UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

HYUNDAI AMERICA SHIPPING AGENCY, INC.

and Case 28-CA-22892

SANDRA I. McCULLOUGH, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

I.	THE ALJ PROPERLY DENIED RESPONDENT'S					
	MOTION TO STRIKE COMPLAINT ALLEGATIONS					
	REGARDING RESPONDENT'S UNLAWFUL					
	HANDBOOK POLICIES (CROSS-EXCEPTIONS 1 AND 2) 1					
	A.	Backg	round2			
	В.	allega and di charge	LJ correctly determined that the Complaint tions regarding Respondent's overly-broad scriminatory rules are closely related to the e allegation that McCullough was discharged ation of the Act			
II.	THE ALJ PROPERLY FOUND THAT RESPONDENT'S WORK					
			THE ACT (CROSS-EXCEPTIONS 3			
	THROUGH 1	1	5			
	A.	The ALJ properly found that Respondent's Confidentiality Rules violate the Act				
		1.	The ALJ correctly concluded that Respondent's confidentiality rule prohibiting employees from discussing matters under investigation violates the Act (Cross-Exceptions 9, 10, 11)			
		2.	The ALJ correctly concluded that Respondent's Electronic Communications and Information Systems Confidentiality Rule violates the Act (Cross-Exceptions 3 10, 11)			
		3.	The ALJ correctly concluded that Respondent's Personnel Files Confidentiality Rules violates the Act 4 10, 11)			
	В.	The ALJ correctly concluded that Respondent's Employee Conduct rule against employee complaints to one another violates the Act (Cross-Exceptions 5, 10, 11)				
	C.	agains	LJ correctly concluded that Respondent's rule at harmful gossip violates the Act s-Exceptions 6, 10, 11)			

	D.	The ALJ correctly concluded that Respondent's rule prohibiting non-work activities during work hours violates the Act (Cross-Exceptions 7, 10, 11)	18
	E.	The ALJ correctly concluded that Respondent's rule prohibiting employees from exhibiting a negative attitude violates the Act (Cross-Exceptions 8, 10, 11)	20
III.	CONCLUSIO)N	21

TABLE OF AUTHORITIES

All American Gourmet, 292 NLRB 1111 (1989)	9
Asheville School, Inc., 347 NLRB 877 (2006)	
NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)	16
Blue Cross-Blue Shield of Alabama, 225 NLRB 1217 (1976)	6, 15
Brookville Glove Co., 116 NLRB 1282 (1956)	
Caesar's Palace, 336 NLRB 271 (2001)	7, 9
Claremont Resort and Spa and Hotel, 344 NLRB 832 (2005)	16
Columbia University, 250 NLRB 1220 fn. 2 (1980)	3
Consumers Power Co. v. NLRB, 113 F.2d 38 (6th Cir. 1940)	3
Double Eagle Hotel & Casino, 341 NLRB 112 (2004)	6, 11
Embassy Suites Resort, 309 NLRB 1313 (1992)	3
FiveCAP, Inc., 331 NLRB 1165 (2000)	14
Flamingo Hilton-Laughlin, 330 NLRB 287 (1999)	
Gold Bond Building Products, 293 NLRB 1138 (1989)	20
Iris USA, Inc., 336 NLRB 1013 (2001)	6
Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976)	8
Kinder-Care Learning, 299 NLRB 1171 (1990)	6
Lafayette Park Hotel, 326 NLRB 824 (1998)	6, 12, 14, 16, 19
Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)	6, 17, 20
M.J. Mech. Servs., Inc., 324 NLRB 812 (1997)	
NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974)	16
Moeller Aerospace Technology, Inc., 347 NLRB No. 76 (2006)	18
Northeastern Land Services, Ltd., 352 NLRB 744 (2009)	7
Phoenix Transit System, 337 NLRB 510 (2002)	7
Redd-I, Inc., 290 NLRB 1115 (1988)	
Sharp v. Karonis Parts, 927 F.Supp. 1208 (D. Minn. 1996)	7
SNE Enterprises, Inc., 347 NLRB 472 (2006)	
SNE Enterprises, Inc., 374 NLRB 472 (2006)	7
Southern Maryland Hosp., 293 NLRB 1209 (1989)	17, 20
State Dept. of Health Services v. Superior Court,	
31 Cal.4th 1026 (2003)	
Westside Cmty. Mental Health Ctr., 327 NLRB 661 (1999)	8

