

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Nos. 05-1305 & 05-1340

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CINTAS CORPORATION

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITE HERE

Intervenor

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ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Cintas Corporation (“the Company”) to review, and on the cross-application of the National Labor Relations

Board (“the Board”) to enforce, a Board order issued against the Company on June 30, 2005, and reported at 344 NLRB No. 118 (2005). (A 1-21.)<sup>1</sup>

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Company filed its petition for review on August 1, 2005. The Board filed its cross-application for enforcement on August 25. Both filings were timely; the Act places no limit on the time for filing actions to review or enforce Board orders.

#### STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by maintaining in its employee handbook an

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<sup>1</sup> “A” references are to the joint appendix. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

overly broad confidentiality rule that unlawfully restricts employee discussion of wages and other terms and conditions of employment.

#### RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant sections of the National Labor Relations Act are reproduced in the Addendum to this brief.

#### STATEMENT OF THE CASE

The Board's General Counsel issued a complaint after conducting an investigation of unfair labor practice charges filed by the Union of Needletrades, Industrial and Textile Employees (UNITE) ("the Union").<sup>2</sup> (A 3.) After a hearing, the administrative law judge issued a decision finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining language in its employee handbook that prohibits employees from discussing wages and other terms and conditions of employment.<sup>3</sup> (A 3-4.) On review, the Board affirmed the judge's rulings, findings, and conclusions, and adopted his recommended order, as modified. (A 1-2.) The Board modified the judge's order only with regard to the remedy. (A 1-2.)

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<sup>2</sup> The Intervenor in this case, UNITE HERE, was formerly UNITE.

<sup>3</sup> The judge dismissed additional allegations from the complaint, which are not at issue in this case.

## I. THE BOARD'S FINDINGS OF FACT

### A. Background; The Company's Confidentiality Rule in Its Employee Handbook

The Company supplies workplace uniforms to businesses throughout North America. (A 3; A 29.) It employs approximately 27,000 people at 350 facilities. (A 3; A 29.) The Company maintains an employee handbook entitled "Cintas Corporation Partner Reference Guide" ("employee handbook"), which is distributed to all new employees at the time of hire as well as redistributed to all employees when revised. (A 3; A 24-25, 30-31, 56-101.) The Company uses the term "partner" or "partners" to refer to its employees. (A 4; A 24-25.)

Since about August 5, 2002, the employee handbook has contained the following provision:

*We honor confidentiality.* We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters.

(emphasis in original) (A 4; A 31, 71.) A few pages later in the employee handbook, another provision states in part:

Examples of behavior that could result in disciplinary action are:

. . . Violating a confidence or unauthorized release of confidential information.

(A 4; A 75.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Battista and Members Liebman and Schaumber), in agreement with the administrative law judge, found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining an overly broad confidentiality rule in its employee handbook. (A 1.) The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, 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 (29 U.S.C. § 157). (A 2.) Affirmatively, the Order requires the Company to rescind the unlawful language of the rules. The Company must also furnish employees with inserts for the employee handbook advising them that the unlawful provisions have been rescinded, or providing language of lawful provisions. Alternatively, the Company may publish and distribute to all employees a revised employee handbook that does not contain the unlawful provisions or provides language of lawful provisions. The Order further requires the Company to post a remedial notice. (*Id.*)

### SUMMARY OF ARGUMENT

The Company's employees have an undisputed statutory right to communicate with each other and the Union about their wages and other terms and conditions of employment. Yet these same employees are informed in their

employee handbook, which they receive upon being hired, that the Company considers confidential “any information concerning . . . its [employees]” and they can be disciplined for an unauthorized release of confidential information. The Board reasonably found that, taken together, these provisions could reasonably be construed by employees as restricting their undisputed right to discuss wages and other terms and conditions of employment with each other and the Union. Given that employees could reasonably construe the Company’s confidentiality rule as a restriction of those rights, the rule violates Section 8(a)(1) of the Act.

## ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING AN OVERLY BROAD CONFIDENTIALITY RULE IN ITS EMPLOYEE HANDBOOK THAT UNLAWFULLY RESTRICTS EMPLOYEE DISCUSSION OF WAGES AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” Employers violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if they “interfere with, restrain, or coerce employees in the exercise of [those] rights.”

Section 7 “rights are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Therefore, Section 7 encompasses the rights of employees to solicit and communicate with other employees regarding wages and other terms and conditions of employment. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978). Indeed, the workplace is a “uniquely appropriate” place for such communications. *Republic Aviation v. NLRB*, 324 U.S. 793, 802 n.6 (1945).

An employer's rule that does not explicitly restrict Section 7 activity will violate Section 8(a)(1) upon a showing of any one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Martin Luther Memorial Home d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB No. 75, slip op. at 2, 2004 WL 2678632, at \*2 (2004). Therefore, an employer's confidentiality rule violates Section 8(a)(1) of the Act where it "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 823, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).<sup>4</sup> *Accord Brockton Hosp. v. NLRB*, 294 F.3d 100, 107 (D.C. Cir. 2002).

Employees' Section 7 rights indisputably include the right to communicate with other employees regarding wages and other terms and conditions of employment. Generally, any rule prohibiting employees from discussing their wages violates Section 8(a)(1) of the Act. *See, e.g., Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999); *Waco, Inc.*, 273 NLRB 746, 748 (1984).

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<sup>4</sup> The Company agrees (Br 9), as it must given this Court's affirmance of the *Lafayette Park* standard, that this is the "appropriate question" for the Board to consider when evaluating the lawfulness of workplace confidentiality rules. Any reliance the Company places (Br 26) on the Board's decision in *Fiesta Hotel Corp. d/b/a Palms Hotel and Casino*, 344 NLRB No. 159 (2005), as enunciating a new standard is entirely misplaced as the Board explicitly applied the *Lafayette Park* framework in that case. *Id.*, slip op. at 26, 2005 WL 1985977, at \*37.

Furthermore, any ambiguity in a rule must be construed against the promulgator of the rule. *Lafayette Park*, 326 NLRB at 828.

This Court “reviews the Board’s decision[s] deferentially.” *Brockton Hosp.*, 294 F.3d at 103. As such, the Court’s review of unfair labor practice findings “is quite narrow.” *Traction Wholesale Ctr. Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000). The Court “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo*.” *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). See generally Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). Furthermore, the Court will “abide [the Board’s] interpretation of the Act if it is reasonable and consistent with controlling precedent.” *Brockton Hosp.*, 294 F.3d at 103 (citing *Local 702, Int’l Bhd. of Elec. Workers v. NLRB*, 215 F.3d 11, 15 (D.C. Cir. 2000)).

B. The Company’s Rule Is Overly Broad and Unlawfully Restricts Employee Discussion of Wages and Other Terms and Conditions of Employment

Substantial evidence supports the Board’s finding (A 1) that the Company violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule in its employee handbook that unlawfully prohibits employee discussion of

wages and other terms and conditions of employment. Applying the well-established principles of *Lafayette Park* and *Lutheran Heritage*, the Board found (A 1) the Company's confidentiality rule unlawful because employees would reasonably construe its language to prohibit Section 7 activity. As the Board explained (A 1), the rule's "unqualified prohibition of the release of 'any information' regarding 'its partners' could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union." Indeed, given the breadth of the all-encompassing phrase "any information concerning . . . its partners[,]" it is difficult to interpret the rule otherwise.

Moreover, the rule here is no different than similar rules the Board found unlawful in *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001), and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). The rule in *IRIS* simply prohibited employees from revealing "information" about "employees." *Id.* at 1015. In *Flamingo Hilton*, the rule banned revealing "confidential information" about "fellow employees." 330 NLRB at 291. The unlawful ban in *Flamingo Hilton* was thus even less restrictive than the Company's rule, which applies to "any information" concerning the Company's "partners" and could reasonably be construed as restricting any discussion of information about not only other employees, but one's own wages and other terms and conditions of employment.

