for that matter—have a legitimate interest in protecting against the disclosure to third parties of social security numbers, medical records, background criminal checks, drug tests, and other testing information which would clearly fall within this category. Why would the Respondent's employees not reasonably conclude that the rule is limited to these confidential types of "personnel information and documents," which are *like* all other types of confidential information described in the rule?[3] Why would they instead reasonably conclude that the rule restricts the discussion of wages, which are *unlike* all other types of confidential information described in the rule? At the very least, to the extent that they would reasonably view the rule as related to wages at all, why would they not understand that the prohibition against disclosure is limited to information to which is accessible to employees only as a consequence of confidential job duties?[4]

What makes the finding of an unlawful overbroad rule all the more remarkable in this case is that the judge had "no doubt that the confidentiality agreement was likely written to prohibit confidential disclosures other than wages or other terms and conditions of employment." Why then would the Respondent's own employees reasonably view it otherwise?

In sum, the Respondent's rule does not on its face prohibit employee discussion of wages and other working conditions with each other or with a union, and there is no objective basis for finding that employees would more broadly read the rule as prohibiting such protected activity.[5] Giving no heed to the context of the rule or its impact on the Respondent's employees, my colleagues, the judge, and the Acting General Counsel have failed to adhere to the Board's proclaimed policy of giving employer confidentiality rules a fair reading in their entirety.[6] The United States Court of Appeals for the District of Columbia has been particularly critical of such failures in the past.[7] Should the decision here go before that

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[2] See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004).

[3] See *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278–279 (2003) (holding that employer intellectual property confidentiality rule forbidding discussion of "employee information" was lawful because a reasonable employee would not consider the terms and conditions of employment to be intellectual property).

I note that the judge's analysis finding a violation relied in part on the judge's decision affirmed by the Board in *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011). I did not participate in the Board panel decision in that case and express no opinion whether it was correctly decided.

[4] See *Asheville School, Inc.*, 347 NLRB 877 (2006) (holding that an accounting employee's disclosure of other employees' wage data was unprotected when she learned that information through her custody of the employer's data).

[5] My colleagues apparently misunderstand my analysis, which is fully consistent with *Lutheran Heritage Village*, supra. I do not suggest either that unspecified "objective evidence," apart from the rule's language, is required to find a violation in every case, or that a rule must be upheld as lawful if employees could reasonably construe its language *not* to prohibit Sec. 7 activity. In my view, the context of the language at issue here is such that employees could and would not *reasonably* construe it as prohibiting Sec. 7 activity. In this circumstance, absent extrinsic evidence, there is no reasonable alternative interpretation to support finding a violation.

[6] See *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998).

[7] *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996); see also *Adtranz ABB Daimler-Benz Transportation., N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001). My colleagues' reliance on other D.C. Circuit precedent is misplaced. In both *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007), and *Brockton Hospital. v. NLRB*, 294 F.3d 100, 106 (D.C. Cir. 2002), the vice of the challenged confidentiality rule was that it proscribed disclosure of *any* information about employees. Indeed, the court's opinion in *Cintas* expressly endorses the view that a rule may not be

court on review, it will likely suffer the same rebuke. The matter should end here instead, with reversal of the judge and dismissal of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad confidentiality rule prohibiting you from discussing your wages or other terms and conditions of employment.

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

WE WILL notify you in writing that the overly broad confidentiality rule that was implemented in May 2010 is rescinded or modified and will not be enforced to prohibit you from discussing wages or other terms and conditions of employment in a manner protected by Federal labor law.

FLEX FRAC LOGISTICS, LLC, AND SILVER EAGLE LOGISTICS, LLC

Erica Berencsi, Esq., for the General Counsel.
Scott Hayes, Esq., of Dallas, Texas, for the Respondents.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Worth, Texas, on October 13, 2011. Kathy Lopez (Lopez) filed the charge on April 15, 2011, and amended the charge on May 4, 2011,[1] and the Acting General Counsel issued the complaint on July 27, 2011.

The complaint alleges that since May 10, 2010, Flex Frac Logistics LLC and Silver Eagle Logistics, LLC (Respondents) have maintained a written rule prohibiting employees' disclosure of confidential information. The complaint further alleges that on or about December 30, 2010, Respondents promulgated, and thereafter maintained a rule prohibiting employees from discussing employee wages. The complaint alleges when the Respondents terminated Lopez on or about December 30, 2010, because she violated these rules, Respondents unlawfully interfered with, restrained, and coerced Lopez in the exercise of rights protected by Section 7 of the National Labor Relations Act (the Act.)

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

FINDINGS OF FACT

I. JURISDICTION

Respondents, as joint employers with an office and place of business in Fort Worth, Texas, have been engaged in interstate transportation of freight. During the 12-month period of time ending June 30, 2011, Respondents, in conducting their business operation, derived gross revenues in excess of $50,000 for the transportation of freight from the State of Texas directly to points outside the State of Texas. During the same time period, Respondents, in conducting their business, performed services valued in excess of $50,000 in States other than the State of Texas. Respondents admit and I find that the Respondents are employers within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

Counsel for the Acting General Counsel submits that the Respondent[2] maintains a confidentiality rule that violates Section 8(a)(1) of the Act on its face because employees would reasonably interpret it as prohibiting their discussion of wages. Furthermore, counsel argues that the Respondent terminated employee Kathy Lopez (Lopez) pursuant to the rule when she discussed wages. The Respondent argues, however, that the confidentiality rule neither refers to wages nor prohibits the discussion of wages by employees. Counsel for the Respondent submits that the provision prohibits the disclosure of the Respondent's confidential information outside the organization and to third parties. The Respondent further submits that it terminated Lopez because it believed that she was discussing its confidential information and specifically the terms of its contracts with customers to individuals outside the organization and because Lopez was disruptive within the workplace.

B. Background

William Funk (Funk) began Silver Eagle Logistics in 2006. In February 2010, Silver Eagle Logistics merged with another company to create Flex Frac Logistics. As referenced above, and for purposes of this proceeding, Silver Eagle Logistics and Flex Frac Logistics function as a joint employer and are jointly

found unlawful merely because employees could read it as prohibiting Sec. 7 activity if that reading is unreasonable. 482 F. 3d at 467 fn. 1.

[1] All dates are in 2010, unless otherwise indicated.

[2] Silver Eagle Logistics and Flex Frac Logistics admit that they are a joint employer for purposes of this proceeding. Accordingly, they are referenced jointly as the Respondent.

identified as the Respondent. As president of Silver Eagle Logistics, William Funk (Funk) oversees the entire operation of these joint employers. Funk also shares ownership of the operation with Jeff Blackwood, Virginia Moore, and Marty Moore. John Wilkinson (Wilkinson) is Respondent's chief financial officer (CFO) and Rick Forepaugh (Forepaugh) is Respondent's general manager. In November 2010, Susie Kellum assumed the position of office manager and assistant controller. Prior to that time, the position was held by Patricia Villerreal. Kellum reports to Wilkinson and manages employees in the office.

Lopez worked in accounts payable from May 2010 until her termination in December 2010. Her job required that she obtain haul tickets from the drivers, input their data, and prepare the drivers' pay at the end of each week. Lopez' sister; Rebecca Williams also worked in accounts payable. Additionally, Lopez' husband worked as a driver, her cousin worked in dispatch, and her two nephews worked as pushers.

C. Respondent's Operation

Respondent's business operation involves the delivery of frac sand to oil and gas well sites. In conducting its operation, Respondent employs approximately 250 employees; approximately 100 of which are company drivers. In addition to the company drivers, Respondent also contracts with approximately 100 nonemployee drivers to deliver their product. These contract drivers are referenced in the record as vendors, leased drivers, or independent contractors.

After submitting a bid to its customer, Respondent then contracts with the customer to haul loads of frac[3] sand for a specific rate. In submitting the bid, Respondent considers the costs for the ground crew, the costs for the load-out crew, and the costs incurred in using the company driver or the leased driver. Respondent's contract with the leased driver provides that the driver will be paid a specific mileage rate for the line haul to Respondent's customer. In addition to the line haul rate, the vendors may also receive additional pay for their "waiting time" or for "deadhead" miles. The total amount paid using this rate may also be reduced if the leased driver generates additional charges such as the driver's use of the Respondent's DOT (U.S. Department of Transportation) authority or if the leased driver uses Respondent's insurance. Respondent asserts that the contract rates with its various customers are confidential and are not disclosed to the lease drivers.

At the end of 2010, Respondent employed approximately 10 employees in its accounting department. The accounting department is supervised by CFO Wilkinson and Controller/Office Manager Keller. The accounting employees prepare the invoices for the customers as well as process the pay for the company drivers and the leased drivers.

D. The Confidentiality Agreement

In early May 2010, the following confidentiality rule was drafted by Controller Patricia Villarreal. The rule was implemented and has remained in effect since that time. It is undisputed that Respondent terminated employee Kathy Lopez pursuant to this rule:

> Employees deal with and have access to information that must stay within the Organization. Confidential information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics, LLC organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

Wilkinson testified that the confidentiality agreement does not prohibit employees from talking with other employees about wages. He also asserted that Respondent has no written document or verbally implemented policy that prohibits employees from discussing wages.