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Counsel for the Acting General Counsel (CAGC), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Answering Brief to the cross-exceptions and brief in support filed on December 13, 2010, by Hyundai America Shipping Agency (Respondent) to the Decision of Administrative Law Judge Gregory Z. Meyerson, [JD(SF) 41-10] (ALJD), which issued on October 18, 2010.

I. THE ALJ PROPERLY DENIED RESPONDENT'S MOTION TO STRIKE COMPLAINT ALLEGATIONS REGARDING RESPONDENT'S UNLAWFUL HANDBOOK POLICIES (CROSS-EXCEPTIONS 1 AND 2)

Respondent asserts, in its Cross-Exceptions 1 and 2, that the Administrative Law Judge (ALJ) erred in denying Respondent's Motion to Strike and in finding violations of the Act on handbook policies when those allegations were neither raised in the charge nor investigated. For the reasons set forth below, the ALJ's denial of Respondent's Motion to Strike was proper, and the ALJ correctly considered – and found to be violative of the Act, as discussed further below – the CAGC's allegations regarding Respondent's unlawful handbook policies.

A. Background

The charge in this matter was filed on February 5, 2010, and alleged that Respondent interfered with, restrained and coerced its employees in the exercise of their Section 7 rights under the NLRA by its actions including terminating the Charging Party, Sandra McCullough (McCullough), because she engaged in protected concerted activities. The Complaint and Notice of Hearing (Complaint), which issued on March 31, 2010, at paragraphs 4(b) through 4(g), alleges as unlawful Respondent's maintenance of overly broad and discriminatory rules, including rules published in Respondent's Employee Handbook. Among the rules alleged to violate the Act are rules prohibiting employees from discussing matters under investigation by Respondent, prohibiting employees from disclosing matters from Respondent's electronic communications and information systems, prohibiting employees from disclosing information regarding employee conduct from an employee's personnel file, and engaging in "harmful gossip."

On June 17, 2010, Respondent filed a Motion to Strike Complaint Allegation (Motion) seeking to strike the allegations at paragraphs 4(b) through 4(g) of the Complaint, arguing that the allegations were not specifically alleged in the charge. That Motion was denied by Administrative Law Judge William G. Kocol, the Administrative Law Judge initially assigned to this matter, during a telephonic conference call on or about June 22, 2010 (Tr. 11). On June 29, 2010, Respondent renewed its Motion during the hearing, at which time the ALJ denied the Motion, finding that the allegations were closely related to the underlying charge allegation regarding McCullough's discharge. (Tr. 11-12; ALJD at 2 n. 4)

C. The ALJ correctly determined that the Complaint allegations regarding Respondent's overly-broad and discriminatory rules are closely related to the charge allegation that McCullough was discharged in violation of the Act.

Section 10(b) of the Act mandates that a charge be filed before a complaint issues, as Congress chose to prevent the Board from initiating complaints on its own motion. *Embassy Suites Resort*, 309 NLRB 1313, 1314 (1992); *Consumers Power Co. v. NLRB*, 113 F.2d 38 (6th Cir. 1940). Section 10(b) does not require that the charge be specific, nor does it require that the charge and the subsequent complaint be identical, as it merely sets in motion the machinery of an inquiry. Id. Based on these principles, the Board has long held that a charge alleging a violation of Section 8(a)(1) in general terms is sufficient to support a complaint alleging a particularized violation of Section 8(a)(1). Id., citing *Brookville Glove Co.*, 116 NLRB 1282 (1956). See also *Columbia University*, 250 NLRB 1220 fn. 2 (1980).

Under the "closely related" test asserted by Respondent, as set forth by the Board in *Redd-I, Inc.*, 290 NLRB 1115 (1988), there is no question that the Complaint allegations regarding Respondent's overly-broad and discriminatory rules are "closely related" to the allegation in the charge that McCullough was terminated in violation of Section 8(a)(1) because they: (1) involve the same legal theory as the allegations in the charge; (2) arise from the same factual situation or sequence of events as the allegations in the charge; and (3) involve the same or similar defenses by Respondent.

