UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

COSTCO WHOLESALE CORPORATION and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 371	Case 34-CA-12421

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS LIMITED CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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I. STATEMENT OF THE CASE

On November 30, 2009, based on a charge filed by the United Food & Commercial Workers, Local 371 (herein the "Union" or "UFCW") against Costco Wholesale Corporation (herein "Respondent") on August 10, 2009 and amended on September 28, 2009 and on October 29, 2009, a Complaint and Notice of Hearing issued alleging that Respondent violated Section 8(a)(1) of the Act by: (1) in or about late July 2009, through Manager Jim Mager, at its Milford, Connecticut facility (herein called the Milford warehouse), interrogating its employees regarding their union and other protected concerted activities; 2) on or about August 5 or 6, 2009, through Manager Jeff Dawson, at its Milford warehouse, interrogating its employees regarding their union and other protected concerted activities; and 3) maintaining about eight separate overly broad rules in its "Employee Agreement," as described in greater detail below.[1]

On March 4, 2010, a hearing was held in Hartford, Connecticut before Administrative Law Judge Steven P. Fish. At the hearing, Counsel for the Acting General Counsel successfully amended the Complaint by: 1) withdrawing the Section 8(a)(1) allegation involving the unlawful interrogation of employees by Manager Jeff Dawson; and 2) adding an allegation that Respondent violated Section 8(a)(1) of the Act by maintaining Rule 11.3.24 in its Employee Agreement prohibiting employees from leaving company premises during their work shift without managerial permission (Tr.13).

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[1] References to the exhibits of Counsel for the Acting General Counsel and Respondent will be cited herein as "GCX__" and "RX__", respectively, followed by the appropriate exhibit number or numbers, and where appropriate, the page number(s). Joint exhibits will be cited herein as "JTX__," followed by the appropriate exhibit number. References to the official transcript of the instant hearing are cited as "Tr.__", followed by the appropriate page numbers or number(s). References to the judge's Decision will be cited herein as "ALJD, followed by the appropriate page and line numbers.

On August 11, 2010, the judge issued his decision. Of the eight rules in Respondent's Employee Agreement alleged in the Complaint to be unlawful, the judge found that seven were overly broad and therefore violated Section 8(a)(1) of the Act. The judge recommended the dismissal of the eighth rule, as described below. The judge further recommended dismissing the lone remaining unlawful interrogation allegation based on credibility grounds.

On September 29, 2010, Respondent filed Exceptions to the judge's findings that Respondent violated Section 8(a)(1) of the Act by maintaining each of those seven rules in its Employee Agreement. On October 27, 2010, Counsel for the Acting General Counsel filed an Answering Brief to Respondent's Exceptions.

In this submission, Counsel for the Acting General Counsel takes an Exception to the judge's recommended dismissal of the eighth rule in Respondent's Employee Agreement (a portion of Rule 11.9) alleged to be unlawful in the Complaint, but will not take Exceptions to the judge's recommended dismissal of the lone remaining allegation concerning an unlawful interrogation by Manager Jim Mager. Accordingly, pursuant to Section 102.46(c) of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this brief in support of his Limited Exceptions to the judge's Decision to dismiss the Complaint allegation regarding that lone rule.

II. FACTS

A. Background

Respondent is engaged in the retail operation of wholesale club stores at various facilities throughout the United States, including its Milford warehouse.

At the hearing the parties stipulated to the following:

1. Respondent maintains a nationwide "Employee Agreement" that sets forth the terms and conditions of employment for its employees at all its nationwide facilities, including the Milford facility, but not at Respondent's facilities where the employees are represented by a union and where a union contract is in effect[2]; and,

2. The "Employee Agreement" is disseminated to all new employees, who are required to sign an "Acknowledgement of Receipt" indicating that the employee has received the Employee Agreement and agrees to comply with it.