E. Respondent's Evidence Concerning Lopez' Discharge

Funk testified that Lopez was terminated after he learned that Lopez was disclosing to employee Frank Gay (Gay) and others the differential between what Respondent was charging its customers and what Respondent was paying its contract drivers. Funk explained that his concern had not been the fact that she disclosed the rates paid to the contract drivers or the amount of pay given to the company drivers. He clarified that the amounts paid to company drivers are often made public as a means of building morale and encouraging drivers. Funk asserted that the line haul rates that are paid to the company drivers are public knowledge. He also explained that the contract rates paid to the vendors are all the same. He confirmed that his concern had been that Lopez had disclosed the contract rates paid to Respondent by its customers or more specifically that she had disclosed Respondent's profit margin. Funk contends that Lopez was not terminated because she discussed wages.

Funk testified that after his managers informed him about Lopez talking with Gay, he personally spoke with Gay during the month of November 2010. Funk testified that during his conversation with Gay, he learned that Lopez had offered to show him documents that would show the difference between what Respondent was charging its customers versus what Respondent was contracting to pay its drivers. Funk recalled that after speaking with Gay, he asked Wilkinson and Forepaugh to do additional investigation while Funk was away from the facility on a 3-week business trip. Wilkinson testified that when he spoke with Gay, Gay told him that in a conversation with Lopez, she explained to him how customers were billed.

Funk also recalled that in addition to his conversation with Gay, he received phone calls from three vendor contractors who gave him information that was similar to what Gay had

[3] Although the parties provided no specific definition of frac sand for the record, it appears to be an additive or proponent used in the drilling process for oil and gas wells.

told him. The contractors told him that they knew what Respondent had charged the customer for work they had done and they wanted more money to make those hauls. Funk could recall the names of two of the contractors but could not recall the name of the third contractor. He confirmed, however, that all three of the contractors stopped providing services to Respondent after these conversations.

Funk explained that based on the investigation, he concluded that information about Respondent's contractual rates with its customers was "out on the streets." He further explained that this kind of disclosure of information not only affects the Respondent's dealings with its contractors, but it also gives his competitors a "leg up." If his competitors know what he is charging his customers, they can adjust their bids accordingly.

Funk confirmed that after the investigation, Wilkinson, Forepaugh, and he jointly made the decision to terminate Lopez. Funk asked Kellum to join the conversation when Lopez' termination was discussed. Wilkinson also testified that Lopez was removed from the accounting department because of her disclosure of confidential information. After his speaking with both Gay and Funk, Wilkinson also decided that Lopez should be fired.

F. Employee Testimony Concerning Lopez' Actions

Although Gay appeared at the hearing pursuant to the Acting General Counsel's subpoena, he did so without meeting or speaking with the Board attorney to prepare for hearing. At the end of October 2010, or the beginning of November 2010, Gay changed from his job as a truckdriver to a job in dispatch. Gay testified that shortly after he took the job in dispatch, he had a conversation with Lopez. Lopez began the conversation by asking Gay what he had made during November as a truckdriver. He told Lopez that as a company driver he was paid 25 percent of what Respondent made for the truck's delivery. Lopez told him that he was being "screwed over" by Respondent because Respondent was not paying him the correct amount. She told him that he had received 25 percent of $700 and he should have received 25 percent of $1100. Lopez further explained that because she worked in accounting and billed Respondent's customers, she could show him where he was being cheated out of the percentage for the $1100. Gay testified that he had a "couple" more conversations with Lopez in which she provided similar information. Gay recalled that in one of the conversations with Lopez, she had documents in her hand and wanted to show him what a specific customer actually paid Respondent. Gay recalled that Shift Supervisor Ben Gatzke was present during his first conversation with Gay and that Lopez' sister; Rebecca Williams was sometimes present during the other conversations with Lopez.

Gay testified that anyone working around Lopez at the time would have heard her comments. Gay recalled that after his first conversation with Lopez, he did all that he could to avoid her because in his opinion "she just spewed a lot of venom through the whole dispatch." He explained that because her comments seemed to have a negative effect on the people working in dispatch, he and Gatzke asked Dispatch Supervisor Jamie Stingley to keep Lopez out of the dispatch area. Gay acknowledged that when he spoke with Stingley, he told Stingley that he wanted Lopez out of dispatch because she was talking about wages and rates of drivers and because she was a negative person. He told Stingley that if she told the wrong person that they were being screwed by the company, they might not take it so lightly. His conversation with Stingley occurred on or about Thanksgiving. In addition to speaking with Stingley, Gay also spoke with Wilkinson and Kellum about his conversations with Lopez. Although he could not recall having a specific conversation with Funk, he did not dispute that he did so. He recalled telling Wilkinson that Lopez came into dispatch "spewing a lot of venom and badmouthing the company. "As an example of the badmouthing, he told Wilkinson that Lopez had informed him that Respondent was not paying the company drivers their percentage of the total amount that Respondent made from the truck delivery.

Lopez testified that if there was some dispute concerning a drivers' haul ticket, she went to dispatch in order to determine the problem. She recalled that while she normally spoke with the dispatch supervisor, she also spoke with other employees in dispatch. She recalled having a conversation with Frank Gay when she went to the dispatch office in early November. Lopez testified that Gay was ending a telephone call with a driver when she entered the office. She asserted that Gay turned to speak to another employee in dispatch and made the statement: "I don't understand why these drivers are complaining about pay, because they all get paid 25 percent of whatever the company makes, so I don't understand." Lopez testified that she told Gay that he was wrong because even though the company pays its drivers 25 percent, there was no way to know what the vendors paid their individual drivers. Lopez contended that she only had the one conversation with Gay. She denied that she offered to show him what the company was being paid by its customers and she denied taking any document with her to dispatch to show Gay what Respondent's customers were paying.

Catherine Lee Chambers (Chambers) began working for Respondent in September 2010 and worked in dispatch until February 2011 when she transferred to the accounting department. Chambers testified that in November 2010 she had a conversation with Lopez in the dispatch office. Chambers did not recall if anyone else was present or within earshot of the conversation. Chambers began the conversation by asking Lopez what employees were paid in accounting. Chambers recalled that although Lopez did not refuse to tell her what employees were paid in accounting, Lopez did not answer the question.

Lopez recalled that her conversation with Chambers occurred on the same day that she spoke with Gay about the pay for company drivers and contract drivers. Lopez recalled that Chambers told her that she wanted to get a position in accounts payable and she asked what the employees made in that position. Lopez told her that while she couldn't tell her what employees made, the starting salary was $14 an hour. Chambers testified that she did not recall having told anyone about her conversation with Lopez. She contended that the first time that she ever told Kellum about this conversation with Lopez was the day of her testimony in the instant hearing. Chambers denied that she had ever spoken with Funk, Wilkinson, or Kellum about her testimony prior to giving an affidavit to the Board

during the investigation. Chambers also recalled observing Lopez as disruptive.

G. Lopez' Testimony Concerning the Confidentiality Rule

When Lopez began working for Respondent in May 2010, her supervisor, Trish Villarreal, asked her to sign the document containing the confidentiality agreement. The document also contains a provision relating to employment-at-will as well as a provision detailing the circumstances that would constitute a basis for termination. Lopez testified that when Villarreal gave her the document to sign, Villarreal told her that it was an employment-at-will document and that everyone had to sign it. Lopez testified that Villarreal said that the reason for the document was to prevent employees from talking about the cost and the price that the company was receiving from the customers. She also added, "and wages and things like that."

III. ANALYSIS AND CONCLUSIONS

A. The Confidentiality Rule

1. The parties' positions

Citing the Board's decision in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), counsel for the Acting General Counsel asserts that an employer violates Section 8(a)(1) of the Act when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. Counsel argues that the confidentiality rule in issue prohibits Section 7 activity, including a discussion of wages. Respondent maintains that the confidentiality provision in no way precludes employees from conferring with respect to matters directly pertaining to the employees' terms and conditions of employment. Furthermore, Respondent argues that the provision cannot reasonably be read as a rule prohibiting discussions of wages or working conditions of employees.

2. Prevailing legal authority

In its 1982 decision in *International Business Machines Corp*., 265 NLRB 638 (1982), the Board explained that the discussion of wages is an important part of organizational activity and that the suppression of that information adversely affects employee rights and will be held violative of the Act unless the employer can establish substantial and legitimate business justification for its policy. Thus, it is well established that employees have a protected right to discuss and to distribute information regarding wages, hours, and other terms and conditions of employment. *Mobile Exploration & Producing U.S.*, 323 NLRB 1064, 1068 (1997), enfd. 156 F.3d 182 (5th Cir. 1998). As the Board later pointed out in *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 fn. 14 (2004), the ability to discuss terms and conditions of employment with fellow employees is the most basic of Section 7 rights. Citing previous decisions[4] in this regard, the Board recently reiterated in *Parexel International*, 356 NLRB 516, 518 (2011), that "wage discussions among employees are considered to be at the core of Section 7 rights."