This Court's holding in *Brockton Hospital* further supports the Board's finding. In that case, this Court enforced the Board's order finding unlawful a policy prohibiting the sharing of "information concerning patients, associates [that is, employees], or hospital operations." *Brockton Hosp.*, 294 F.3d at 106. The language that rendered the policy unlawful was the prohibition on sharing "information concerning . . . associates." That language is indistinguishable from the Company's provision protecting the confidentiality of "any information concerning . . . partners." (A 1; A 71.) As the Court explained, such rules are unlawful because they "have the tendency to cause [employees] who read [them] to believe [they] restrict [their] right to discuss hours, wages, and other terms and conditions of employment." *Id.* at 106-07. *Accord Lafayette Park*, 326 NLRB at 826. In short, the policy here, like the unlawful policy in *Brockton Hospital*, "on its face, prohibits [employees] from discussing with each other, let alone the Union office, information concerning themselves." 294 F.3d at 106-07; *see also Pontiac Osteopathic Hosp.*, 284 NLRB 442, 466 (1987) (rule prohibiting discussion of "employee problems" unlawfully overbroad); *Super K-Mart*, 330 NLRB 263, 263 (1999) (rule prohibiting disclosure of "company business" would have "clearly trampled on employees Section 7 rights" had it also limited discussions of "employee problems").

The Company's attempt (Br 17) to distinguish *Brockton Hospital* on the basis that language in the employer's policy in that case prohibits discussion of employee information "inside or outside" the workplace is unavailing. The addition of the phrase "inside or outside" does not render that rule's scope any broader than the Company's confidentiality rule, which contains no language identifying any location where sharing of employee information may occur. Accordingly, given the virtually identical language in the Company's employee handbook and that found unlawful in *Brockton Hospital*, the Board "faithfully appl[ied]" the "accepted" *Lafayette Park* standard, (*Community Hosp. of Central California v. NLRB*, 353 F.3d 1079, 1088 (D.C. Cir. 2003)), in concluding (A 1) that the rule "could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union."

The Company asserts (Br 11) that it has not violated Section 8(a)(1) by maintaining the confidentiality rule because there is no evidence that the Company disciplined any employee under the confidentiality rule for engaging in union or other protected activity. The Board has consistently held that non-enforcement of an overly broad rule does not change the unlawful nature of the rule. *See Lutheran Heritage*, 343 NLRB No. 75, slip op. at 2, 2004 WL 2678632, at \*2 ("violation is dependent upon a showing of *one* of the following" -- employees could reasonably

construe to prohibit Section 7 activity, rule promulgated in response to union activity, *or* application of the rule to Section 7 activity) (emphasis added); *see also Brockton Hosp.*, 333 NLRB 1367, 1377 (2001) (confidentiality rule found unlawful in absence of any employee being disciplined), *enforced in relevant part*, 294 F.3d 100 (D.C. Cir. 2002); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 67 (2d Cir. 1992) (rule prohibiting employees from discussing wages and other terms and conditions of employment violated Section 8(a)(1) “even absent evidence of [its] enforcement”); *IRIS*, 336 NLRB at 1017 (confidentiality rule prohibiting release of “information” about “employees” found unlawful even where no employees were disciplined under the rule); *Flamingo Hilton*, 330 NLRB at 287 n.3, 291 (same).

