

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

MEDALLION CABINETRY, INC.

and

Cases 25-CA-30623  
25-CA-30658  
25-CA-30659

CARPENTERS INDUSTRIAL COUNCIL,  
a/w UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA

*Raifael Williams, Esq.*, for the General Counsel.  
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(*Wessels Sherman, PC.*), of Minneapolis, Minnesota,  
and Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Rochester, Indiana, on October 7-8 and November 18, 2008. The original charge in Case 25-CA-30623 was filed by the Carpenters Industrial Council, a/w United Brotherhood of Carpenters and Joiners of America (the Union or the Charging Party), on March 5, 2008, against Medallion Cabinetry, Inc. (the Respondent). That charge was amended on June 11, 2008. The charges in Cases 25-CA-30658 and 25-CA-30659 were filed by the Union on April 14, 2008. On July 31, 2008, the Regional Director for Region 25 of the National Labor Relations Board (the Board), issued an order consolidating cases, consolidated complaint, and notice of hearing.

The consolidated complaint alleges that the Respondent's supervisors and agents, at all material times, interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act (the Act) in violation of Section 8(a)(1) of the Act by: maintaining and enforcing a rule that would reasonably tend to chill employees in the exercise of their Section 7 rights; and by issuing written warnings to two employees because they engaged in union and protected concerted activities.

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

## FINDINGS OF FACT

## I. Jurisdiction

5 The Respondent, a corporation, with an office and place of business in Culver, Indiana,  
has been engaged in the business of manufacturing cabinets primarily for residential markets.  
During the 12-month period ending July 31, 2008, the Respondent in conducting its business  
operations, purchased and received at its Culver, Indiana facility goods valued in excess of  
\$50,000 directly from points outside the State of Indiana. The Respondent admits, and I find,  
10 that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of  
the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Background

15 The Respondent's Culver, Indiana facility is one of six Medallion facilities located  
throughout Minnesota, Oregon, and Illinois. The Respondent is owned by Elkay Cabinetry  
Division. Pam Michelson is the human resources manager for the six Medallion facilities.  
20 Michelson reports to Phyllis Roth, the vice president of Elkay Cabinetry Division. Dick Reil is  
the operations manager at the Culver facility. At the time of the hearing, the facility employed  
approximately 250 employees. Donna Louk is the human resources supervisor at the facility.  
She reports directly to Reil, and has some reporting responsibility to Michelson.

25 The Culver facility opened in late 2005. The employee handbook that was in effect when  
it opened was revised by Michelson in February 2007. The employee handbook contains a part  
entitled "performance improvement plan, disciplinary, action and termination of employment"  
(GC Exh. 4 at 1-16). The statement below is contained in that part: (id. at 1-16, 1-17).

30 Following is a list of actions which will result in serious disciplinary action, including  
termination of employment. These actions include but are not limited to:

35 Disrupting other workers by inappropriate behavior or otherwise offensive behavior  
including, but not limited to unwelcome solicitations, persistent and unwelcome talking,  
distracting actions or non-work activities, etc.

The complaint alleges that the maintenance and the enforcement of this rule violates  
Section 8(a)(1) of the Act.

## B. Wright's March 3, 2008 Warning

40 Employee Julie Wright has been employed by the Respondent since January 2006 as a  
dual process specialist. In February 2008, Wright contacted the Union regarding organizing the  
Respondent's work force. To that end, also in February, the Union began conducting meetings  
45 in Monterey and Culver, Indiana. Wright signed a union authorization card on about February 9  
and she solicited other employees to sign cards. Wright was the chairperson for the Union's in-  
house organizing committee. The Respondent does not dispute that Wright was a known active  
and vocal supporter of the Union. The Respondent also admits that it was aware of the union

organizing campaign in February 2008. Louk testified that she saw union and antiunion buttons and literature in the facility on a daily basis. She also testified that she was aware that the employees had attempted an organizing campaign in February 2007.

5 On February 26, 2008, Wright was on her morning break in the employee break room. Wright sat at the same table every day during her break and distributed union buttons and literature, and solicited employees to sign union authorization cards. Shortly after 8:30 a.m., Wright noticed an antiunion flyer on a table. The first sentence on the flyer indicated that “what the Union doesn’t want you to know is that you can say ‘no’ to the Union.” (Tr. 81.) Wright  
10 took issue with that sentence. Because there were approximately 25 employees in the break room, Wright testified that she raised her voice to be heard. Wright announced, “What they don’t want you to know on this piece of paper, is that you are allowed to say ‘yes,’ too.” An employee asked what Wright thought about the flyer. Wright replied, “I don’t think much of it,” and mimicked wiping her behind with the flyer. Wright denied threatening anyone, using  
15 profanity, or any inappropriate language. Sometime after this incident employees Lisa Stacy and Katherine Brandenburg complained to Louk about this incident and later still they provided Louk with written statements.

20 On February 28 at approximately 11:25 a.m. Wright, who was on break, stationed herself near the front door to the facility. After the first buzzer sounded, the employees began reentering the building. Wright asked them if they wanted to sign a union authorization card as they walked pass. Wright noticed Louk leaving through the door that the employees were entering.

25 Louk is uncertain as to whether the date was February 27 or 28. Louk states that Stacy told her that employee Dawn Sibbo complained to Stacy about Wright screaming “don’t forget to sign your union card.” This reminded Louk of “something that I had witnessed going to lunch.” Stacy, in her written statement, claims that the Sibbo incident occurred on February 27.