Thus, because of the inherent protection for employees in discussing wages and other terms and conditions of employment, the Board has scrutinized employer confidentiality agreements or rules that may restrict such Section 7 rights. In *Scientific-Atlanta, Inc*., 278 NLRB 622, 626 (1986), the Board found that an employer's confidentiality rule barring the disclosure of employee promotions and raises was unlawful whereas in *K-Mart*, 330 NLRB 263 (1999), the Board found that an employer's rule prohibiting disclosure of company business documents was lawful. Additionally, in *Mediaone of Greater Florida, Inc*., 340 NLRB 277 (2003), the employer's prohibition from disclosing the employer's proprietary private business information was not found to be unlawful.

In order to determine whether an existing confidentiality rule is unlawful, the Board has set out a framework for evaluating employer confidentiality rules. The rule must first be examined to determine whether it explicitly restricts Section 7 activity. If it does not, the circumstances must be evaluated to determine whether: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. If any of these circumstances are shown to apply, the rule infringes on employee rights under the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Thus, an employer's confidentiality rule that is shown to infringe on Section 7 rights may be found to be unlawful unless the employer articulates and establishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee rights. See, e.g., *Desert Palace Inc*., 336 NLRB 271 (2001); and *Phoenix Transit System*, 337 NLRB 510 (2002).

3. The basis for Lopez' termination

Before addressing the specific language of Respondent's confidentiality agreement, it is necessary to examine its enforcement with respect to the prohibition against wage discussion. Although Respondent admits that Lopez was terminated pursuant to the confidentiality agreement that she signed in May 2010, Respondent maintains that it terminated her because she was disclosing Respondent's contract rates with its customers; information that Respondent considered to be confidential. I find that the total record evidence supports Respondent's assertion.

Funk credibly testified that based on information that he received, it was his understanding that Lopez was telling employee Frank Gay and others the amount that Respondent was charging its customers versus the amount that Respondent paid its drivers. Funk also testified that there was no prohibition in employees talking about what they were paid by Respondent. He testified without contradiction that Respondent often made drivers' pay public in order to motivate the drivers in their work.

Gay testified that although truckdrivers did not know how much Respondent received from their customers, it was not uncommon for them to discuss their own pay. Although Gay opined that he did believe that he should disclose the various

[4] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988).

drivers' pay when he worked in dispatch, he did not identify any written rule that prohibited the disclosure. He did not indicate why he believed this or whether anyone in management had specifically instructed him in this regard. Chambers testified that she had never been told that she could not discuss wages with other employees and that she had heard other employees discussing wages at the facility.

The only employee who testified concerning any restriction in discussing wages was Lopez. She testified that when Villarreal first gave her the agreement to sign in May 2010, Villarreal told her that the reason for the document was to keep employees from talking about the costs and the price that Respondent was receiving from its customers. Lopez then added, "and wages and things like that." She testified that when she was terminated, Wilkinson told her that she was terminated because she discussed wages and talked about drivers' pay. I don't find Lopez' testimony to be credible. Aside from the fact that Lopez' alleged accounts of these conversations are self-serving, her description of these conversations conflicts with her other testimony. Lopez contends that she spoke with Gay about drivers' pay and that she also spoke with Chambers about the pay for accounting employees. Had Villarreal actually warned Lopez that she was prohibited from discussing wages under the confidentiality agreement, it is unlikely that she would have freely engaged in such conversations with either Gay or Chambers. Additionally, Lopez testified that perhaps as early as August 2010, she was involved in a discussion with owner Virginia Moore, Supervisor Villarreal, and three other employees. During the conversation, Lopez and the other employees were questioning why the contract drivers were getting raises and the company drivers were not. Lopez recalled that she and the other employees stated that they thought that it was unfair for the company drivers to receive one rate and the contract drivers another rate. Moore responded to the employees' comments by simply stating that Respondent was not going to change the rates as suggested by Lopez and the other employees. Lopez admitted that neither Moore nor anyone else told her that the wage information that she was discussing was confidential. There is no evidence that any action was taken against Lopez or any of the other employees who participated in the conversation for their having openly discussed the wages of the truckdrivers. Thus, I do not credit Lopez' testimony that she was told that she was terminated for discussing employees' wages or that she was ever told that the confidentiality agreement prohibited the discussion of wages.

Furthermore, I do not credit Lopez' testimony concerning her conversation with Gay. She denied that she offered to show Gay records of what Respondent received from its customers. Her version of the conversation was in total contrast with Gay's testimony. I found Gay's testimony to be straightforward and unembellished. There was nothing in the record to indicate that he fabricated or exaggerated his testimony or that he would have had a reason to do so. The total record evidence supports a finding that during her conversations with Gay, Lopez disclosed information about Respondents' contracts with its customers and that Gay shared this disclosure with Funk and the other managers.

The only other evidence that would otherwise support a finding that Lopez was terminated for discussing employee wages is the language that Kellum included in Lopez' termination notice. When Kellum prepared the termination notice, she included the following language:

> Kathy told one of our dispatch employees that we paid our drivers one rate and our customers another. She also discussed what people make in the accounting office to other employees that are or were looking for raises.

Kellum testified that she had only been employed with Respondent for 4 days when she first spoke with Funk about his terminating Lopez. Funk told here that he wanted Lopez "gone now." She recalled that Funk's concern was that Lopez was discussing Respondent's contracts with its customers. Although he wanted to terminate Lopez, he was also leaving for a business trip and he wanted management to get additional information before Lopez was terminated. Kellum recalled that in a later conversation, Funk told her that he would wait to fire Lopez after the holidays as he didn't want to terminate her before Christmas.

Kellum testified that although she included the reference to Lopez' accounting department wage discussions in the termination notice, Funk had spoken with her only about terminating Lopez for her discussions concerning what the contractors are paid versus what Respondent's customers pay She testified that although she knew that it is important to write the correct reason for an employee's termination on the discipline notice, she had only terminated one other employee in her career prior to Lopez. She testified that in her previous jobs, the confidentiality agreements had always prohibited discussing internal company matters. She explained that "in her mind," this would also include wages. Because she knew that Lopez had discussed wages in the accounting department and because she personally didn't think that wages should be discussed, she added both reasons to the termination notice. She admitted, however, that Funk made the decision to terminate Lopez and he had never expressed any concern about Lopez discussing wages with other employees.

The overall record reflects that Kellum did not make the decision to terminate Lopez. It is obvious that in her zeal as a new manager to prepare a comprehensive termination notice, she drafted what she thought would be a proper basis for a termination. It is apparent, however, that she took such an action on her own initiative. Based on the entire record, it is apparent that Respondent terminated Lopez because of her disclosure of confidential information about the contract rates paid to Respondent by its customers and not because of any discussions that Lopez may have had about accounting employees' wages or for any other discussions about wages.

4. The application of the confidentiality agreement

Clearly any rule that prohibits employees from discussing their compensation has been determined to be unlawful on its face. *Danite Sign Co*., 356 NLRB 975 fn. 1 and 981 (2011); *Freund Baking Co*., 336 NLRB 847 (2001). In the instant case, Respondent's confidentiality rule includes a long list of information that is considered to be confidential and prohibited from

disclosure. The agreement provides that the disclosure of such information could lead to termination as well as possible legal action. There is no reference in the entire rule to wages, compensation, or any other specific terms and conditions of employment. Included in this extensive listing of confidential information that is prohibited from disclosure, however, are "personnel information and documents."

In its 2008 decision in *NLS Group*, 352 NLRB 744, 745, the Board found that the employer violated Section 8(a)(1) by terminating an employee pursuant to an overly broad confidentiality rule. Following its earlier decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board in *NLS* reiterated that even if a rule does not explicitly restrict Section 7 rights, the rule is nonetheless unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity. Thus, the central question appears to be whether employees would read a confidentiality rule as prohibiting protected employee communications about terms and conditions of employment or whether employees would recognize "the legitimate business reasons" for which such a rule is promulgated and would not believe that it reaches Section 7 activity. *LaFayette Park Hotel*, 326 NLRB 824, 827 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

In its 2001 decision in *IRIS U.S.A.*, 336 NLRB 1013 (2001), the Board dealt with confidentiality language that was similar to that found in the instant case. Specifically, in *IRIS*, the employer prohibited disclosure of confidential information to include financial information, leases, licenses, agreements, sales figures, business plans, and proprietary information. As with the confidentiality language in the instant case, it was apparent that the employer sought to prevent the disclosure of information that might give unfair advantage to competitors or adversely affect its ability to compete in its industry. The employer, however, went on to include "personnel records" as confidential and limited their disclosure only to the named employee and senior management. In determining whether the employer's confidentiality rule was lawful, the judge noted that "personnel records" contain various kinds of information about employees; including their wages. The Board adopted the judge's findings and found that the employer violated Section 8(a)(1) by maintaining the confidentiality provision. Id. at 1014 fn. 1.

Certainly the Board has cautioned that a rule should be given a "reasonable reading" and that particular phrases in a rule should not be read in isolation or presumed to have improper interference with Section 7 rights. *Guardsmark, LLC*, 344 NLRB 809, 809 (2005). Counsel for the Acting General Counsel submits, however, that because Respondent's ambiguous rule prohibits the dissemination of "personnel information and documents" and because Respondent does not clarify the term, Respondent's rule reasonably tends to chill protected activity. The Acting General Counsel's argument has merit.