(JTX 1). Under Section 11.0 of the Employee Agreement, Respondent maintains certain "Standards of Conduct and Discipline," which employees are required to follow (GCX 2; p. 67). According to the Employee Agreement, an employee's failure to follow these standards may lead to the issuance of a counseling notice (Section 11.1), an unpaid suspension (Section 11.2), or termination (Section 11.3) (GCX 2, pp. 67-68).

B. Rule 11.9 (requiring employees to only use "appropriate business decorum" in communicating with all others; and precluding employees from damaging another employee's reputation)

The Complaint alleged that certain portions of Rule 11.9 of the Employee Agreement violated Section 8(a)(1) of the Act. The relevant alleged portion of that rule provides as follows:

> Costco recognizes the benefits associated with electronic communications for business use. *All employees are responsible for communicating with appropriate business decorum whether by means of e-mail, the Internet, hard-copy, in conversation, or using other technology or electronic means.* Misuse or excessive

[2] At the hearing, Respondent's counsel clarified that the Employee Agreement is in effect at some of its unionized facilities, but not all.

personal use of Costco technology or electronic communications is a violation of Company policy for which you may be disciplined, up to and including termination of employment. Your use of Costco technology and electronic communication systems represents your agreement with the following policies:

> *Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company*, defame any individual *or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.*

(The portions of the above rule alleged to be unlawful are in italics). In his Decision, the judge recommended the dismissal of the Complaint allegation alleging that the above portion of Rule 11.9 was unlawful by relying on the following factors:

1) Counsel for the Acting General Counsel's reliance on the majority opinion in Ridgeview Industries, 353 NLRB 1096 (2009)(where the Board found that employer's rule prohibiting employees from engaging in behavior designed "to create discord or lack of harmony" was unlawful) is unpersuasive because "that finding has no precedential value here"(ALJD p. 19, lines 28-31) and because "that even under the judge's analysis, Ridgeview does not support a finding of a violation here" (ALJD p. 36-37); and,

2) Counsel for the Acting General Counsel relied on the dissenting opinions of Board Members Liebman and Walsh in Lutheran Heritage Village, 343 NLRB 646 (2005) and other cases; rather than rely on controlling Board law to the contrary (ALJD p. 17, line 42-46, p. 18, line 1-30).

III. ARGUMENT

A. The Legal Analysis Applied in Determining Whether An Employer's Work Rules Are Lawful

The Board has repeatedly recognized that mere maintenance of overbroad work rules can violate Section 8(a)(1) of the Act. Lafayette Park Hotel, 326 NLRB 824, 825, 828 (1998); American Cast Iron Pipe Co., 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). Indeed, the Board has held that a work rule that prohibits, inter *alia*, *un*protected behavior may be unlawful if it *also* contains prohibitions so broad that they can reasonably be understood as encompassing protected conduct. See e.g., Flamingo Hilton-Laughlin, 330 NLRB 287, 288 fn. 4, 294 (1999)(rule prohibiting "false, vicious, profane, or malicious statements" unlawful because it prohibits statements that are "merely false" and might include union propaganda); Lafayette Park Hotel, supra, at 828.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of their Section 7 rights, the Board applies the analytical framework set forth in Lutheran Heritage Village-Livonia, 343 NLRB 646, 646 fn.5 (2004). Under that framework, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original). If the rule does not explicitly restrict such activity, 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 activities; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. The Board further instructs that in determining the legality of the rule, it must be given a reasonable reading, particular phrases should not be read in isolation, and there should not be a presumption of improper interference with employee rights. Lafayette Park Hotel, supra at 825, 827.

Based on the foregoing, the judge correctly found that the following rules in the Employee Agreement violated Section 8(a)(1) because they explicitly restrict employees' ability to engage in Section 7 activities, as described in greater detail below: 1) Rule 11.3.22 (no-distribution); 2) Rule 11.7 (to the extent it prohibits employees from discussing matters of other employees, including, but not limited to, sick calls, leaves of absence, FMLA and/or ADA-related absences, or workers comp injuries); and 3) Rule 11.9 (to the extent it prohibits the sharing of payroll information).