30 Based on Stacy’s reminder, Louk added that on “2/28/08 [Wright] was again shouting as employees were returning from lunch” to the written warning that was given to Wright on March 3, 2008. (GC Exh. 6.) Louk also testified that she contacted Michelson, Roth, and the Respondent’s labor attorney and the group decided that Wright should be issued the warning. The warning is signed by Riel, the operations manager, Ian Brandt the production manager, James Elder, the production supervisor, and Louk. Louk admitted that she was the only  
35 decisionmaker to sign the warning. Louk testified that the decision to reprimand Wright was made “right after I did my investigation, I am thinking it was probably a couple of days after the last incident.” The warning is dated February 28, 2008, which is the date it was signed by Louk and Riel. Brandt and Elder signed the reprimand on March 3. After counsel for the General Counsel reminded Louk that the last incident occurred on February 28, 2008, Louk replied: “It  
40 was actually issued to her . . . on March third.” Thus, based on Louk’s testimony it appears that she and Riel signed the warning before the decision was made to issue it.

45 The warning has “performance improvement plan” written in bold print at the top form. The forms are called performance improvement plan (PIP) notifications. They are part of the Respondent’s progressive discipline system. In essence, they are written disciplinary warning and are referred to as such throughout the decision. The warning states that there were numerous complaints from employees regarding Wright’s screaming and yelling in the break room on February 26. The reprimand alleges that employees reported that they were uncomfortable with

Wright's intimidating behavior. Additionally, Wright's shouting at the front entrance on February 28, 2008, "was unwelcomed by a number of employees." The warning concludes "[a]s stated in the Employee Handbook, disrupting other workers by inappropriate behavior or otherwise offensive behavior will result in serious disciplinary action, including termination of employment." (GC Exh. 6.)

During the afternoon of March 3, Wright was summoned to the office by Brandt and Elder and they gave her the reprimand. After Wright refused to sign it, Brant commended Wright "for holding in your anger." Thereafter he and Elder signed the reprimand, gave it to Wright, and she left the office.

#### Discussion

I find Wright to generally be a credible witness. I do not accept her statement she was not angry because "angry is when you have to go out and [physically] beat something down." (Tr. 105.) Not only is the statement ludicrous but there is no record evidence Wright was ever arrested or disciplined for any physical assault. Moreover, it is inconsistent with the testimony of other witnesses who attested to Wright's reputation for anger. Indeed, as noted Wright testified that after Brant gave her the reprimand he commended her for not exhibiting anger. Wright's voice when testifying was louder than that of most people, it appeared to be her normal speaking voice. No doubt the volume of her voice was greatly increased when speaking in the break room and when soliciting at the front entrance.

Employee Dino McCay testified on behalf of counsel for the General Counsel regarding the break room incident. Although McCay left the break room before Wright gestured, he did observe that she appeared to be angered by what she read on the flyer. McCay acknowledged that Wright had a reputation for being loud and aggressive but denied that she was yelling. Employee Loyal Bailey also testified on behalf of the General Counsel. He was present throughout the incident. He stated that Wright was complaining about what she had read on the paper, and that she was telling the employees that they had the right to vote for or against the Union, and to discuss, or not, the reason for their position. Although Bailey had difficulty distinguishing between speaking in a loud voice and yelling, he testified, "[t]hat's just the way she speaks [she] is a loud person." (Tr. 320.)

I find that McCay and Bailey are credible witnesses neither of whom appeared to have any apparent bias. I am unable to make the same finding regarding the credibility of Brandenburg and Stacy. I find that Brandenburg's claims regarding Wright's conduct are nothing more than generalized exaggerations. Thus, according to Brandenburg the first sound she heard from Wright was screaming "in the loudest voice I've ever heard inside." She could not "even put a name to it because it was so loud it was—you could feel her voice. I almost want to call it a blood curdling scream." Brandenburg claims that Wright's "arms were flailing. Her head was just going all over the place. She was pacing. Her body language was very aggressive." When asked to explain what she meant by aggressive body language, Brandenburg stated, "I was waiting for furniture to move because being she was going to push it." After being asked for further clarification, Brandenburg admitted that Wright never attempted to "push" any furniture, but that was Brandenburg's "feeling." (Tr. 278-280.) I find that Brandenburg's testimony concerning Wright's conduct is exaggerated and that she is biased in favor of the Respondent. Her bias is established by her admission that she is a personal friend of Louk's, that

she was in the break room to collect signatures for an antiunion petition, and that it was she who had distributed the proemployer flyer.

As a point of clarification, I specifically find that Wright never used profanity and specifically never verbally interpreted her gesture, i.e., she never said, “I’ll show you what this [paper] is good for. It’s only good to wipe my . . . [ass] with,” as Louk testified. (Tr. 220.) Louk claimed that Brandenburg told her that was said by Wright as she gestured. Wright credibly denied ever swearing, neither Brandenburg nor anyone else testified that Wright swore, and it is not contained in Brandenburg’s written statement. That statement was what Louk said reflected what she was told by Brandenburg on February 26. Accordingly, I discredit Louk’s testimony on this matter and I credit Wright’s emphatic denial.