Although I have no doubt that the confidentiality agreement was likely written to prohibit confidential disclosures other than wages or other terms and conditions of employment, Respondent did not limit the prohibition to only those confidential matters that did not involve wages and other terms and conditions of employment. In *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860 (2011), the Board affirmed Judge Gregory Meyerson in finding that the respondent violated Section 8(a)(1) by maintaining or enforcing rules in the employee handbook that prohibited employees from disclosing information or messages from emails, instant messaging, and phone systems to unauthorized persons. As Judge Meyerson aptly pointed out "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." This same analysis may be applied to Respondent's confidentiality agreement. By including the wording "personnel information and documents" in the listing of confidential documents, Respondent leaves to employees the task of determining what entails "personnel information and documents" and requires them to speculate as to what kind of information disclosure may trigger their discharge. Accordingly, I find that the confidentiality agreement that Respondent implemented in May 2010, and which has been maintained since that time, is overly broad and has language that employees may reasonably construe as restricting the exercise of their Section 7 rights.

Although I have not found that Respondent terminated Lopez because she discussed wages with other employees, her termination is nevertheless unlawful. It is axiomatic that a rule may be unlawful even if it is not enforced. *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992); *Waco, Inc*., 273 NLRB 746 (1984). In the instant case, Lopez was terminated pursuant to the existing confidentiality agreement even though she was not terminated for discussing wages or other protected activity. Under extant Board precedent, an employer's imposition of discipline pursuant to an unlawfully overbroad policy or rule further constitutes a violation of the Act. *NLS*, 352 NLRB 744, 745 (2008); *Double Eagle Hotel & Casino*, 341 NLRB 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). Thus, despite the fact that the rule may not have been enforced because Lopez discussed wages with other employees, the rule is nonetheless unlawful and Lopez' discharge is violative of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondents Flex Frac Logistics LLC and Silver Eagle Logistics, LLC are joint employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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

(a) By promulgating and maintaining an overly broad confidentiality rule that employees could reasonably understand to prohibit them from discussing their wages and other terms and conditions of employment.

(b) By discharging Kathy Lopez pursuant to an overly broad confidentiality rule.

3. I do not find that Respondent violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent,

having unlawfully terminated the employment of Kathy Lopez, I shall order Respondent to offer Kathy Lopez immediate and full reinstatement and make her whole for any loss of earnings[5] and other benefits, computed on a quarterly basis from the date of her discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in F. *W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

[Recommended order omitted from publication.]

[5] In the complaint, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. The Acting General Counsel also requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Consistent with the Board's recent rulings in this regard, the Acting General Counsel's request is denied. See *Rogan Bros. Sanitation, Inc.*, 357 NLRB 1655, 1662 fn. 4 (2011); *Consumer Product Services*, 357 NLRB No. 87, slip op. at 4 fn. 3 (2011) (not reported in Board volumes).

Lafayette Park Hotel, a Limited California Partnership *and* Hotel Employees, Restaurant Employees and Bartenders Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO. Case 32–CA–15314

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

Upon a charge filed by Hotel Employees, Restaurant Employees and Bartenders Union, Local 2850, Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) on March 19, 1996, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on August 20, 1996, alleging that the Respondent, Lafayette Park Hotel, a Limited California Partnership, violated Section 8(a)(1) of the National Labor Relations Act.[1] The Respondent filed a timely answer denying the commission of any unfair labor practices.

On November 12, 1996, the General Counsel, the Respondent, and the Union filed with the Board a Motion to Transfer Proceedings to the Board and a Stipulation of Facts. On December 12, 1996, the Executive Secretary, by direction of the Board, issued an order granting the parties' motion, approving the stipulation, and transferring the proceeding to the Board. Thereafter, the General Counsel, the Union, and the Respondent each filed briefs.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California partnership, with an office and place of business in Lafayette, California, has been engaged in the operation of a hotel and restaurant. During the 12 months preceding the issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000, and purchased and received goods or services valued in excess of $5000 which originated outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining "unacceptable conduct" rules in its employee handbook. The alleged unlawful rules are set forth below.[2]

The General Counsel does *not* contend that the rules were initiated in response to any union and/or protected concerted activity or that any employee has been disciplined under the rules for engaging in union and/or protected concerted activity. The General Counsel's theory of the violation is that by maintaining the rules the Respondent has violated and continues to violate Section 8(a)(1) because the rules interfere with, restrain, and coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

A. Facts

At all material times, the Respondent has maintained the following rules and standards of conduct as set forth in its employee handbook:

STANDARDS OF CONDUCT

. . . .

The following conduct is unacceptable:

. . . .

6. Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

. . . .

17. Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

18. Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

. . . .

31. Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

. . . .

The following rules are also enforced:

. . . .

6. Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

[1] The Union filed a first amended charge on October 8, 1996.

[2] In brief, these rules prohibit, inter alia, the following kinds of employee activity: "conduct that does not support [the Hotel's] goals and objectives"; "divulging Hotel-private information" to unauthorized individuals; making "false" statements concerning the Hotel or its employees; "unlawful or improper conduct off the Hotel's premises or during nonworking hours"; use of the restaurant or lounge for entertaining guests without prior approval; fraternizing with hotel guests on hotel property; and remaining on the premises after the completion of the employee's shift.

> 7. Employees are not allowed to fraternize with hotel guests anywhere on hotel property.
>
> . . . .
>
> *SCHEDULING AND ATTENDANCE*
>
> . . . .
>
> [Paragraph 4] Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.

The employee handbook is distributed by the Respondent to each of its employees at the time of hire[3] and each employee must sign an acknowledgment of receipt.[4] The Respondent has an open door policy to the general manager if an employee has a complaint, wants to be critical of a policy of the hotel, or has a complaint against an employee. The Respondent's employees receive a 50-percent discount at the hotel restaurant.

B. Discussion

Resolution of the issue presented by the contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation* v. *NLRB*, 324 U.S. 793, 797–798 (1945). In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.[5] Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB* v. *Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation*, supra, 324 U.S. at 803 fn. 10.

Although we all agree with the standard to be applied, we do not agree in its application. Thus, a majority of the Board[6] finds that standards of conduct 6, 17, and 31 and hotel rules 6 and 7 would not reasonably tend to chill the exercise of Section 7 rights. A different majority[7] finds that standard of conduct 18 would reasonably tend to chill employees in the exercise of Section 7 rights. The Board is unanimous in finding that the maintenance of scheduling and attendance rule, paragraph 4 violates Section 8(a)(1).

1. Standards of conduct 6, 17, and 31; rules 6 and 7[8]

a. Standard of conduct 6

Standard of conduct 6 provides that the following conduct is unacceptable:

> Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

The General Counsel and the Union contend that the maintenance of the prohibition against engaging in conduct that does not support the Hotel's "goals and objectives" is unlawful. They reason that because the handbook does not define the Respondent's "goals and objectives," employees could reasonably assume that a "goal" of the hotel is to remain nonunion. Thus, the General Counsel and the Union argue that employees may reasonably believe that it is unacceptable to actively support union organizing, and that the rule prohibits them from participating in protected activities. They further maintain that any ambiguities in the rule should be construed against the Respondent, the promulgator of the rule, and that the mere maintenance of this rule, without enforcement against union or protected concerted activity, violates the Act because the rule has a reasonable tendency to chill employees' exercise of their Section 7 rights.

The Respondent argues that the rule does not expressly prohibit protected activity and there is no evidence that any employee has actually been prevented, discouraged, or restrained in any manner from exercising rights protected by Section 7. Absent such evidence, the Respondent contends that any chilling effect is speculative.

We conclude that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. In this regard, the rule, in providing that it is unacceptable for employees to engage in conduct that does not support the Respondent's "goals and objectives," addresses legitimate business concerns, including, as the rule specifically states, being "uncooperative with supervisors, employees, guests and/or regulatory agencies." We find no ambiguity in this rule as written. Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation, and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language, and we find that employees would not reasonably conclude that the rule as written prohibits Section 7 activity.

[3] The parties stipulated that the Respondent has hired 60 employees since April 8, 1996.

[4] The acknowledgments are maintained in employees' files.

[5] Member Hurtgen would not so limit the inquiry. If a rule reasonably chills the exercise of Sec. 7 rights, it can nonetheless be lawful if is justified by significant employer interests (e.g., a rule against solicitation during working time chills Sec. 7 exercise for that period. But, the rule is valid because the employer has a significant interest in having worktime set aside for work.)

[6] Chairman Gould and Members Hurtgen and Brame (Members Fox and Liebman dissenting).

[7] Chairman Gould and Members Fox and Liebman (Members Hurtgen and Brame dissenting).

[8] Members Fox and Liebman do not join in this section of the decision.