Contrary to Respondent's assertion (Respondent's Brief in Support at p. 4), the Complaint does not merely allege that McCullough was discharged for "complaining about sexual harassment." Rather, the Complaint alleges, in paragraph 4(j), that McCullough was

¹ In *Brookville*, the charge alleged a violation of Section 8(a)(1), but the section of the charge entitled "Basis of the Charge" was left blank by the charging party. The complaint alleged that the respondent violated Section 8(a)(1) by discharging and refusing to reinstate two employees because they refused to abandon an economic strike.

discharged not only because she concertedly complained about her working conditions, including sexual harassment, but also because she violated the very rules that Respondent seeks to strike from this proceeding, including those described in Complaint paragraphs 4(b), 4(c), 4(d), 4(f), and 4(g). In fact, a written summary of the reasons for McCullough's discharge, prepared by Respondent prior to McCullough's termination on August 5, 2010, expressly described at least five reasons for McCullough's proposed discharge, including the following: (1) violation of Respondent's Employee Conduct and Dishonesty policies by engaging in dishonesty regarding issuance of a personal check for demurrage; (2) violation of Respondent's Employee Conduct policy by blind copying third parties on confidential emails concerning workplace investigations; (3) violation of Respondent's Employee Conduct policy by engaging in "harmful gossip" about another employee's absence from work; (4) violation of Respondent's Employee Conduct and Sexual Harassment policies by encouraging employees to complain to Human Resources and by making an inappropriate comment to another employee; and (5) violation of Respondent's Alcohol or Drug Abuse Policy by alleged drug use during work hours. (GC 2)

Throughout these proceedings, Respondent has expressly cited violations of numerous company policies, including the Employee Conduct policy and the Harmful Gossip policy alleged in the Complaint, as specific reasons for McCullough's discharge, and the charge plainly asserts that Respondent "interfered with, restrained and coerced its employees in the exercise of their Section 7 rights by its actions including terminating McCullough..." (GC 1(a); emphasis added.) It is disingenuous for Respondent to argue that allegations that Respondent's Employee Handbook and other policies are unlawful on their face are not closely related to allegations that it terminated McCullough in violation of the Act, when her

violations of the policies themselves were expressly cited as the reason for McCullough's termination.

Under these circumstances, it is without question that the charge allegations, that McCullough's discharge was in violation of the Act, and the Complaint allegations, that the Respondent's policies – many of which were expressly cited as the reasons for McCullough's discharge – arise out of the same factual situation or sequence of events leading to McCullough's discharge. Furthermore, the legal theories involved in both are the same or similar, inasmuch as the discharge of McCullough was unlawful under the Act to the extent that it was based on violations of policies that are, on their face, unlawful under the Act. The same is true for Respondent's defenses. In order to justify the lawfulness of McCullough's discharge based on violation of various company policies, Respondent must establish that the policies themselves are lawful.

Therefore, the ALJ properly denied Respondent's Motion, because the Complaint allegations regarding Respondent's overly-broad and discriminatory rules are closely related to the charge allegation that McCullough was discharged – in part because of her alleged violation of those overly-broad and discriminatory rules – in violation of the Act.

Accordingly, Respondent's Cross-Exceptions 1 and 2 should be denied.

II. THE ALJ PROPERLY FOUND THAT RESPONDENT'S WORK RULES VIOLATE THE ACT (CROSS-EXCEPTIONS 3 THROUGH 11)

The bulk of Respondent's Cross-Exceptions take issue with the ALJ's findings and conclusions that several of Respondent's work rules violate Section 8(a)(1) of the Act. As discussed more fully below, Respondent's Cross-Exceptions are without merit and should be rejected by the Board.

As to the work and confidentiality rules at issue, in general terms, when determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Id. See also *Blue Cross-Blue Shield of Alabama*, 225 NLRB 1217, 1220 (1976).