Stacy testified that she and Wanda Fox were laughing at Wright when Wright started speaking. The laughter stopped, according to Stacy, when Wright started “yelling at someone telling them to ‘Sit Down and Shut Up!’” Stacy claims that Wright was “loud, rude, and disrespectful to everyone in the break room.” (R. Exh. 4.) I discredit Stacy’s written and oral statements that Wright made that statement. (Tr. 297–298; R. Exh. 4.) Stacy’s statements are contradicted by Wright’s credited testimony that she did not direct any comments or threats to any individual. Wright’s testimony is corroborated by McCay and Bailey, both of whom testified that they did not hear Wright make any threats. Brandenburg did not mention this incident in her testimony. Nor was Wanda Fox, the employee who was sitting next to Stacy during this incident, called to corroborated Stacy’s testimony. I find that her discredited testimony is evidence of a personal bias against Wright and her announced bias for the Respondent. In Stacy’s undated written statement, she admits that she is “tired of [Wright’s] tactics.” She then volunteers that the Respondent is a fair and generous employer that provides more benefits than other employers. This non sequitur is followed by Stacy’s assurance that she and “quite a few” other employees “are proud to be a members of [the Respondent].” (R. Exh. 4.)

Based on the complaint allegations, counsel for the General Counsel argues that the Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined Wright for engaging in union and protected concerted activities. Furthermore, argues counsel for the General Counsel, the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that reasonable tends to chill employees in the exercise of their Section 7 rights.

The Respondent argues that the challenged language in the rule does not explicitly restrict Section 7 activity, nor would employees reasonably construe the language to prohibit Section 7 activity. The Respondent also argues that Wright was not engaged in protected concerted activity, and even if her conduct in the break room was protected concerted activity, it was so opprobrious that she lost the protection of the Act.

*a. The incident in the break room*

There is no question that Wright was engaged in union and protected concerted activity when she began her harangue in the break room. The record also establishes that the Respondent was aware of that fact before it reprimanded Wright. Thus, Brandenburg wrote that Wright was speaking about “the company” (quotes in the original) being in the wrong, the office people being in “volition” (sic), and “how the company was in the wrong and the office people don’t

5 have the right to do this and she [Wright] has the proof,” implying that the proof was written in the paper she was waving about. Stacy testified that Wright was addressing chargeable and non-chargeable offenses because of the antiunion paper in the break room. Brandenburg and Stacy each adopted their statements. Louk testified that the statements are representative of what the women said when they first came to her office.

10 I also note that had the Respondent conducted even a minimal investigation, as opposed to merely accepting statements from two biased employees, and relying on hearsay statements from other employees, it could have easily established the union and protected nature of Wright’s comments and actions. For example McCay testified that he observed that Wright appeared to be angered by what was written on the antiunion flyer. He heard Wright say something regarding the Union. Bailey recalled that Wright was complaining about what written on the antiunion flyer, and that she was telling the employees that they had a right to vote for or against the Union, and to discuss, or not, the reason for their position. Moreover, in a situation  
15 such as this—with an ongoing union organizing drive, and aggressive pro and antiunion partisans, I would be loath to permit the Respondent to claim lack of knowledge of the context of Wright’s actions and thereby take advantage of its own pathetic investigation. An investigation that did not even give the subject of the investigation an opportunity to address the accusations made against her. See generally *Alstyle Apparel*, 351 NLRB 1287, 1288 (2007) (where the Board adopted the judge’s finding that the employer did not discharge the employees based on a reasonable belief of misconduct because it conducted only a limited investigation, deciding to discharge the employees before giving them an opportunity to explain the allegations against them).

25 The Respondent also contends that “the subject of the discussion was [Wright’s] dislike toward Brandenburg’s presence. I reject this contention. The only contact Wright had with Brandenburg was after she had finished her speech. That fact is acknowledged by the question posed to Wright by the Respondent’s counsel—“Do you recall after your speech . . . was over and before you left, . . . going over to [] Brandenburg’s table and speaking with her?” Wright credibly denied that Brandenburg was the cause, or the object, of Wright’s displeasure, and I  
30 reject the Respondent’s contention to the contrary. (Tr. 113–115.)

35 I find, in agreement with counsel for the General Counsel, that Wright was disciplined for engaging in union and protected concerted activity. The Board has held, and the parties do not contend otherwise, that where the conduct for which an employee is disciplined is intertwined with protected concerted activity, the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is inapplicable. Thus, the only issue is whether Wright’s conduct lost the protection of the Act. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003) (and cited cases).

40 Where, as here, it is clear that the employee was disciplined for an outburst that occurred while engaging in union and protected concerted activity, the appropriate inquiry is whether the outburst was so opprobrious as to remove the employee from the protection of the Act. *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000). The test to determine the outcome of the inquiry is set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979). In that case, the Board enumerated the factors  
45 to be balanced in determining whether an employee’s protected concerted activity loses the protection of the Act due to opprobrious conduct, or otherwise crosses the line between protected and unprotected conduct. The factors for consideration are: (1) the place of the discussion; (2)

the subject matter of the discussion; (3) the nature of the outburst; and (4) whether the outburst was provoked by unfair labor practices. *Atlantic Steel*, supra at 816.

5 Applying the factors to the facts, I find that the first factor weighs in favor of retaining the protection of the Act. The incident happened in the employees' break room, a location that would not interfere with the Respondent's workflow. It was in a nonworking area on nonworking time. There is no evidence that any nonemployees were present. It was an area where partisan activity was permitted. Thus, Wright was asking employees to sign union authorization cards and Brandenburg was asking them to sign an antiunion petition. See generally *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007).

10 Addressing the second factor, I find that the subject matter of Wright's harangue also weighs in favor of protection. Wright was clearly advocating that the employees reject the information contained in the antiunion flyer and, alternatively, informing them that they had a right to vote "yes" for the Union and to discuss, or not discuss, the reasons for their decision among themselves. In finding this factor favors the Act's protection I also note that I have previously rejected the Respondent's contention that the subject matter of the discussion had anything to do with Brandenburg's presence in the break room.