Furthermore, the Respondent has not by other actions led employees reasonably to believe that the rule prohibits its Section 7 activity. Thus, the Respondent has not enforced the rule against employees for engaging in such activity, and there is no evidence that the Respondent promulgated the rule in response to union or protected concerted activity or that those employees even engaged in any such activity. Moreover, there is no evidence that the Respondent exhibited antiunion animus. In these circumstances, to find the maintenance of this rule unlawful, as do our dissenting colleagues, effectively precludes a common sense formulation by the Respondent of its rule and obligates it to set forth an exhaustively comprehensive rule anticipating any and all circumstances in which the rule even theoretically could apply. Such an approach is neither reflective of the realities of the workplace nor compelled by Section 8(a)(1).

We find that the General Counsel has not met his burden of showing that the maintenance of this rule would reasonably chill employees in the exercise of their Section 7 rights. Accordingly, we find that the mere maintenance of this rule in the employee handbook has no more than a speculative effect on employees' Section 7 rights, which is too attenuated to warrant a finding of an 8(a)(1) violation. We shall dismiss the complaint as to this rule.

b. Standard of conduct 17

Standard of conduct 17 states that the following conduct is unacceptable:

> Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

The General Counsel and the Union contend that the maintenance of this rule in the employee handbook is unlawful. They reason that, because the term "Hotel-private" is not defined in the handbook, employees could reasonably believe that the rule prohibits discussions among employees concerning wages, benefits, and other terms and conditions of employment.

The Respondent argues that it has the right to keep its business records confidential and may validly maintain a rule which forbids employees from disclosing confidential information. The Respondent claims that there is no ambiguity in this rule which does not on its face cover employee wage discussion, but merely prohibits the disclosure of private information. We agree with the Respondent and find that the maintenance of this rule does not violate Section 8(a)(1).

Our dissenting colleagues state that discussion of wages is part of organizational activity[9] and employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid.[10] We agree. "But to concede this point lends nothing to the analysis in this case, because the rule in question in no way precludes employees from conferring . . . with respect to matters directly pertaining to the employees' terms and conditions of employment." *Aroostook County Ophthalmology v. NLRB*, 81 F.3d 209, 212 (D.C. Cir. 1996).[11] We do not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union.[12] Clearly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information. Although the term "hotel-private" is not defined in the rule, employees in our view reasonably would understand that the rule is designed to protect that interest rather than to prohibit the discussion of their wages. Thus, just as employees would not reasonably construe the rule as precluding them from disclosing their wage information in the normal course of events to banks, credit agencies and similar entities, they also would not reasonably construe the rule as precluding them from discussing their wage information with other employees. Our dissenting colleagues recognize the legitimacy of the confidentiality interest but in this case would find the rule unlawful by speculating both that it prohibits conduct not addressed by the rule and that such conduct includes Section 7 activity. We choose not to engage in such speculation. Rather, we conclude that the rule reasonably is addressed to protecting the Respondent's interest in confidentiality and does not implicate employee Section 7 rights. Accordingly, we dismiss this allegation.

c. Standard of conduct 31

Standard of conduct 31 states that the following conduct is unacceptable:

> Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees,

[9] *International Business Machines Corp*., 265 NLRB 638 (1982).

[10] See *Waco, Inc*., 273 NLRB 746, 748 (1984); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); *International Business Machines Corp*., supra.

[11] In *Aroostook County Opthalmology*, 317 NLRB 218 (1995), the Board found unlawful the promulgation and enforcement of an overly restrictive rule limiting the right of employees to discuss office business with spouses, families or friends. The employer argued that the "rule—when read in context—is designed only to prevent employees from discussing *patient medical information* with persons outside of the office." In denying enforcement, the court agreed, concluding that the rule on its face was not unlawful and finding that, absent evidence that the employer was imposing an "unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified." 81 F.3d at 212–213.

[12] Unlike the cases cited by the dissent, the rule here does not bar discussions of "terms and conditions of employment" or "employee problems."

supervisors, or the hotel's reputation or good will in the community.

Contrary to our dissenting colleagues, we do not believe that this rule can reasonably be read as encompassing Section 7 activity. In our view, employees would not reasonably fear that the Respondent would use this rule to punish them for engaging in protected activity that the Respondent may deem to be "improper." To ascribe such a meaning to these words is, quite simply, far-fetched. Employees reasonably would believe that this rule was intended to reach serious misconduct, not conduct protected by the Act.

We recognize that the Board has stated that the maintenance of a similar rule (which, however, additionally prohibited "unseeming" conduct) is unlawful. See *Cincinnati Suburban Press*, 289 NLRB 966 (1988). That finding, however, was made in the context of the respondent's "actions" in that case. Although, according to the administrative law judge, the case "presented a close 'concerted' activity issue," 289 NLRB at 975, the Board found that the rule had been enforced against union activity in violation of Section 8(a)(3). 289 NLRB at 967–968. Here, there is no such context and no factual basis for reasonable employees to view the rule as prohibiting Section 7 activity. Consequently, that case is distinguishable. Thus, we are left with the language of the rule itself, which, as stated above, a reasonable employee would not believe was intended to reach conduct protected by the Act. Accordingly, we find that the maintenance of the rule does not violate Section 8(a)(1).[13]

d. Hotel rule 6

This rule provides:

> 6. Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

The General Counsel and the Union contend that this rule is unlawful because it allows management to select which off-duty employees may use the premises, and can therefore be used to inhibit Section 7 activity. Thus, the General Counsel and the Union theorize that employees may reasonably believe that they must seek employer permission to engage in Section 7 activity in the restaurant or cocktail lounge, and that this belief would chill the employees in the exercise of their Section 7 rights.

Contrary to our dissenting colleagues, we do not believe that this rule reasonably would be read by employees to require them to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas. *Brunswick Corp*., 282 NLRB 794, 795 (1987), relied on by our dissenting colleagues, is distinguishable. There, the Board found unlawful a rule which required employees to obtain the employer's permission before engaging in union solicitation in work areas during nonworking time, and required the employer's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods. Thus, in *Brunswick*, union solicitation was directly implicated.

Here, the rule does not mention or in any way implicate Section 7 activity. Rather, it merely requires permission for "entertaining friends or guests." In our view, a reasonable employee would not interpret this rule as requiring prior approval for Section 7 activity. There are legitimate business reasons for such a rule, and we believe that employees would recognize the rule for its legitimate purpose, and would not ascribe to it far-fetched meanings such as interference with Section 7 activity. We therefore find that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, this allegation is dismissed.

e. Hotel rule 7

This rule provides:

> 7. Employees are not allowed to fraternize with hotel guests anywhere on hotel property.

The General Counsel and the Union contend that the maintenance of this rule is unlawful, reasoning that because the term "fraternize" is not defined, the rule could reasonably be interpreted by employees to prohibit off-duty employees from engaging in protected communications with hotel guests in nonworking areas of the Respondent's property, in an attempt to solicit sympathy or support for the employees' protected activities.

As with the previously discussed rules, we do not believe that employees reasonably would read this rule as prohibiting protected employee communications with customers about terms and conditions of employment. Nor would it be likely to inhibit protected employee communications with customers merely because the term "fraternize" is undefined. Despite this undefined term, the rule is not ambiguous. Employees would recognize the legitimate business reasons for which such a rule was promulgated,[14] and would not reasonably believe that it reaches Section 7 activity. We therefore find that the Respondent's maintenance of this rule in its employee

[13] We note that the respondent did not except to the above finding in *Cincinnati Suburban Press*. However, the Board in fn. 2 of its decision in that case indicated its agreement with the judge's finding that the respondent's maintenance of the rule in question violated Sec. 8(a)(1). To the extent that that footnote can be read as tantamount to a finding that the rule in question is unlawful even in the absence of the activity with which it was viewed in context, *Cincinnati Suburban Press* is overruled.

[14] In its brief the Respondent suggests that the rule was promulgated to prevent the appearance of favoritism, claims of sexual harassment, and employee dissension created by romantic relationships in the workplace.

handbook does not chill employee rights or violate Section 8(a)(1) of the Act.

2. Standard of conduct 18[15]

Standard of conduct 18 provides that the following conduct is unacceptable:

> Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

The Board has found the maintenance of similar rules to violate Section 8(a)(1) of the Act. In *Cincinnati Suburban Press*, 289 NLRB at 975, the Board found unlawful a handbook provision, similar to the one at issue here, which prohibited employees from making "false, vicious or malicious statements concerning any employee, supervisor, the Company, or its product." The Board relied on *American Cast Iron Pipe Co*., 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), which invalidated a similar provision on the ground that it prohibited and punished merely "false" statements, as opposed to maliciously false statements, and was therefore overbroad. In enforcing the Board's Order, the court stated that "[p]unishing employees for distributing merely 'false' statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected activities." 600 F.2d at 137.[16]

The Respondent's standard of conduct 18 is nearly identical to the provisions found unlawful in *Cincinnati Suburban, Spartan Plastics,* and *American Cast Iron*.[17] In accord with this Board[18] and court precedent, we find that the Respondent's maintenance of standard of conduct 18 violates Section 8(a)(1) of the Act.