Moreover, whether employees continued to engage in Section 7 activity notwithstanding the rule is not germane to a determination of whether the rule is overly broad and thus unlawful. *See Franklin Iron & Medal Corp.*, 315 NLRB 819, 820 (1994) (“[n]or does it matter whether the rule was unenforced or unheeded”), *enforced*, 83 F.3d 156 (6th Cir. 1996); *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (“the finding of a violation is not premised on . . . subjective impact”), *enforced*, 987 F.2d 1376 (8th Cir. 1993); *Waco*, 273 NLRB at 747-48 (rule prohibiting discussion of wages unlawful where no employee disciplined and “no employee testified that this instruction inhibited him from engaging in protected activity”). Thus, the testimony (A 41-45) of the Company’s

human resources director regarding employees who shared wage and benefit information with the Union is irrelevant to determining whether the rule violates Section 8(a)(1), because employees could reasonably construe it as restricting their discussion of wages and other terms and conditions of employment.

The Company goes on (Br 12) to note that its own distribution of benefit information to employees indicated to employees that such information is not confidential. This point ignores the clear statement to employees in the employee handbook that “violating a confidence or unauthorized release of confidential information . . . could result in disciplinary action.”<sup>5</sup> (A 4; A 75.) Thus, while the Company may very well disseminate some information to its employees, this does not negate the fact that employees are warned they may not do so without authorization.

The Company also argues (Br 15) that another provision in the employee handbook, enumerated separately from the confidentiality provision and stating that the Company “compl[ies] with all governmental laws and regulations” (A 71), should be read in conjunction with the confidentiality provision and discipline statement to make them lawful. A statement that the Company follows the law

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<sup>5</sup> The Company asserts (Br 3) that the Board did not rely on this language in reaching its conclusion. This is patently false because the judge specifically quoted and relied on the two provisions in combination to find a violation of Section 8(a)(1) (A 4), and the Board “decided to adopt the judge’s rulings, findings, and conclusions.” (A 1.)

does not save an otherwise overly broad rule from violating Section 8(a)(1). *See IRIS*, 336 NLRB at 1018 (statement preceding confidentiality rule that “[i]t is crucial that [employees] observe all applicable laws and regulations while conducting business on [the employer’s] behalf” does not negate unlawfulness of the rule); *see also Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding that a savings clause did not render lawful a rule that otherwise violated Section 8(a)(1) where the savings clause was “designed to protect the [employer], not its employees . . . [because t]here is no way an employee is likely to know if any of the handbook provisions run afoul of some law or other unless the employer so advises him or her”).

The Company also complains (Br 10) that the Board ignored the intent of its confidentiality provision, which, it claims, was only “to address the Company’s legitimate confidentiality concerns, including concerns about the inappropriate disclosure of employees’ private personal information.” On its face, however, the rule does not articulate any such limitation. Rather, it broadly restricts employees from discussing “any information” about company employees upon threat of discipline.

The Board has recognized that employers have a “legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary

information.” *Lafayette Park*, 326 NLRB at 826. Accordingly, the Board has upheld employer confidentiality rules that protect that interest, and do not implicate employee Section 7 rights. *See Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39, slip op. at 2-3, 2003 WL 22207222, at \*3-\*4 (2003) (rule entitled “Proprietary Information” prohibiting improper use of “intellectual property,” which was enumerated to include “customer and employee information,” reasonably read to prohibit only disclosure of information assets); *Super K-Mart*, 330 NLRB at 263 (rule prohibiting disclosure of “company business and documents” would be reasonably understood by employees to protect private information, such as guest information, trade secrets, and contracts with suppliers); *Lafayette Park*, 326 NLRB at 826 (rule prohibiting disclosure of “Hotel-private information” reasonably construed to protect proprietary information).<sup>6</sup>

None of the rules found to be lawful contained language prohibiting disclosure of information about employees, which is exactly the type of information sharing that is protected by the Act and is restricted by the Company’s unlawful rule. The Company’s confidentiality rule does not contain any limitation

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<sup>6</sup> The Company faults (Br 19) the Board for not discussing each of the aforementioned cases as well as additional Board cases cited herein. However, the Board is not required to address each distinguishable case applying a well-established legal test simply because the case before it is decided using the same legal framework. *See Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1092 (D.C. Cir. 2002); *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995); *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976).

that would make it a lawful rule prohibiting only the discussion of private, proprietary information. Moreover, to the extent that the rule could possibly be read ambiguously on this point by going beyond the bounds of its plain language, any ambiguity must be construed against the Company as the rule's promulgator. *Lafayette Park*, 326 NLRB at 828.