A. The ALJ properly found that Respondent's Confidentiality Rules violate the Act.

As discussed in more detail below, the ALJ properly applied extant Board law in finding the violations at issue. The Board has held that "confidentiality" rules which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment such as disciplinary actions, restrain and coerce employees in violation of Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated or ever enforced. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (handbook provision a violation on its face where confidential information is defined as "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations, [and] salary information"); *Kinder-Care Learning*, 299 NLRB 1171, 1172 (1990); *Iris USA, Inc.*, 336 NLRB 1013 (2001) (maintaining a handbook rule instructing employees to keep information about employees strictly confidential was a violation); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291 (1999) (handbook provision prohibiting employees

from disclosing "confidential information regarding . . . fellow employees" was a violation); see also *Sharp v. Karonis Parts*, 927 F.Supp. 1208 (D. Minn. 1996) (employer enjoined under Section 10(j) from maintaining a handbook rule prohibiting employees from discussing wages with each other).

Further, the Board has held that even "[i]f the rule does not explicitly restrict Section 7 activity, it is nonetheless unlawful if (1) employees would reasonably construe the language of the rule 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."

Northeastern Land Services, Ltd., 352 NLRB 744 (2009) (applying the Board's standard in Lutheran Heritage Village-Livonia, 343 NLRB at 647).

1. The ALJ correctly concluded that Respondent's confidentiality rule prohibiting employees from discussing matters under investigation violates the Act (Cross-Exceptions 9, 10, 11).

An employer violates Section 8(a)(1) when it prohibits employees from speaking to coworkers about discipline, investigations, and other terms and conditions of employment. In *SNE Enterprises, Inc.*, 374 NLRB 472 (2006), the Board affirmed the ALJ's finding that the employer violated Section 8(a)(1) by prohibiting an employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that prohibition. See also *Caesar's Palace*, 336 NLRB 271, 272 (2001) ("employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees" and that the employer's "rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right"); *Phoenix Transit System*, 337 NLRB 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003) (employer violated Section 8(a)(1) of the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual

harassment complaints amongst themselves); Westside Cmty. Mental Health Ctr., 327 NLRB 661, 666 (1999) (employer's instruction not to discuss an employee's suspension with anyone violated the Act, particularly when the prohibition restricted employees "from possibly obtaining information from their coworkers which might be used in their defense"). "Once it is established that the employer's conduct adversely affects employees' protected rights, the burden falls on the employer to demonstrate 'legitimate and substantial business justifications' for his conduct." Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976) (citing NLRB v. Fleetwood Trailer Co., Inc., 389 U.S. 375, 378 (1967)).

Respondent asserts that its rule is based upon its duties under other laws, including California laws in particular, which "demand" confidentiality of sexual harassment complaints. Respondent's reliance is completely misplaced. Under the guidance cited by Respondent in its Brief in Support, the purpose behind preserving confidentiality to the extent possible in sexual harassment investigations is to protect the employee, not the employer. As the California Supreme Court stated in the case cited by Respondent, *State Dept. of Health Services v. Superior Court*, 31 Cal.4th 1026, 1048-49 (2003), an "employee is more likely to promptly report harassment" if the employer has "sought to preserve confidentiality." Similarly, EEOC rules requiring employers to keep records of harassment complaints confidential are obligations imposed on employers, not on employees. Likewise, any potential liability an employer may face for defamation and other tort actions would arise from an employer's disclosure of confidential information.

Nothing in any of the rules, statutes, guidelines, or cases cited by Respondent require that an employer *prohibit* an *employee*, who has a right under the Act to discuss terms and conditions of employment with others, from discussing sexual harassment complaints or any