15 The third factor, the nature of the conduct weighs in favor of protection of Wright's conduct as well. There is no question but that Wright was loud. Wright speaks in a voice that is louder than that of most people. She was also attempting to speak over, and get the attention of, the other 20 plus people in the break room. Lastly she was angered by the contents of the antiunion flyer. Wright is an ardent union adherent. She was the employee that initial contacted the Union and she is the chairperson for the Union's organizing committee. Although her impassioned voice was loud, she was not profane. See *Farah Mfg. Co.*, 202 NLRB 666 (1973) (refusal to lower voice while engaged in protected concerted activity was found to be protected and not insubordinate). Her ire was neither directed at an individual, nor was she "in anyone's face." Undeniably her gesture was crass, but it was also a succinct, vivid depiction of her opinion of the antiunion flyer. I accept Brandenburg's testimony that the entire incident lasted approximately 4 minutes. Based on the foregoing, and being mindful that, "the Board has allowed a degree of latitude in circumstances where employees are engaged in allegedly inappropriate, yet protected activities." See, e.g., *Noble Metal Processing, Inc.*, 346 NLRB 795, 799-801 (2006) (footnote omitted) (and cited cases), I find that this factor weighs in favor of the protection of the Act.

20 25 30 35 As to the fourth factor, I find that Wright's conduct was not provoked by the Respondent. In making this finding, I note that there is no evidence that the Respondent was in any way responsible for, or involved in, the creation or distribution of the antiunion flyer. I conclude that this factor weighs against Wright's retaining the Act's protection.

40 45 50 Having carefully balanced the four factors articulated in *Atlantic Steel*, supra, I find that the fourth factor is clearly outweighed by the initial factors. Accordingly, I find that Wright's conduct on February 26, 2008, did not removed her from the protection of the Act. Additionally, given the nexus between Wright's union and protected concerted activity, the Respondent cannot rely on independent motive to legitimate Wright's discipline. Thus, the comparator evidence offered by the Respondent is of no relevance.

Having found that Wright's conduct in the break room on February 26, 2008, was protected, it follows that the Respondent violated Section 8(a) (1) and (3) of the Act when, on March 3, 2008, it disciplined Wright for engaging in union and protected concerted activity and I so find. See *St. Joseph's Hospital*, 337 NLRB 94, 95 (2001), *enfd.* 55 Fed. Appx. 902 (11th Cir. 2002); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611-612 (2000).

*b. The incident near the front door to the facility*

This part of the March 3, 2008 reprimand is allegedly based on "something that I [Louk] had witnessed going to lunch is when [Wright] was screaming 'don't forget to sign your union card.'" Louk testified that this incident occurred on either the day after the break room incident, February 27, or the following day, February 28. Louk expressed no such reservation when she drafted Wright's reprimand on February 28, and wrote "2/28/08." Thus, Louk is writing about the February 28 incident on the day it happened. Louk never explains why she had doubts about the date. Regrettably this is not the only problem with Louk's testimony.

When asked by the Respondent's counsel what she did immediately after receiving the written statements Louk emphatically responded, "Well, I read them and re-read them and I thought, oh boy." (Tr. 169.) Even when confronted by the fact that Brandenburg's statement is dated March 6, 2008, 3 days after Wright was given the reprimand, Louk attempts to obfuscate. She never offers any satisfactory explanation for this obvious inconsistency. Had Louk's testimony not been so emphatic and specific it could be attributed to an unreliable memory. This is not the case. I find that Louk's testimony was an attempt to mislead, possibly in hopes of making the Respondent's disciplinary process appear more deliberative.

Another example of Louk's mendacity is her fallacious explanation of how she decides who she will interview before issuing discipline. Louk claims that "where if two employees were going at it, he said/she said, and it involves two individuals, at times, I would get both [sides] of the story. If it is an alleged harassment claim, I would definitely do interviews, per se." (Tr. 66.) Notwithstanding how incredible that answer appears, it does, conveniently accomplish its purpose of fitting the facts of this case. I also find that it further diminishes Louk's credibility.

Some misstatements are such blatant falsehoods that it is reasonable to believe the very opposite of what the witnesses says, and to disbelieve the witness totally. *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Louk's testimony regarding Wright's solicitations on February 28 fits that category.

I find, in accordance Wright's testimony, and the date Louk wrote on Wright's reprimand, that the incident occurred on February 28, 2008. Louk testified that although she observed Wright "screaming" at the employees, she not only failed to confront Wright, but totally forget about the incident until she was reminder by Stacy. I find that her testimony is patently false. Louk is the human resources supervisor, and Wright is not just another employee. Wright is the employee that was the subject of consultations between Louk, the Company's labor attorney, the Company's human resources manager, and the vice president of Elkay Cabinetry Division. Wright is the employee for whom she would draft a disciplinary warning when she returned from lunch. Wright is not an employee that Louk would or could forget.

5 A more likely scenario is that Wright was doing nothing that would cause Louk to stop and confront Wright or to take disciplinary action against her. Wright was soliciting union authorizations cards in a nonworking area on nonworking time. Most assuredly she was loud, her normal speaking voice was louder than most people. Additionally, she presumably wanted to be heard, and to get the attention of the employees as they passed by. This would have caused her to speak even louder than usual. Even so, Louk clearly saw no need to stop. Louk's failure to act belies her testimony. She saw no reason to discipline Wright, at least not until Stacy presented Louk with her written statement.