3. Scheduling and attendance rule, paragraph 4[19]

As set forth above, this rule requires employees to leave the premises immediately after the completion of their shift, and not return until their next scheduled shift. Under *Tri-County Medical Center*, 222 NLRB 1089 (1976), "except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid." The General Counsel alleges that this rule violates Section 8(a)(1) of the Act because it is not limited to the interior of the premises and other working areas, and the Respondent has not shown any business justification for the rule. The Respondent argues that "the record is devoid of any suggestion that Lafayette Park includes parking lots and similar areas within this rule." The Respondent further contends that even if the parking lot is considered to be covered by the rule, it as well as all other areas of its property are "working areas." The Respondent also maintains that business reasons justify a no access rule for off-duty employees in the context of a hotel.[20]

We reject the Respondent's argument that the rule does not cover parking areas and other outside areas.[21] The rule contains no explicit exclusion of such areas, and therefore employees would reasonably read the rule as covering those areas. Thus, even if the Respondent did not intend the rule to reach those areas, that intent was not clearly communicated to the employees. Further, even if the rule could be considered ambiguous, any ambiguity in the rule must be construed against the Respondent as the promulgator of the rule.[22]

We also disagree with the Respondent's contention that all areas of the Respondent's property should be considered to be working areas. We see nothing in the nature of the hotel business in general or the Respondent's business in particular to support such a finding.

[15] Members Hurtgen and Brame do not join in this section of the decision.

Member Brame would find that the Respondent's mere maintenance of this rule does not reasonably tend to chill employees' Sec. 7 activity. As is true with the other rules and standards, the language of this rule itself does not proscribe Sec. 7 activity. Furthermore, there is no evidence that the Respondent implemented this rule in response to concerted protected or union activity or that it used the rule to discipline any employee for engaging in such activity. In these circumstances, Member Brame would find that employees reasonably would recognize that the rule, in providing that it is unacceptable to make false as well as vicious, profane or malicious statements towards the Respondent or its employees, is directed at a legitimate employer interest and not Sec. 7 activity. To the extent that the cases relied on by the majority hold that the mere maintenance of a rule prohibiting the making of false statements violates Sec. 8(a)(1), Member Brame would overrule them.

[16] See also *Spartan Plastics*, 269 NLRB 546, 552 (1984) (respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting employees from making "false, vicious, or malicious statements concerning any employee, supervisor, the Company, or its products").

[17] The Respondent attempts to distinguish those cases on the ground that here, unlike in those cases, there is no context of other unfair labor practices to cause employees to reasonably fear being disciplined for unknowingly false statements. We do not find this distinction significant. In our view, the rule has a reasonable tendency to chill protected activity even in the absence of other unlawful conduct.

[18] See also *Simplex Wire & Cable Co*., 313 NLRB 1311 (1994).

[19] All Board Members join in this section of the decision.

[20] The Respondent claims that the rule prevents interference with employees who are working and prevents guests from being confused by off-duty employees who may still be in uniform; it reduces the risks of accidents and claims from guests and other employees for sexual harassment and other illegal activities; and it enhances security.

[21] Member Brame finds that employees reasonably would conclude that the Respondent's "premises" includes the Respondent's parking areas and its other outside areas. Accordingly, on this basis, he concludes that the Respondent's maintenance of this rule violates Sec. 8(a)(1).

[22] *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

We further find that the Respondent's proffered business reasons for the rule do not justify a total denial of access by off-duty employees to all areas of the Respondent's premises. The types of concerns raised by the Respondent are common to service employers in general and have been found to be insufficient to justify the denial of access by off-duty employees to nonworking areas such as parking lots and other outside areas.[23] The Stipulation of Facts contains nothing which would justify the restriction of access to nonworking areas of the Respondent's premises such as parking lots and other outside areas. Because the Respondent's scheduling and attendance rule, paragraph 4 does not meet the requirements set forth in *Tri-County*, supra, we find that the maintenance of that rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, we conclude that the Respondent has violated Section 8(a)(1) of the Act by maintaining that rule in its employee handbook.

CONCLUSIONS OF LAW

1. By maintaining the following standard of conduct in its employee handbook, the Respondent has violated Section 8(a)(1) of the Act.

> 18. Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

2. By maintaining the following scheduling and attendance rule in its employee handbook, the Respondent has violated Section 8(a)(1) of the Act.

> [Paragraph 4] Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.

3. The unfair labor practices found above have an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not otherwise violated the Act as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, Lafayette Park Hotel, a Limited California Partnership, Lafayette, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the following scheduling and attendance rule in its employee handbook:

[Paragraph 4] Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.

(b) Maintaining the following Standard of Conduct in its Employee Handbook:

> 18. Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

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

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

(a) Rescind the rules quoted above, remove them from its Employee Handbook, and advise the employees in writing that the rules are no longer being maintained.

(b) Within 14 days after service by the Region, post at its facility in Lafayette, California, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 19, 1995.

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

CHAIRMAN GOULD, further concurring.

I agree with the majority opinion in this case which finds that the Respondent's standards of conduct 6, 17, and 31, and hotel rules 6 and 7, are lawful, and that the Respondent's standard of conduct 18 and its scheduling and attendance rule, paragraph 4, are unlawful. I write separately, however, because I am concerned that the analysis put forth by Members Fox and Liebman in their partial dissent fails to appreciate the importance of civility and good manners for all people, including employees.

In their partial dissent, Members Fox and Liebman find that standards of conduct 6, 17, and 31, and hotel rules 6 and 7, are facially unlawful. They find that these

[23] See e.g., *Ohio Masonic Home*, 290 NLRB 1011 (1988), enfd. 892 F.2d 449 (6th Cir. 1989).

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rules are "ambiguous as to their reach," and consequently, "each causes employees to refrain from engaging in protected activities." While accusing the majority of "paying lip service to the appropriate standard," they have completely lost sight of the most obvious meaning and intent of these rules: the maintenance of civility and good manners. In short, these are rules for life, not for Section 7 conduct.

My colleagues' finding that these rules are ambiguous demonstrates a failure to apply the appropriate standard to these rules. It is readily apparent from their opinion that they have viewed these rules through the eye of a sophisticated labor lawyer and have focused on whether any language in the rules could theoretically encompass Section 7 activity. Their search for ambiguity in these rules, however, must begin with a focus on the obvious, plain meaning of the language in the rule. When the obvious meaning of such rules is the promotion of civility and good manners, there is no basis to presume that a reasonable employee might parse out certain language, for example such as "goals and objectives" from standard of conduct 6, and assume that it applies to union organizing. Similarly, that the term "Hotel-private information," as set forth in standard of conduct 17, is undefined does not mean that it is intended to apply to anything other than the obvious, i.e., the legitimate privacy concerns that arise in the hotel business.

In short, it is not enough to find that certain language in a rule is broad enough to arguably apply to Section 7 activity. The appropriate inquiry must center on whether a reasonable employee could believe that the rule prohibits protected activity. When the rules have an obvious intent, they cannot be found unlawful by parsing out certain words and creating theoretical definitions that differ from the obvious ones. If that were the standard, virtually all of the work rules in today's workplace could be deemed violative of our Act unless they explicitly state that they do not apply to Section 7 activity. Such findings would clearly be inconsistent with the purposes of the Act. Accordingly, I join Members Hurtgen and Brame in finding that the Respondent's maintenance of these rules do not violate Section 8(a)(1) of the Act.

MEMBERS FOX and LIEBMAN, dissenting in part.

We agree with our colleagues that the appropriate inquiry in this case is whether the maintenance of the rules at issue reasonably would tend to chill employees in the exercise of their Section 7 rights. We part company with them in the application of this principle to standards of conduct 6, 17, and 31 and hotel rules 6 and 7. While paying lip service to the appropriate standard, our colleagues have applied that standard in such a way as to enable employers lawfully to maintain rules that have the likely effect of chilling Section 7 activity.

Employers, of course, have the right to issue rules of conduct to maintain workplace discipline and further legitimate business purposes. In accommodating this undisputed right with the equally undisputed right of employees to engage in Section 7 activity, as we must do in construing workplace rules, the Board has flexibility to "accomplish the dominant purpose of the legislation. . . . So far as we are here concerned that purpose is the right of employees to organize for mutual aid without employer interference. This is the principle of labor relations which the Board is to foster." *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945).

Our colleagues in the majority concede that maintenance of workplace rules may violate the Act even absent evidence of enforcement. See *NLRB v. Vanguard Tours,* 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation Corp. v. NLRB*, supra, 324 U.S. at 803 fn. 10. Yet, they proceed consistently to rely on nonenforcement as proof of the rules' lawfulness, thereby creating a catch-22 for employees considering protected activity: either they must risk discipline under the rules or refrain from conduct to avoid penalty. Either way, their Section 7 rights are infringed.

Indeed, we are mystified that while all of our colleagues agree that scheduling and attendance rule, paragraph 4 violates Section 8(a)(1) because of its likely chilling effect on Section 7 rights—and the Chairman agrees that standard of conduct 18 is similarly unlawful—they nevertheless find the remaining rules lawful. In our view, our colleagues have drawn artificial distinctions and miss the common thrust. Each of these seven rules suffers from the same deficiency: they are all overly broad and equally ambiguous as to their reach.[1] Each fails to define the area of impermissible conduct in a manner clear to employees. As a result, each has a reasonable tendency to cause employees to refrain from engaging in protected activities.