other matters under investigation, and Respondent's reliance on such authority to justify its unlawful rule is misguided. Furthermore, contrary to Respondent's assertion, the ALJ's finding that Respondent's rule – which undisputedly prohibits employees from discussing their concerns or complaints during an investigation (Tr. 142, 163) – violates the Act (ALJD at p. 19) is not inconsistent with existing Board law. Again, Respondent's reliance on Desert Palace, Inc., 336 NLRB 271 (2001), which upheld a confidentiality rule during an investigation involving unique allegations of illegal drug activity, management cover-up, and threats of violence, is misplaced. The Board's approval of a confidentiality rule in the unusual factual circumstances presented by *Desert Palace* – a case often mis-cited by respondent employers in cases presenting none of the unusual facts upon which that decision was based – does not support Respondent's argument that an employer may impose such a rule in any and all workplace investigations, including those involving commonplace allegations of sexual harassment. To the contrary, the Board has expressly ruled that rules such as the one at issue here are overly broad and violate the Act. See All American Gourmet, 292 NLRB 1111, 1129-30 (1989) (finding that employer's rule prohibiting employees from discussing sexual harassment complaints was overly broad and violated the Act).

2. The ALJ correctly concluded that Respondent's Electronic Communications and Information Systems Confidentiality Rule violates the Act (Cross-Exceptions 3, 10, 11).

Page 6 of Respondent's Employee Handbook contains a confidentiality provision that reads, in relevant part:

ELECTRONIC COMMUNICATIONS AND INFORMATION SYSTEMS

Hyundai's electronic communication and information systems including, but not limited to, electronic mail ("e-mail"), voicemail and computer system are Company property and should be used for Company purposes only. Nothing should be

entered into these systems without good reason. You must be aware that Hyundai reserves the right to: 1) Monitor and retrieve information from these systems to assure that its property is being used for appropriate business purposes only; and 2) disclose or use any information found in these systems. Employees do not have a personal privacy right in any matter created, received, sent or stored in these systems. **Finally, employees should only disclose information or messages from theses** [sic] systems to authorized persons.

(GC 4, emphasis added) This rule is written so broadly as to prohibit employees' disclosure of *any* information exchanged on company emails, instant messages, and phone systems, which could reasonably be viewed by employees to include discussions of wages and salary information, disciplinary actions, performance evaluations, and other information of common concern that employees are entitled to know and to share with each other. To avoid violating the Act, Respondent must limit any prohibition on the disclosure of information to those matters that are clearly "confidential" and do not involve terms and conditions of employment. Employees should not have to decide at their own peril what information is not lawfully subject to such prohibition. Because such a broad prohibition could reasonably chill Section 7 rights, the ALJ was correct in concluding that the rule violates Section 8(a)(1) of the Act. (ALJD at p. 13)

Respondent argues that the ALJ's finding "would require Hyundai to allow employees to communicate confidential customs information to unauthorized individuals," exposing Respondent to a host of undesirable results, such as loss of customs certifications, customers, trade secrets, etc. (Respondent's Brief in Support at p. 11) Respondent further argues, in an attempt to justify its unlawful rule, that Board law permits a rule prohibiting a payroll accountant from revealing confidential wage and salary information to unauthorized employees, citing *Asheville School, Inc.*, 347 NLRB 877 (2006). (Respondent's Brief in

Support at p. 11) In that case, however, the judge concluded that the payroll accountant possessed special custody of such records and was aware that her job duties included keeping that information confidential. That case has no bearing on the overly-broad rule – applicable to all employees – at issue here.

More specifically, Respondent's argument ignores the heart of the ALJ's finding, which is that Respondent's rule is not similarly restricted to specific employees or to specific information and further fails to define what is "unauthorized." (ALJD at p. 13) As such, the rule is overly broad and ambiguous, making it facially invalid and an impermissible infringement of employees' Section 7 rights on its face. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB at 114 (finding a violation of Section 8(a)(1) by maintenance of a rule stating: "You are not, under any circumstances permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any nonemployee without approval from the General Manager or the President"). Furthermore, as the ALJ noted, even if a suspect rule could be considered ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. (ALJD at p. 12, citing *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

Respondent could have crafted a rule that is lawful and does not chill employees'

Section 7 rights yet still protects its trade secret and other confidential information, and the ALJ's finding does nothing to prohibit Respondent from doing so. What Respondent cannot do, however, is maintain an overly broad and ambiguous rule that requires employees to "guess," at their own peril, as to what Respondent considers permissible and impermissible.

By maintaining such a rule, Respondent has reasonably chilled employees' Section 7 rights in violation of the Act.