10 Stacy, perhaps because of her bias, appears to be overly enthusiastic about building a case against Wright. Although Louk told Stacy and Brandenburg to memorialize the verbal statement that they had to her, Stacy went the extra yard and provided additional information that had nothing to do with the events in the break room. (R. Exh. 4.) Wright credibly testified that it was 11:25 a.m. when Louk walked past her. Louk testified that she was on her way to lunch. Presumably Stacy gave Louk her written statement that afternoon. Stacy was not a witness to the event that is alleged to have occurred on February 27. Stacy merely added what was reported to her by two employees. Louk did not contact the employees. The best that Louk could say was that she did "know of one." (Tr. 171.) Perhaps it was the double hearsay problem, but in any case I am convinced that it was only after Louk became aware of the other complaints that she "remembered" her own.

20 The point of the foregoing is to make it clear that there is no credible evidence from which to conclude that Wright even came close to engaging in opprobrious conduct or "creating a problem in any area of proper management concern." *Farah Mfg. Co.*, 202 NLRB 666, 666 (1973). If, however, I were to balance the *Atlantic Steel* factors, I would find that the first three, unlike the fourth, favor retaining the Act's protection and that they far outweigh the fourth factor.

30 Based on the foregoing I find that the Respondent violated Section 8(a) (1) and (3) of the Act when it disciplined Wright on March 3, 2008, for engaging in union and protected concerted activity on February 28, 2008. See *St. Joseph's Hospital*, (supra); *Nor-Cal Beverage Co.* (supra).

*c. Paragraphs 6(a) and (b) of the complaint*

35 Paragraph 6(a) of the complaint alleges that the Respondent has violated Section 8(a)(1) of the Act by maintaining an unlawful work rule. Paragraph 6(b) alleges that the Respondent has violated Section 8(a)(1) and (3) by enforcing the rule with respect to its employees' protected union activities.

40 The rule is set forth in part 14 of the employees handbook "performance improvement plan, disciplinary, action and termination of employment" (GC Exh. 4 at 1-16.) The rule states:

Following is a list of actions which will result in serious disciplinary action, including termination of employment. These actions include but are not limited to:

45 Disrupting other workers by inappropriate behavior or otherwise offensive behavior including, but not limited to unwelcome solicitations, persistent and unwelcome talking, distracting actions or non-work activities, etc.

The analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004) (emphasis in original and footnote omitted):

5 [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. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading  
10 particular phrases in isolation, and it must not presume improper interference with employee rights. *Id.* at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.

15 If the rule does not explicitly restrict activities protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the  
20 exercise of Section 7 rights.

Counsel for the General Counsel argues that the maintenance of the rule is unlawful because the handbook does not define inappropriate or offensive behavior. Thus, argues counsel for the  
25 General Counsel the employees could reasonably believe that it is inappropriate to actively support union organizing and that the rule prevents employees from participating in protected activities. Finally, counsel for the General Counsel contends that the rule is vague and ambiguous, and as such any ambiguities should be construed against the Respondent.

30 Counsel for the General Counsel's argument has appeal, although I find the total lack of supporting case citations to be disconcerting. Regardless, I have found that the rule has been applied to restrict Section 7 rights. Accordingly, I conclude that the mere maintenance of the rule tends to have a chilling effect on the employees Section 7 rights and as such the maintenance of the rule is an unfair labor practice. *Id.* at 825

### 35 *C. Wright's April 11, 2008 Warning*

On April 11 at approximately 5:45 a.m. Wright placed union flyers on a table near  
40 employee Don Tessner's work area. Tessner was on the clock and working at the time but Wright's shift had not begun. Wright told Tessner not to touch the flyers until he went on break. Wright next approached employee Terry Sloan who was working in the "super-susan" area. She left some flyers and also instructed Sloan not to touch them until he went on break. Contrary to Wright's instructions Sloan picked up the flyers.

45 Employee Ernie Quimby was working in the same room where Wright was distributing the flyers. He was on a machine that was 15 feet off the ground. Quimby testified that he saw Wright approach the employees, hand them the flyers, and talk to them for a few minutes. He testified that he was only 15 feet away and that this happened between 5 and 6 a.m.

One of the employees threw the flyer in the trash. Quimby retrieved it and saw that it was union propaganda. He reported what he saw to Louk.

5 Later that day, Louk gave Wright a reprimand for “soliciting employees during non-break time on the production floor by the super susan area.” The reprimand also contained the following statement from the employee handbook: “Team members may not solicit co-workers or distribute any type of literature during working hours.”

10 There do not appear to be any significant factual dispute. Counsel for the General Counsel does not contend that the Respondent’s no-solicitation/no-distribution rule is invalid on its face. Instead, counsel for the General Counsel argues that the rule was disparately enforced. To that end, Wright testified that employees uniformly solicit during work hours and on company time. She gave as examples sales of cosmetics, Girl Scout cookies, and collections of money and clothes for employees in distress. She also testified that a supervisor has sold products for her children’s school. Wright candidly testified that those who sold in work areas “hide the books when they see the supervisors come around, because they know they are not supposed to be doing that during working hours.” She also implied that supervisors do not go out of their way to find employees soliciting.

20 In addition to corroborating Wright’s testimony, employee Christie Grogg candidly admitted that she did most of her buying during worktime. Sometime she merely confirms a “standing order” for a product. Other times she peruses a catalog containing the items for purchase. Tessner also testified that when he sold candy bars all he did was to ask anyone who walked near him if they wanted to buy a candy bar.