The judge also correctly found that the remaining rules alleged in the Complaint are unlawful because an employee would reasonably construe them to restrict such lawful activity. These rules include: 1) Rule 11.3.24 (leaving company premises without approval); and, 2) three rules relating to the disclosure of confidential information (found in portions of Rules 11.3, 11.7, and 11.9) because of the manner in which Respondent defines "confidential" information.

Consistent with the judge's above findings, it is respectfully submitted that the other alleged portion of Rule 11.9 is also unlawful for the following reasons.

B. Rule 11.9 is Overbroad and Unlawful Because Employees Would Reasonably View Various Protected Activities To Fall Within the Ambit of the Rule

Although the above rule has two aspects that are overly broad and, therefore, unlawful, both rules will be dealt with jointly in this section because both rules allow Respondent to conceivably punish employees for lawful statements. In this regard, the above rules do not define the term "appropriate business decorum" nor explain the actions that might "damage the Company...or any person's reputation." The Employee Agreement also fails to provide specific examples of the prohibited speech and/or written on-line statements that would cause an employee to run afoul of its prohibitions. Thus, employees might reasonably be uncertain whether vehemently condemning a supervisor's perceived unfair treatment of a co-worker, either verbally or via intra-company email, would be acts of "inappropriate" business decorum or acts "damaging" the supervisor's reputation- subjecting the employee to discipline in the unexplained sense of the rules. As correctly explained by Members Liebman and Walsh in their dissenting opinion in Lutheran Heritage Village-Livonia, "an employee might reasonably fear that using words like "scab" in the course of union activity would result in discipline, although such language is clearly protected under the Act." Id. at 650, citing to Letter Carriers v. Austin, 418 U.S. 264, 268, 277-278 (1974). Further, employees would reasonably construe the rule's prohibition against making on-line statements that "damage the company" from writing electronic complaints about the employer to its customers; an act employees can otherwise safely perform within the course of their protected activities. See e.g., Cintas Corp., 353 NLRB 752 (2009)(employees who write

letters to customers complaining about the employer are engaged in protected concerted activity).

As a result of such ambiguity, the Board has found violations where the employer maintained overly broad rules similar to the ones here. For example, in University Medical Center, 335 NLRB 1318 (2001), the Board affirmed the judge's conclusion that a similar rule maintained by that employer was unlawfully overbroad. More specifically, the rule at issue in that case prohibited employees from engaging in "insubordination...or other disrespectful conduct toward a service integrator, service coordinator, or other individual." In doing so, the Board reasoned:

> [C]oncerted employee protest of supervisory activity and employee solicitation of union support from other employees are protected activities under the Act, and employees here could reasonably believe that both forms of activity might be prohibited by (these rules).

Id. at 1321. As with the words "other disrespectful conduct" in University Medical Center, an employee here could reasonably construe Respondent's rule regarding "appropriate business decorum" to prohibit them from engaging in any form of concerted protest. Employees could also reasonably construe the following acts, among others, to violate the "damage any person's reputation" portion of the rule: 1) a protest about the company during a concerted walk-out; 2) a concerted protest about a supervisor; or 3) calling a co-worker a "scab" during a strike. As explained by the Fourth Circuit in enforcing the Board's Order in Southern Maryland Hospital, 293 NLRB 1209 (1989), enfd. in pertinent part, 916 F.2d 932 (4th Cir. 1990)(Unlawful rule against, inter alia, "derogatory attacks on fellow employees...or hospital representative[s]"):

> Although certain types of derogatory remarks may sound quite similar to maliciously false and defamatory speech,

> which an employer may prohibit, derogatory remarks may also include truthful union propaganda that places hospital personnel in an unfavorable light. By permitting the punishment of employees for speaking badly about hospital personnel, the employer "failed to define the area of permissible conduct in a manner clear to employees and thus cause[d] employees to refrain from engaging in protected activities." American Cast Iron Pipe Co. v. NLRB, 600 F.2d 132, 137 (8th Cir. 1979). It may very well be true that derogatory attacks destroy, as the hospital puts it, "the positive work atmosphere," but the values of free speech and union expression outweigh employer tranquility in this instance. [916 F.2d at 940].