We find no merit to our colleagues' conclusion that any impact of these rules on the employees' exercise of their Section 7 rights is purely speculative or too attenuated to warrant an 8(a)(1) finding. In our view, an employee contemplating protected Section 7 activity would be uncertain as to whether these rules encompass that activity. Because violation of the rules may result in discipline, an employee would reasonably hesitate before engaging in protected activity and would thereby be chilled in the exercise of his or her Section 7 rights. In this regard, we note that the Respondent requires each employee to sign an "Acknowledgement of Receipt of Employee Handbook," and the Respondent maintains this form in the employee's file. By signing this document, the employee represents that he "understand[s] that [the handbook] contains important information about

[1] "Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it." *Norris/O'Bannon,* 307 NLRB 1236, 1245 (1992), quoting *Paceco,* 237 NLRB 399 fn. 8 (1978).

Hotel personnel policies and the privileges and obligations of the employees of the Hotel." In addition, the handbook itself states that "[e]mployees who fail to follow the established policies, procedures, and rules of the hotel will be disciplined." In effect, our colleagues' decision requires that employees seeking to engage in activity protected by the National Labor Relations Act must risk violating their employer's work rules and subjecting themselves to disciplinary action in order to test whether that activity is covered by the rules. Our colleagues find such a situation permissible; we do not. Accordingly, we must dissent.

Analyzing each of the alleged unlawful rules under established Board principles, we conclude, as set forth below, that the maintenance of these rules violates Section 8(a)(1) of the Act.[2]

Standard of Conduct 6

Standard of conduct 6 provides that the following conduct is unacceptable:

> Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

As set forth in the majority opinion, the Respondent argues that this standard is lawful because it does not expressly prohibit protected activity and because there is no evidence that it has actually restrained or discouraged any employee from exercising Section 7 rights. The General Counsel and the Union argue that such evidence is immaterial in the case of rules that are so broad or ambiguous, and in the case of standard of conduct 6, they argue that the prohibition against engaging in conduct that "does not support" the Respondent's "goals and objectives" would discourage protected activity in view of the fact that the handbook contains no definition of "goals and objectives."

Our colleagues acknowledge that Board precedent holds that the mere maintenance of an ambiguous or overly broad rule is unlawful because it tends to inhibit employees from engaging in otherwise protected activity. *Ingram Book Co.,* 315 NLRB 515, 516 (1994); *J. C. Penney Co.*, 266 NLRB 1223, 1224 (1983). Accord: *Medeco Security Locks v. NLRB*, 142 F.3d 733, 745 (4th Cir. 1998) (employer's prohibition on disclosure unlawful if it might deter protected activity "even if an employee has yet to exercise a right protected by the Act"). Our colleagues attempt to distinguish such precedents on grounds that standard of conduct 6 could not reasonably be read as prohibiting protected activity. We disagree.

The rule's failure to define the hotel's "goals and objectives" is overbroad and ambiguous and reasonably could lead employees to believe that standard of conduct 6 prohibits protected activity.[3] We agree with the General Counsel and the Union that employees could reasonably conclude that if they chose to support a union, they could be engaging in conduct that did not support the Respondent's "goals and objectives." We do not doubt that some employers desire to keep their workplaces union free. See *BE & K Construction Co. v. NLRB*, 133 F.3d 1372, 1376 (11th Cir. 1997). Perhaps even more fundamentally, reasonable employees could just as easily conclude that the Respondent formulated the terms and conditions of employment for its employees consistently with its overall philosophy or "goals and objectives." Thus, they might very reasonably conclude that any concerted protest of current terms and conditions of employment, conduct certainly protected by the Act, would violate the Respondent's rule.

In our view, the ambiguity of this rule is sufficient to chill the exercise of protected conduct. Contrary to our colleagues, we find this potential chilling effect to be more than speculative or attenuated. We believe that it is the uncertainty over the rule's meaning, the absence of evidence that the rule's scope had been permissibly defined for employees, and the possibility of enforcement against protected activity that would reasonably tend to chill the exercise of Section 7 rights.[4]

Our colleagues rely on the absence of any union or protected concerted activity by the employees to support their finding that any impact of these alleged unlawful standards of conduct on the exercise of employees' Section 7 rights is speculative or attenuated. We disagree. If anything, the absence of evidence of union or protected concerted activity by the employees suggests that the rules are indeed working to discourage protected activity.

For these reasons, we find that the maintenance of this rule violates Section 8(a)(1).

Standard of Conduct 17

Standard of conduct 17 states that the following conduct is unacceptable:

[2] We agree, for the reasons set forth in the majority opinion, that the Respondent violated Sec. 8(a)(1) of the Act by maintaining standard of conduct 18 and scheduling and attendance rule, par. 4 in its employee handbook.

[3] That the rule specifies that it is unacceptable to be "uncooperative with supervisors, employees, guests and/or regulatory agencies" does not cure the problem, because the rule also broadly prohibits "otherwise engaging in conduct" not supportive of the hotel's "goals and objectives."

[4] In light of the handbook's statement, noted above, that employees "will be disciplined" for failing "to follow the established policies, procedures, and rules of the hotel," employees would understandably be reluctant to place their jobs in jeopardy by engaging in Sec. 7 protected conduct, since they might reasonably fear that the Respondent could determine that the conduct "does not support [its] goals and objectives."

> Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

For the following reasons we agree with the General Counsel and the Union that the prohibition on disclosure of "Hotel-private" information, a term that is undefined in the Handbook, could reasonably lead employees to believe that the standard prohibits discussion among employees concerning wages, benefits, and other terms and conditions of employment. We thus reject the Respondent's argument (accepted by our colleagues), that the standard is not unduly ambiguous and would reasonably be construed as merely prohibiting the disclosure of information other than that directly pertaining to wages and working conditions that an employer could properly keep confidential.

It is well established that discussion of wages, benefits, and working conditions are an important part of organizational and other concerted activity.[5] Although employers may have a substantial and legitimate interest in limiting or prohibiting discussion of some aspects of their affairs, they may not prohibit employees from discussing their own wages and working conditions or attempting to determine, for example, what other employees are paid.[6] Standard of conduct 17 is overbroad and fails to clearly define the impermissible conduct. It is not crafted so that employees would understand that the standard does not prohibit them from, for example, compiling wage information on their own or discussing employer policies or actions that affect their working conditions with others. In light of that ambiguity, which must be construed against the Respondent,[7] employees may reasonably believe that protected activity is prohibited by this standard.[8] Therefore, we believe that the Respondent's maintenance of this rule would reasonably tend to chill the employees' exercise of their Section 7 rights.[9] Accordingly, we would find that the Respondent violated Section 8(a)(1) by maintaining this rule in its employee handbook.

Standard of Conduct 31

Standard of conduct 31 states that the following conduct is unacceptable:

> Unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community.

In *Cincinnati Suburban Press*, 289 NLRB 966, 975 (1988), the Board found unlawful the maintenance of a rule prohibiting "[u]nlawful, improper or unseeming [sic] conduct on or off the Company premises or during non-working hours which affects the employee's relationship to his/her job, to his/her fellow employees or to his/her supervisors, or affecting the Company's product reputation or goodwill in the community." Standard of conduct 31, at issue here, is virtually identical. In each case, "the rule fails to define the area of permissible conduct in a manner clear to employees." 289 NLRB at 975. Employees may reasonably fear that the Respondent will use this rule in the future to punish them for engaging in protected activity that the Respondent may deem to be "improper." Contrary to our colleagues and in accordance with clear and well-established precedent,[10] we find that the Respondent violated Section 8(a)(1) of the Act by maintaining this rule in the employee handbook.

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[5] *Advance Transportation*, 299 NLRB 900 (1990) (employer's profit-sharing plan); *Korea News*, 297 NLRB 537, 538 (1990) (harsh practices of supervision, numbers of employees assigned to particular tasks, conditions of work space, overtime pay); *International Business Machines*, 265 NLRB 638 (1982) (wage information).

[6] See, e.g.**,** *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990) (prohibition on discussing "condition of center facilities and the terms and conditions of employment" with parents of children at center); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987) (rule prohibiting discussion of "Confidential Information" including "employee problems"); *Waco, Inc.*, 273 NLRB 746, 747–748 (1984) (prohibition on discussing wages); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (same).

[7] *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992) (ambiguities construed against promulgator of rule).

[8] *Medeco Security Locks v. NLRB*, supra, 142 F.3d at 745; *Pontiac Osteopathic Hospital*, supra (prohibition of discussion of "[h]ospital affairs, patient information, and employee problems" found to be overly broad and violative of Sec. 8(a)(1)). See also *Aroostook County Regional Ophthalmology Center,* 317 NLRB 218 (1995), enf. denied in part 81 F.3d 209 (D.C. Cir. 1996), where the Board found that the employer violated Sec. 8(a)(1) by maintaining, inter alia, a rule stating that "no office business is a matter for discussion with spouses, families or friends." Finding that "ordinarily 'office business' may reasonably be interpreted to include employees' terms of employment," the Board held that it was "at least ambiguous whether the 'no office business' provision is intended to be limited to matters of patient information," as claimed by the employer. Because employees have the right to discuss their terms of employment with others, the Board found the provision to be prima facie unlawful. Our colleagues in the majority rely on the court of appeals decision that reversed the Board. However, the court was particularly persuaded by the placement of the rule in the office policy manual; it followed a long paragraph about patient confidentiality in which the term "office business" was used to refer to confidential patient medical information. In context, the court concluded that the Board's broad interpretation of the rule was unjustified. 81 F.3d at 213. No such context is provided for standard of conduct 17.