#### 25 Discussion

30 I credit the employee witnesses regarding the solicitations during worktime, albeit I find that the volume of business is greatly exaggerated. After hearing their testimony, I was left with the impression that more sales occurred at the facility than in most department stores. I also believe that the selling is less blatant than their testimony implies. I am also certain that many of the solicitations mentioned occurred in nonworking areas and on nonworking time, in accordance with the Respondent’s unchallenged no-solicitation/no-distribution rule.

35 *Register Guard*, 351 NLRB 1110 (2007), cited by the Respondent appears to stand for the proposition that discrimination means unequal treatment of equals. That does not appear to be an issue here. The Respondent appears to allow a wide range of nonwork-related solicitations, as long as the solicitation and/or distribution is done in nonworking areas on nonworking time. According to the policy, as articulated in the employee handbook, the “only exceptions to [the solicitation and distribution policy] will be fundraisers to support holiday charitable donation sponsored by Medallion or other programs authorized by the Human Resources Department.” (GC Exh. 4 at 1-10.)

45 The burden on counsel for the General Counsel is to show that the Respondent permits others to ignore the policy, but enforces it against employees who are exercising their Section 7 rights. I am not convinced. Louk credibly testified that when she receives a report of a breach of the policy she issues a reprimand, if one is warranted. The Respondent offers the reprimand of an employee for passing out invitations on working time to a tattoo party, as evidence of this

fact. (R. Exh. 8.) Counsel for the General Counsel correctly observes that the reprimand, although issued before Wright's discipline, was still after the union organizing drive started. Even so, I find that it supports and is consistent with Louk's testimony. Nor should it be overlooked that it was another employee that complained of Wright's conduct, not a supervisor.

5 Based on this record, I do not find that the Respondent has enforced its facially valid no-solicitation/ no-distribution rule in a desperate manner. Having made that finding it follows, contrary to counsel for the General Counsel's contention, that the lawful application of the Respondent's policy cannot be the foundation for a discrimination finding based on union  
10 membership. I recommend that paragraph 7(c) of the complaint be dismissed.

#### *D. Grogg's April 1, 2008 Warning*

15 Employee Christie Grogg has been employed by the Respondent since 2007. Her job is to rebuild and repair cabinets. During the relevant period Grogg worked from 6 a.m. to 5 p.m. with breaks at 8:30-8:40 a.m., lunch from 11-11:30 a.m., a break from 1-1:10 p.m., and the final break from 2:30-2:40 p.m. Grogg has signed a union authorization card and attended union meetings.

20 Grogg testified that during the morning of on March 26, 2008, employee Mellissa Townsend and another employee asked Grogg for union authorization cards. Grogg said she would get the cards. It was not until the 2:30 p.m. break that Grogg had the cards. Grogg gave Townsend a card after they accidentally met by an exit door during the 2:30 p.m. break. After handing Townsend a card she went to the other employee's workstation. That employee was not  
25 at his station, Grogg, however, placed the card in a small box at the workstation. Grogg testified that before the break ended she saw the individual and she pointed to the box. On April 1, 2008, Supervisor Michelle Siple issued Grogg a written warning for "soliciting two employees during non-break time on the production floor by the wall build area." (GC Exh. 8.) Immediately on receipt of the reprimand, Grogg wrote a response refuting the location and the time of the  
30 incident. (R. Exh. 2.)

Employee Mellisa Townsend was called as a witness by counsel for the General Counsel. She testified that she had worked for the Respondent for a little over 2-½ years. She appeared to be a credible witness who basically corroborated Grogg's testimony.

35 Joel Lloyd (incorrectly identified as Joe and Boyd in the transcript) was called by the Respondent to testify. He had been employed by the Respondent for almost 3 years. Lloyd stated that on March 26, 2008, at approximately 2:45 p.m., he was working at his workstation. While working, he saw Grogg handing out union authorization the cards to another employee.  
40 Lloyd estimated that Grogg and the other employee were only 20 feet away.

Lloyd immediately reported his observation to Brandt, his supervisor. He testified that the reason he reported Grogg was because the previous day he overheard her telling employees that when the Union got in it was going to have employees who had not signed a card  
45 discharged. Lloyd felt threatened by the alleged statement.

Brandt told Lloyd to prepare a written statement and to give it to Louk the next day, because Louk had left for the day. Lloyd went home and typed: "On March 26, 2008, I Joel

Lloyd witnessed Chriss Grogg handing out two union cards on company time. This happened around 2:45pm.[sic] It happened by the wall build area.” Lloyd signed the statement.

5 Louk states that on March 26 she talked with Lloyd after he talked with Brandt. She listened to what he said and then asked him to write it out. She was surprised when he returned with a typed statement. Louk is unsure if she waited to see the statement before she issued the reprimand or not. In any case, Louk testified that the decision to reprimand Grogg was made by Louk, Michelson, Roth, and “others I am not supposed to mention.” (Tr. 52.)

#### 10 Discussion

15 I found Grogg to be a very impressive witness. Her demeanor was that of an honest and sincere person. I was especially impressed by her candor. She displayed no hesitation when she admitted that all of her purchases were made on worktime. She was equally forthcoming concerning a sexual harassment complaint that she filed against Lloyd, after he complained about her soliciting. Lloyd’s demeanor was not forthright. I found some of his testimony to be unbelievable, and other parts conflicted with the documentary evidence, and some of his testimony cried out for corroboration but none was forthcoming. Set out below are some of the problems with Lloyd’s testimony and the Respondent’s discipline.