3. The ALJ correctly concluded that Respondent's Personnel Files Confidentiality Rule violates the Act (Cross-Exceptions 4, 10, 11).

Page 7 of Respondent's Employee Handbook contains a confidentiality provision that reads, in relevant part:

PERSONNEL FILES

Human Resources maintains a personnel file on each employee; the personnel file includes documents such as your employment application, tax withholding information, performance information, etc. Personnel files are Hyundai's confidential business information.

It is important that we keep accurate information concerning your name, address, telephone number, marital status, dependents, withholding status and emergency contacts. If you have any changes in this information, please notify Human Resources promptly in writing.

Except for internal business use, Hyundai generally will not release information from your personnel file without your written consent or without an appropriate court order, subpoena or government request. Any request for this information should be directed to the Human Resources Department in writing. Since the information in personnel files is confidential business information, Hyundai reserves the right to deny any request for information from a personnel file, unless the Company is required by law to comply with such request. Any unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge.

(GC 4, emphasis added) Again, this rule is written so broadly as to prohibit employees' disclosure of *any* information contained in personnel files. Not only could this reasonably include discussions of wages and salary information, disciplinary actions, performance evaluations, and other information that employees are entitled to know and to share with coworkers, on its face the provision expressly states that personnel files include documents

regarding performance information. In addition, much of this information is of the type that affects employees' wages, hour, working conditions, or other terms and conditions of employment, and, as such, may be shared by employees, provided to unions, or given to governmental agencies. By expressly threatening discipline, including discharge, for violations of the provision, it can have no more direct consequence than to chill employees in the exercise of their Section 7 rights.

Again, Respondent attempts to justify the rule by citing *Asheville School, Inc.*, 347 NLRB 877 (2006), arguing that the rule "is not necessarily addressed to rank and file employees . . . , but rather those employee[sic] with access to such files, such as Human Resources and Payroll employees." (Respondent's Brief in Support at p. 12-13) Again, however, Respondent's rule, which is contained in an employee handbook of general distribution, is not restricted to such employees or to legitimately confidential information, and again, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)). Contrary to Respondent's argument, the rule can be reasonably read to prohibit any employee from discussing with anyone his or her annual performance evaluation. As such, the rule is facially invalid, overly broad, ambiguous, and an impermissible infringement of employees' Section 7 rights, and the ALJ correctly found that the rule violates Section 8(a)(1) of the Act. (ALJD at p. 14)

B. The ALJ correctly concluded that Respondent's Employee Conduct rule against employee complaints to one another violates the Act (Cross-Exceptions 5, 10, 11).

Respondent's Employee Handbook contains an Employee Conduct rule that states, in relevant part:

EMPLOYEE CONDUCT

We expect you to perform your position duties in a professional and diligent manner. Courtesy to our customers, visitors and your fellow employees is always expected.

It is easy to criticize, but more difficult to make constructive suggestions. Voice your complaints directly to your immediate superior or to Human Resources through our "open door" policy. Complaining to your fellow employees will not resolve problems. Constructive complaints communicated through the appropriate channels may help improve the workplace for all.

(GC 4, emphasis added) It is a long, well-established principle that an employer violates Section 8(a)(1) of the Act when it prohibits employees from speaking to coworkers about discipline and other terms and conditions of employment. See SNE Enterprises, Inc., 347 NLRB 472 (2006) (Board affirmed the ALJ's finding that the employer violated Section 8(a)(1) by prohibiting an employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that prohibition). Respondent's directive to employees to voice their complaints to their superiors or to Human Resources in conjunction with the imperative statement "[c]omplaining to your fellow employees will not resolve problems" could reasonably chill employees' Section 7 rights. The provision goes on to reference "complaints communicated through the appropriate channels (emphasis added)," implying that employees should not discuss complaints among themselves. That is an attack directed at the very heart of protected concerted activity. See FiveCAP, Inc., 331 NLRB 1165, 1194 (2000) (holding that employer's rule to employees that complaints like grievances are to be directed to supervisors only and not to other employees was "an unlawful promulgation of a rule which is violative of Section 8(a)(1) of the Act, inasmuch as it inhibits

employees from engaging in their Section 7 rights of discussing matters regarding their terms and conditions of employment").