[9] As discussed above, contrary to our colleagues, we find the mere presence of this ambiguous rule in the employee handbook, without more, to be sufficient to chill the employees in the exercise of their Sec. 7 rights.

[10] Our colleagues' attempt to distinguish *Cincinnati Suburban* is unconvincing. "Unlawful or improper conduct," proscribed by standard of conduct 31, is indistinguishable from "unlawful, improper or unseeming conduct," proscribed in *Cincinnati Suburban Press.* Nor is the fact that the rule in *Cincinnati Suburban Press* had actually been enforced grounds for distinction. As stated, the mere maintenance of a rule can chill employee rights, even absent evidence of enforcement. Our colleagues have thus overruled *Cincinnati Suburban* without satisfactory explanation.

Hotel Rule 6

This rule provides:

> 6. Employees are not permitted to use the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager.

The General Counsel and the Union contend that this rule is unlawful because it allows management to select which off-duty employees may use the premises. In *Brunswick Corp*., 282 NLRB 794, 795 (1987), the Board found unlawful a rule requiring employees to obtain the employer's permission before engaging in union solicitation in work areas during nonworking time, and requiring the employer's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods. The Board stated that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful. Further, "the mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if the rule is not enforced." Id.

Applying these principles, we find it plain that where an employer allows some off-duty employees access to its restaurant and lounge, it may not condition that access on the approval of management. Hotel rule 6 does just that. This rule allows the Respondent to select which employees will receive permission to use the Respondent's facilities and to deny access to employees seeking to engage in Section 7 activity on their own time. In our view, such a rule has a reasonable tendency to chill employees in the exercise of their Section 7 rights and its maintenance violates Section 8(a)(1).[11]

Hotel Rule 7

This rule provides:

> 7. Employees are not allowed to fraternize with hotel guests anywhere on hotel property.

Section 7 protects employee communications with customers about terms and conditions of employment.[12] We agree with the General Counsel and the Union that because the term "fraternize" is undefined the rule can reasonably be read to prohibit off-duty employees from engaging in protected communications with hotel guests in nonworking areas of the Respondent's property, in an attempt to solicit sympathy or support for the employees' protected activities. Even if the rule was established for legitimate business purposes, as found by our colleagues, it is not drafted so as to clearly define what is proscribed and eliminate any ambiguity as to whether protected activity is covered. It is this ambiguity that chills reasonable employees in the exercise of their Section 7 rights.[13] Accordingly, we find that the Respondent's maintenance of this rule in its employee handbook is a violation of Section 8(a)(1) of the Act.

Conclusion

For the foregoing reasons, we find that established Board precedent compels the conclusion that the mere maintenance of each of the rules alleged to be unlawful in the complaint reasonably would tend to chill an employee in the exercise of his or her Section 7 rights. Accordingly, we conclude that the maintenance of those rules in the employee handbook violates Section 8(a)(1) of the Act. Our approach to these rules is not, as our colleagues contend, purely hypothetical or fanciful. While the Respondent may or may not have purposely intended to include protected activities within the scope of these rules, that is of no import. The point is that because each rule is susceptible to doubt as to its coverage, each reasonably could lead an employee to refrain from protected activity for fear of breaking the rule and incurring disciplinary penalty. That is the essence of "chilling" of rights long recognized by the Board and the courts.

In reading these rules as we do, we are by no means precluding or restricting employers from achieving legitimate business objectives by imposing work rules governing employee conduct. Our construction is intended to safeguard the opportunity to exercise Section 7 rights as well as the ability to enforce proper workplace discipline. *Both*, as our colleagues concede, are "essential elements in a balanced society." *Republic Aviation v. NLRB*, 324 U.S. at 798. We only require that workplace rules be narrowly and precisely drawn to define the proscribed conduct so that an employee contemplating protected Section 7 activity would not reasonably wonder whether that activity was covered by the rules' prohibi-

[11] Our colleagues find that this rule was established for legitimate business reasons and that reasonable employees would recognize that lawful purpose and would not believe that Sec. 7 activity was encompassed by the rule. Contrary to our colleagues, we do not think that the Respondent has provided a legitimate business reason for this rule. The Stipulation of Facts which constitute the record in this case provide no justifications for any of the rules or standards of conduct, and the contention in the Respondent's brief that the rule prevents interference with employees who are working, reduces risks of accidents and claims of sexual harassment from guests and other employees, and enhances security does not explain why more carefully drafted rules could not serve those purposes. Given its present form, it is not "far-fetched" that reasonable employees could conclude that some Sec. 7 activity could be covered by the rule. Employees should not have to risk their jobs in order to test the rule's coverage.

[12] See *NCR Corp*., 313 NLRB 574, 576 (1993); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990).

[13] The fact that there is no evidence of enforcement is irrelevant where, as here, the mere presence of the rule would reasonably tend to chill the employees in the exercise of their Sec. 7 rights. See *NLRB v. Beverage-Air Co.,* 402 F.2d 411, 419 (4th Cir. 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful because it "may chill the exercise of the employees' [Sec.] 7 rights").

tions. This would spare employees from the catch-22 choice whether to refrain from protected conduct or test the reach of the rules under peril of disciplinary action.

Requiring employers to draft rules of conduct narrowly and with precision does not require any business sacrifice or impose any real burden. Surely, employers can craft rules which are clear on their face and can not reasonably be read to interfere with or restrain the exercise of Section 7 rights. If the rules were drafted so as to eliminate ambiguity, employers could legitimately maintain discipline and further business objectives, and employees would not be chilled in the exercise of their Section 7 rights. We find that the rules at issue here were not so drafted. Accordingly, we would order the Respondent to rescind these rules, delete them from the employee handbook, and notify the employees that the rules will no longer be maintained.

MEMBER HURTGEN, concurring in part, dissenting in part.

I agree that the maintenance of a rule which, on its face, interferes with Section 7 activity, is unlawful, even if it has not been applied. However, I do not agree that a rule should be condemned as unlawful simply because it can be parsed broadly enough to theoretically cover Section 7 activity. Thus, where the rule does not refer to Section 7 activity (e.g., solicitation or distribution), is not motivated by such activity, has never been applied to such activity, and does not affect such activity, I would not reach out to condemn it. Indeed, I would not spend the Board's scarce resources by ranging through employment rules in an effort to see if some of them can conceivably be construed to refer to Section 7 activity.

Consistent with this approach, I agree with the majority that standards 6, 17, and 31 and rules 6 and 7 are lawful. Also consistent with this approach, I conclude that standard 18 is lawful. In this latter regard, I agree that, hypothetically, an employee might utter a falsity in the course of a Section 7 statement, under circumstances where the falsity would not remove the statement from the protection of Section 7. I also agree, again hypothetically, that the Respondent might read its rule mechanically and might punish the employee. If this happened, the punishment would be unlawful. However, none of this has happened. Further, unlike the cases relied upon by the majority (e.g., *Cincinnati Suburban Press*, 289 NLRB 966 (1988)), there are no unfair labor practices of a kind which would cause a reasonable employee to believe that standard 18 would be unlawfully construed and applied. In this regard, I recognize that scheduling and attendance rule, paragraph 4 (discussed, infra) is unlawful. However, that rule deals with a subject matter that is entirely different from the subject matter of standard 18. In addition, scheduling and attendance rule, paragraph 4 is unlawful on its face. It is *not* an example of a lawful rule that is unlawfully construed and applied. In sum, an employee who is exposed to scheduling and attendance rule, paragraph 4 would not reasonably conclude that an entirely different rule (standard 18) would be construed so as to apply to protected activity. Finally, to the extent that my colleagues read *Cincinnati Suburban,* supra*,* to hold that the rules therein are per se unlawful (i.e., without reference to other unfair labor practices), I disavow that holding. Such a holding would mean an employer violates Federal law if it tells its employees, through a neutral rule, that it is improper to lie. I do not think that Congress envisaged such a result.

My conclusions with respect to the foregoing rules are not inconsistent with my conclusion that scheduling and attendance rule, paragraph 4 is unlawful. That rule clearly requires employees to leave Respondent's premises after their shift. If they must leave, they obviously cannot exercise their Section 7 right to engage in union activity on the premises (albeit outside the hotel itself) after the completion of their shift.[1] Thus, the rule on its face, clearly interferes with a Section 7 right.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT maintain the following scheduling and attendance rule in our employee handbook:

> [Paragraph 4] Employees are required to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.

WE WILL NOT maintain the following standard of conduct in our employee handbook:

> 18. Making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees.

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

WE WILL rescind the rules quoted above, remove them from our employee handbook, and advise the employees in writing that the rules are no longer being maintained.

LAFAYETTE PARK HOTEL, A LIMITED CALIFORNIA PARTNERSHIP

[1] See *Tri-County Medical Center*, 222 NLRB 1089 (1976).