In accord with the above rationale, each of Respondent's above rules (i.e., requiring employees to only use "appropriate business decorum" in their work-related communications, and prohibiting any communication that "damages the Company...or any person's reputation") without further definition of those terms, are overly broad and violate Section 8(a)(1) of the Act. See also, Ridgeview Industries, 353 NLRB 1096 (2009)(the Board affirmed the judge's finding that a rule prohibiting employees from "engaging in behavior designed to create discord or lack of harmony" was overly broad).

Significantly, this rule is also unlawful because it maintains a "catch-all" phrase that allows Respondent to discipline employees if they "violate" any of the other "policies outlined in the Costco Employee Agreement," some of which have already been found by the judge to be unlawful.

Accordingly, based on the foregoing, the above rule is unlawfully overbroad and, therefore, violates Section 8(a)(1) of the Act.

C. The Judge Improperly Recommended the Dismissal of the Above-Described Provisions of Rule 11.9

As noted above, the judge recommended the dismissal of this allegation because: 1) he did not find Counsel for the Acting General Counsel's reliance on the

Board's decision in Ridgeview Industries, supra, to be persuasive or to reflect current Board law; and 2) Counsel for the Acting General Counsel relied on the dissenting opinions of Board Members Liebman and Walsh in Lutheran Heritage Village, supra, and other cases; rather than rely on controlling Board law to the contrary.

With regard to the judge's first basis for dismissal, i.e., Ridgeview Industries in unpersuasive, it is respectfully submitted that the judge is both incorrect and correct in his two-part analysis.

With regard to the first prong of the judge's analysis, he found that Ridgeview Industries "has no precedential value here" because:

> there were no exception's to the judge's finding that the employer violated Section 8(a)(1) of the Act" by maintaining rules prohibiting employees from engaging in behavior designed to create discord or lack of harmony. See fn. 2 at pg. 1 of 353 NLRB #119. Thus, the judge's finding, although affirmed by the Board, cannot be cited as authority for finding the rule unlawful. Trump Marina, supra.

(ALJD p. 19, lines 28-36). It is respectfully submitted that the judge's above analysis is incorrect. In this regard, a judge's decision lacks precedential value only when the Board specifically states that it is adopting the decision "only in the absence of Exceptions being filed." Here, the Board did not state that it was adopting the judge's decision "only" in the absence of Exceptions being filed; thus there was no language limiting its precedential value. It simply noted that no Exceptions had been filed to indicate that there was nothing else raised by the employer to which the Board had to respond. Accordingly, the judge's decision in Ridgeview Industries with regard to the rule allegation at issue there was fully affirmed by the Board and represents extant Board law.

On the other hand, the second prong of the judge's analysis is, on its face, partially correct- at least with regard to his description of the facts and analysis used by the judge in Ridgeview Industries. In this regard, the judge found that Ridgeview Industries was unpersuasive because "even under [that] judge's analysis, Ridgeview does not support a finding of a violation here" (ALJD p.19, lines 36-37), further correctly explaining that in Ridgeview, the judge found a violation because "the rule in issue was utilized as a partial basis to discipline" and therefore had been unlawfully applied to restrict Section 7 activity (ALJD p. 19, lines 39-50). The judge went on to state that the finding in Ridgeview "has no applicability here, where there is no evidence that Respondent applied these rules to restrict protected conduct" (ALJD p. 19, lines 49-51).