20 Lloyd claims that he was only 20 feet away from Grogg and the person to whom she allegedly gave the authorization cards. I find it unbelievable that Lloyd was so close so as to be able to see that Grogg was holding two authorization cards, and yet he was totally unable to identify anything about the person to whom she was speaking. Initially, he attributes this to a poor memory “I don’t really remember who it was,” implying that at one time he did know the person. The next sentence he claims that he “couldn’t really get a good view of who it was.” Thus, admitting that from a distance of only 20 feet he could not see the individual because of some unidentified obstruction that blocks his view of the individual, but not of the two cards in Grogg’s hand. Lloyd never explains what was obstructing his view of the person but not his ability to see two cards Grogg is holding. When asked the same question on cross-examination, he again blames his poor memory. Townsend and Lloyd have worked for the Respondent almost the same length of time. They take their breaks outside the same exit door. Even if Lloyd did not know her name, he should have at least be able to provide a description. A close reading of his testimony reveals that he never even alludes to the gender of the other individual.

35 Lloyd and Louk’s stories also conflict. Lloyd says that he spoke with Louk about the incident on March 27 not March 26 the day that it happened. (Tr. 329–330.) Also on March 27, Lloyd gave Louk the statement that he had typed at the request of Brandt. Lloyd says that Brandt told him to write it and that was because Louk was gone for the day. Lloyd testifies that the brief statement is all that he told Louk. (Tr. 334.) Louk claims that Lloyd came to her with a question on the day of the incident and in response to her answer said that he wanted to file a complaint against Grogg. Louk asked him to write a statement. (Tr. 180.) Louk, who drafted the warning, avers that she relied on Lloyd’s on the statement. (Tr. 181.) Earlier in her testimony, Louk states that her investigation consisted of a personal meeting with Lloyd where she asked him what he said to Brandt. She then asked him to “put that in writing for me.” (Tr. 40 45 52.) Later in her testimony, Louk continues to claim that it was she who asked Lloyd for the statement. Once again, however, Louk becomes confused as to when she received the statement from Lloyd. As with Stacy’s written statement, Louk accepted Lloyd’s statement, without

5 making any notation when it was received.. Once again Louk is at a loss to recall if she relied on  
Lloyd's written statement when she typed Grogg's discipline. She opines, however, that the  
absence of the statement is of no significance "[b]ecause I heard what he had to say. He had  
shared with me what he had seen and I asked him to put it in writing." (Tr. 219.) The  
10 significance is that Lloyd swore to seeing Grogg "hand" one person two cards. The warning that  
Louk prepared Grogg with soliciting two employees on nonworking time. Louk admits that  
when she prepared the discipline that was her intention. Counsel for the General Counsel asked  
her the number of employees Grogg was allegedly soliciting or distributing cards to. Louk said  
"two," and then said that number was reported to her by Lloyd. (Tr. 51-52.) The record  
15 contains no explanation for this dichotomy, and the matter is not addressed by the parties. I find  
it the testimony regarding this matter to be very disconcerting. Grogg admits handing out two  
cards to two different people, but Lloyd makes no mention of two people in his testimony. He  
does use "handing out," a phrase that usually denotes a distribution to a number greater than one.  
The significance of the number of cards, a fact that all must concede is totally insignificant also  
is odd. If Grogg was on worktime it matters not if she was distributing one or a hundred cards.

20 Lloyd initially states that he had returned from his break and he thought it was about 5  
minutes later that he saw Grogg handing out the cards. When asked how he was sure, he states  
that he and his partner were at their building table "so it had to have been after 2:40." This  
statement assumes that they returned exactly at 2:40 p.m. Significantly both Lloyd and Grogg  
agree that there is no buzzer at the end of the 2:30 p.m. break. Thus, absent a synchronized  
timepiece, and Lloyd was not even wearing a watch, when the break ended has to be a guess.  
When asked on cross-examination what time he saw Grogg handing the cards to someone, he  
replies, "2:45." He was asked how he knew it was 2:45. He answers: "It was after the last break.  
25 I was already at my table with my partner working. And then we have to write down our  
cabinets at certain times, how many we have, and it was 2:45." Although that statement was  
made with certainty, when asked by counsel for the General Counsel if he was absolutely certain  
it was 2:45 he replies, "It could have been 2:46. I mean it was after 2:40." (Tr. 331.)

30 My concern is not whether Lloyd saw Grogg hand the cards to the individual at 2:45 or  
2:46 p.m., my concern is whether Lloyd saw this happen before, during, or after the break, or at  
all. Lloyd never established how he knew the time. This is especially true about his having to  
write the time as part of his job duties. He never explains how he knew to write 2:45 p.m.  
wherever he was required to write it. Presumably, since the Respondent requires that a record be  
35 kept, it would also have some interest in retaining the record, at least long enough for Louk to  
obtain a copy. No such record is in evidence. Grogg testified, without contradiction, that it takes  
about "a half a minute," to go from her work area to the wall build area were Lloyd works.  
Thus, if Lloyd's estimates are true and accurate, Grogg would have been at least 5-1/2 minutes  
late returning from break. An absence of that length would most certainly be noticed by her  
40 supervisor, as well as other employees. Almost all of whom should have been, like Lloyd,  
working. Neither Grogg's then supervisor, Michelle Siple the person who gave her the  
reprimand, nor anyone else corroborated Lloyd's allegations.

45 Grogg credibly testified that on March 26 she noticed that Lloyd, towards the end of the  
2:30 p.m. break, was standing alone at his worktable. Grogg was also looking for his partner  
because he was the individual in whose box she left the authorization card. Grogg explained,

without contradiction, that both Lloyd and his partner must build together. Additionally, because they are the first table, if they are not building, the other employees can not perform their jobs. The partner did not testify.