Respondent attempts to justify its rule by arguing that the policy merely "suggests" complaints be communicated to management and pointing out that the policy does not impose any penalty or prohibition on communications with other employees. (Respondent's Brief in Support at p. 13) That, however, is not the test. In determining whether the maintenance of specific work rules violates Section 8(a)(1) of the Act, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Id. See also Blue Cross-Blue Shield of Alabama, 225 NLRB 1217, 1220 (1976). Furthermore, even if that were the proper inquiry, as the ALJ noted, implicit in the directive "Voice your complaints directly to your immediate supervisor or to Human Resources . . . " is a prohibition against employees making complaints to other employees, to the union, to customers, or to other entities. (ALJD at p. 15) Such a requirement reasonably tends to inhibit employees from engaging in concerted activities under the Act. Moreover, any questions employees may have as to the likely application or purpose of the rule are answered by Respondent's statement, in the rule, denigrating employees' "criticism" of Respondent or its policies ("It is easy to criticize, but more difficult to make constructive suggestions."). The ALJ properly found that the rule violates Section 8(a)(1) of the Act. Respondent's Cross-Exceptions to such findings should be rejected by the Board.

C. The ALJ correctly concluded that Respondent's rule against harmful gossip violates the Act (Cross-Exceptions 6, 10, 11).

Respondent cross-excepts to the ALJ's finding that its rule prohibiting "harmful gossip" violates the Act (ALJD at p. 16; Complaint paragraph 4(g)). Respondent's crossexception is without merit. More specifically, the Board has found that a rule prohibiting "negative conversation" about associates or managers violates the Act. See Claremont Resort and Spa and Hotel, 344 NLRB 832 (2005). In so finding, the Board applied the three-part test in Lutheran Heritage Village-Livonia, 344 NLRB at 832, to find that "the rule's prohibition of 'negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities." Id. See also Central Hardware Co, 407 U.S. at 542-543 (1972) (citing Peyton Packing Co., 49 NLRB 828 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied, 323 U.S. 730 (1944)). "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322, 325 (1974). However, "[n]o restrictions may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956). "The Respondent may not prohibit discussions about a union during work time while permitting discussions about other nonwork subjects." M.J. Mech. Servs., Inc., 324 NLRB 812, 814 (1997) (citing Williamette Indus., Inc., 306 NLRB 1010, 1017 n. 2 (1992)).

Respondent's rule is similar to the rule found unlawful in *Claremont Resort*.

Respondent's rule prohibits "harmful gossip" and states, in relevant part:

The following actions, will not all-inclusive, may be cause for disciplinary action, including termination without prior warning. These include, but are not limited to:

* * *

14. Threatening, intimidating, coercing, harassing or interfering with the work of fellow employees or **indulging in harmful gossip.**

(GC 4, emphasis added) The phrase "harmful gossip" is ambiguous, and one person's harmful gossip may well be another person's concerted activities. Applying the standard announced by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB at 832, this rule would reasonably be construed to limit employees' Section 7 rights to freely communicate with fellow employees about supervisors, working conditions, and other union-related topics. Contrary to Respondent's assertion, the Board, in *Southern Maryland Hosp.*, 293 NLRB 1209, 1222 (1989), did not uphold a rule prohibiting "harmful gossip." (Respondent's Brief in Support at p. 15) Rather, the Board held in that case that a rule prohibiting "malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representative" was overly broad and unlawful. In dicta, the Board acknowledged that it has consistently held that an employer may lawfully maintain a rule prohibiting "malicious" statements, i.e., statements "deliberately and maliciously made, with knowledge of their falsity or with reckless disregard of the truth." Id.