As noted above, the judge in the instant matter correctly cited to the facts and the judge's analysis in Ridgeview; thus, his conclusion is understandable. However, the judge's analysis in the instant matter was incomplete. In this regard, the judge in Ridgeview correctly applied the framework in Lutheran Heritage and first found that the offending rule did not *explicitly* restrict Section 7 activity. Ridgeview at 1112. The judge in Ridgeview then turned to the second prong of Lutheran Heritage, which would find the rule at issue unlawful 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 activities; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Significantly, without addressing whether the rule at issue was unlawful under the first or second parts of the test, the judge turned immediately to the third part of the test and found a violation because the evidence showed that the employer had applied its rule in a manner restricting Section 7 activity.

Having found a violation, the judge in Ridgeview stopped his analysis and never addressed the question whether the employer's rule was *also* unlawful under either of the first two parts of the Lutheran Heritage test. Indeed, to the extent, the judge in Ridgeview considered that question, it seems likely he would have found a violation anyway because, in a footnote, he cited to a case where the Board found an employer violated Section 8(a)(3) of the Act by discharging an employee for violating a rule that prohibited the creation of discord or lack of harmony. Id. at 1112, fn. 69 (relying on the Board's decision in Aerodex, Inc., 149 NLRB 192, 199 (1984)). The judge in Ridgeview was constrained to note in the same footnote that there was no decision in Aerodex regarding the legality of the rule, likely because the cases that gave rise to overly broad handbook violations did not begin in earnest until 14 years later when the Board's watershed decision in Lafayette Park Hotel issued in 1998. Based on the foregoing, the judge in the instant matter should not have dismissed the rule at issue here based on the truncated analysis conducted by the judge in Ridgeview. Rather, exactly because the judge in Ridgeview (and, by extension, this judge as well) did not fully analyze the rule at issue there under all three rubrics required by Lutheran Heritage, the Board is encouraged to re-examine this judge's dismissal of the allegations in the instant case. For the reasons discussed in the preceding section, it is apparent that such a re-examination would lead to the conclusion that Respondent's rule precluding employees from damaging the Company's or a fellow employee's reputation and/or its rule requiring employees to use "appropriate business decorum" in communicating with others are unlawfully over broad because, applying the full Lutheran Heritage test,

either rule would reasonably lead employees to construe the language to prohibit Section 7 activity due to their inherent vagueness.

Moreover, as found by the judge, this Respondent has already shown a propensity for defining otherwise neutral language in its Employee Agreement concerning "confidentiality" to include protected conduct (ALJD pp. 20-21). Accordingly, on this basis alone, employees would reasonably conclude that the portions of Rule 11.9 at issue here would similarly be defined by Respondent to prevent employees from engaging in certain protected conduct, such as calling a co-worker a "scab" in the event of a strike or vehemently condemning a supervisor's perceived unfair treatment of a co-worker, either verbally or via intra-company email. As such, the rule(s) is overly broad and unlawful.

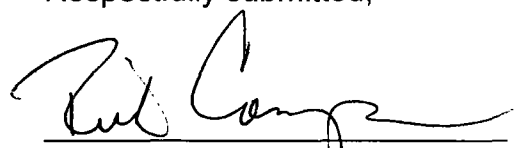
Finally, the Counsel for the Acting General Counsel's reliance on Ridgeview Industries did not prevent the judge from failing to find the alleged portion of Rule 11.9 unlawful on the basis of its catch-all provision alone. The judge erred by failing to address this portion of the rule in his decision, thus the Board must do so.

With regard to the judge's concern that Counsel for the Acting General Counsel relied in his brief on certain sections of Board Member's Liebman and Walsh's dissents in Lutheran Heritage Village and other cases, it should be noted that Counsel for the Acting General Counsel also relied on the court's decision in Southern Maryland Hospital, supra, which is still good law and which found a violation of the Act based on that employer's unlawfully over broad rules. Indeed, the purpose in citing the dissents authored by Board Member Liebman and Walsh in Lutheran Heritage Village and other

cases is to demonstrate that they are consistent with the court's majority analysis in Southern Maryland Hospital, supra, and are not wild deviations from extant Board law.

Dated at Hartford, Connecticut, this 27th day of October 2010.

Respectfully submitted,



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