5 Immediately after receiving the reprimand, Grogg wrote a response denying the  
accusations, thus, satisfying Louk's she/said, he/said criteria for including statements of both  
parties as part of an investigation. Louk never spoke to Grogg about this incident. This is so  
even though Louk found merit to Grogg's sexual harassment complaint about Lloyd. Louk  
apparently never asked Lloyd what motivated him to make his complaint. Had she done so, I see  
10 no reason why he would not have told her, as he testified, that he felt threatened by the statement  
he allegedly overheard Grogg make claiming that when the Union got in they would find out  
who had not signed a union card and have them discharged. Certainly, either one of those pieces  
of information would give one pause before accepting Lloyd's unsupported allegations against  
Grogg.

15 For all the foregoing reasons I credit Grogg and find that she did not violate the  
Respondent's no-solicitation/no-distribution rule. I find that the Respondent disciplined Grogg  
because she was engaged in union and protected concerted activities. Accordingly, I find that  
the Respondent violated Section 8(a)(1) and (3) of the Act when it disciplined her for engaging  
20 in protected union activity.

Moreover, contrary to the Respondent's "good-faith" argument, when an employee is  
disciplined for an alleged violation of a lawful rule while engaging in protected activity the  
employer is not privileged to act on a reasonable belief if, in fact the employee is innocent. See,  
25 e.g., *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990).

#### CONCLUSIONS OF LAW

30 1. The Respondent, Medallion Cabinetry, Inc., is an employer engaged commerce within  
the meaning of Section 2(2), 2(6), and (7) of the Act.

2. The Union, Carpenters Industrial Council, a/w United Brotherhood of Carpenters and  
Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

35 3. By maintaining an overly broad rule prohibiting employees from engaging in  
disrupting other workers by inappropriate behavior or otherwise offensive behavior including,  
but not limited to unwelcome solicitation, persistent and unwelcome talking, distracting actions,  
or nonwork activities, the Respondent has violated Section 8(a)(1) of the Act.

40 4. By enforcing the foregoing rule against employee Julie Wright on March 3, 2008, by  
issuing her a written warning because she engaged in protected union activities the Respondent  
has violated Section 8(a)(1) and (3) of the Act.

45 5. By issuing employee Christie Grogg a written warning on April 11, 2008, because she  
engaged in protected union activities the Respondent has violated Section 8(a)(1) and (3) of the  
Act.

## REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to rescind its unlawful rule, and that it must notify all employees in writing that its unlawful rule is no longer being maintained. The Respondent shall also be ordered to take certain other affirmative action necessary to effectuate the policies of the Act.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

## ORDER

15 The Respondent, Medallion Cabinetry, Inc., Culver, Indiana, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

20 (a) Maintaining and enforcing an overly broad rule prohibiting employees from engaging in disrupting other workers by inappropriate behavior or otherwise offensive behavior including, but not limited to unwelcome solicitation, persistent and unwelcome talking, distracting actions, or nonwork activities, in order to discourage union activities.

25 (b) Issuing written discipline to employees because they engaged in solicitation and/or distribution of union authorization cards during nonworking time in order to discourage union activities.

30 (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.

35 (a) Rescind the overly broad rule prohibiting employees from engaging in disrupting other workers by inappropriate behavior or otherwise offensive behavior including, but not limited to unwelcome solicitation, persistent and unwelcome talking, distracting actions, or nonwork activities. Further notify all employees in writing that the Respondent's unlawful rule is no longer being maintained.

40 (b) Furnish all current employees with inserts for the current edition of the employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful rule, or (2) provides the language of a lawful rule.

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45 <sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of the Board’s Order, remove from its files any reference to the unlawful disciplinary warnings issued to employees Julie Wright on March 3, 2008, and Christie Grogg on April 1, 2008, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its facility in Culver, Indiana, copies of the attached notice marked “Appendix.”<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, 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 February 1, 2008.

(e) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 13, 2009

\_\_\_\_\_  
John T. Clark  
Administrative Law Judge

<sup>2</sup> 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.”

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 or enforce an overly broad rule prohibiting you from engaging in disrupting other workers by inappropriate behavior or otherwise offensive behavior including, but not limited to unwelcome solicitation, persistent and unwelcome talking, distracting actions, or nonwork activities in order to discourage union or other protected activities.

WE WILL NOT discipline you because you engage in solicitation and/or distribution of union authorization cards during nonworking time in order to discourage union or other protected activities.

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 and remove from the employee handbook the overly broad rule prohibiting you from engaging in disrupting other workers by inappropriate behavior or otherwise offensive behavior including, but not limited to unwelcome solicitation, persistent and unwelcome talking, distracting actions or nonwork activities and WE WILL notify you in writing that this has been done and that the rule is no longer in force.

WE WILL furnish all current employees with inserts for the current edition of the employee handbook that (1) advise that the unlawful rule has been rescinded, or (2) provide the language of a lawful rule; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful rule , or (2) provides the language of a lawful rule.

WE WILL, within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplinary warnings issued to employees Julie Wright on March 3, 2008, and Christie Grogg on April 1, 2008, and WE WILL, within 3 days thereafter notify the employees in writing that this has been done and that the unlawful discipline will not be used against them in any way.

MEDALLION CABINETRY, INC.

\_\_\_\_\_  
(EMPLOYER)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

575 North Pennsylvania Street, Federal Building, Room 238  
Indianapolis, Indiana 46204-1577  
(317)-226-7382  
Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317)-226-7413.