In *Safeway, Inc.*, 338 NLRB 525 (2002), relied on by the Company (Br 20-21), the rule at issue described as confidential and not to be disclosed certain information such as that described above, including business and financial information, project and marketing plans, and ad information, as well as "personnel and medical records," "salary information," and "personnel information." *Id.* at 525. The Company's comparison (Br 20-21) between the rule in *Safeway* and its own rule ignores the outcome in that case. The Board specifically did not reach the question of whether the confidentiality rule was overly broad and thus violated Section 8(a)(1). *Id.* at 526 n.3. Rather, in *Safeway*, the Board limited its conclusion to a determination that maintaining the rule could not reasonably have affected the results of the representation election in that case, (*id.* at 526), a question that is answered applying a different standard than the *Lafayette Park* and *Lutheran Heritage* standard that is applicable in this case.

The Company also relied on *Palms Hotel & Casino*, 344 NLRB No. 159, 2005 WL 1985977 (2005), a case decided after the Board's Order issued in this

case. Contrary to the Company's claims (Br 26), in that case the Board followed precedent and applied the *Lafayette Park* standard in determining that an employer's confidentiality provision was not overly broad in violation of Section 8(a)(1). The provision in *Palms Hotel* advised employees that they were responsible for protecting the confidentiality of the employer's "operational, financial and business affairs and activities." *Id.*, slip op. at 26, 2005 WL 1985977, at \*37. The information covered by this confidentiality provision included "policies and procedures." *Id.* The Board concluded that employees would reasonably understand the prohibited disclosure of "policies and procedures" to pertain to proprietary business information because the items listed in the rule preceding that phrase, such as customer lists, computer programs, and recipes were clearly proprietary. The Board distinguished the provision in *Palms Hotel* from the unlawful rule in *IRIS*, 336 NLRB at 1016, which, like the Company's rule here, prohibited disclosure of confidential information concerning "employees." *Palms Hotel*, 344 NLRB No. 159, slip op. at 26, 2005 WL 1985977, at \*38.

The Company does not further its position by relying (Br 16-17) on *Aroostook County Reg'l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), which is easily distinguishable. As this Court has explained, in *Aroostook*, the employer's confidentiality rule "prohibited discussion only of 'office business,'

which the court expressly understood not to cover the wages, hours, and working conditions of employees.” *Brockton Hosp.*, 294 F.3d at 107. In contrast, here, the Company’s rule prohibits discussion of “any information” about “its [employees].”

The Company’s reliance (Br 18) on *Community Hosp. of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), is equally misplaced. There, the rule prohibited “release or disclosure of confidential information about patients or employees.” This Court concluded that no reasonable employee would construe the rule to mean that his or her own wages would fall under the rubric of “confidential information,” because “[c]onfidential information is information that has been communicated or acquired in confidence.” *Id.* at 1089.

Moreover, the Court in *Community Hospital* distinguished *Brockton Hospital* on grounds that are equally applicable here. The rule in *Community Hospital* prohibited only the release of “confidential information . . . concerning employees.” *Id.* at 1089. The rule in *Brockton Hospital*, however, covered “information concerning . . . employees,” with no limiting language that the information must be confidential. 294 F.3d at 106. Likewise, the rule here is not limited to “confidential information” about employees. Rather, the Company’s rule makes explicit that “any information concerning” the Company’s employees is confidential, and warns that disciplinary action could result from “violating a confidence or unauthorized release of confidential information.” (A 4; A 75.) In

the circumstances, the Board reasonably found that the Company's rule, like the unlawful rule in *Brockton Hospital*, which pertains to "information" concerning employees, would reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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