Respondent's rule, however, does not merely prohibit malicious statements. It goes beyond that and prohibits "harmful gossip," which the ALJ properly concluded is "imprecise, ambiguous, and subject to different meanings, including a reasonable belief that it would include protected activity." (ALJD at p. 16) Respondent argues that the ALJ's finding is erroneous because "there is no evidence that Hyundai enforced this rule against employees for

engaging in Section 7 activity." (Respondent's Brief in Support at p. 14) Again,
Respondent's reliance is misplaced. "The appropriate inquiry is whether the rules would
reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB at 825. The ALJ correctly concluded that Respondent's rule prohibiting
employees from engaging in "harmful gossip" would reasonably tend to chill employees in
the exercise of their Section 7 rights and, as such, is unlawful under the Act. (ALJD at p. 16)

D. The ALJ correctly concluded that Respondent's rule prohibiting nonwork activities during work hours violates the Act (Cross-Exceptions 7, 10, 11).

Respondent maintains a rule in its Employee Handbook that prohibits non-work activities during work hours. That rule reads, in relevant part:

The following actions, will not all-inclusive, may be cause for disciplinary action, including termination without prior warning. These include, but are not limited to:

* * *

14. Performing activities other than Company work during working hours.

(GC 4, emphasis added)

The Board has long held that rules prohibiting union solicitation or activities on "company time" or during "working hours" are overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time, including an employee's break times or other nonwork periods. *Moeller Aerospace Technology, Inc.*, 347 NLRB No. 76, 2006 WL 2206890, *8 (2006). The Board has also held that the phrase "working hours" connotes periods from the beginning to the end of work shifts, periods that include the employees' own time, such as lunch and break periods. Id. at n. 7. An employer

can only overcome the presumption that such a rule is facially invalid by showing that the rule was communicated to employees in such a way as to convey **clearly** an intent to permit solicitation during periods and in places where employees are not actually working. Id. at *8.

Respondent has made no such showing here. Although Respondent argues that elsewhere in its handbook, "working time" is defined to exclude meal and break periods (Respondent's Brief in Support at p. 15), it is important to note that Respondent's handbook is 18 pages in length and consists of more than 40 distinct policies or rules. Respondent also asserts that its handbook has an express provision stating that Respondent "does not impose restrictions on [an employee's] personal time, activities, or business affairs outside of working hours." (Respondent's Brief in Support at p. 15) That provision, however, is maintained within Respondent's "Conflicts of Interest" policy, and Respondent's use of that provision to justify a separate policy involving Employee Conduct is out of context and misplaced. The mere fact that Respondent maintains other policies in its handbook that deal with rules regarding working and non-working hours does not establish a **clear** intent by Respondent to limit the rule at issue, which does not define "working hours" on its face, to periods during which employees are actually performing work. Respondent has offered no evidence to show that it communicated to employees that the rule was limited in that manner. Based on the foregoing, Respondent's cross-exception in support of this rule should be rejected. The ALJ properly found that the rule in question is overly broad and a violation of Section 8(a)(1) of the Act. (ALJD at p. 16-17)

E. The ALJ correctly concluded that Respondent's rule prohibiting employees from exhibiting a negative attitude violates the Act (Cross-Exceptions 8, 10, 11).

Respondent's rule prohibiting a "negative attitude" is also similar to the rule found unlawful in *Claremont Resort*, as discussed above. Respondent's rule states, in relevant part:

The following actions, will not all-inclusive, may be cause for disciplinary action, including termination without prior warning. These include, but are not limited to:

* * *

21. Inefficiency, lack of productivity or not meeting performance standards of the Company; **exhibiting a negative attitude toward or losing interest in your work assignment.**

(GC 4, emphasis added) Again, the phrase "negative attitude" is ambiguous, and one person's negative attitude may well be another person's concerted activities. Applying the standard announced by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB at 832, this rule would reasonably be construed to limit employees' Section 7 rights to freely communicate with fellow employees about supervisors, working conditions, and other union-related topics.

Respondent argues that the phrase "negative attitude" should be read in conjunction with the rule's prohibition against "inefficiency" and "lack of productivity," which Respondent asserts are lawful prohibitions, citing *Gold Bond Building Products*, 293 NLRB 1138 (1989). (Respondent's Brief in Support at p. 16) Notwithstanding that *Gold Bond* did not involve allegations that general work rules prohibited "inefficiency" or "lack of productivity" by employees, Respondent cannot convert an unlawful rule into a lawful one by merging it with another rule that may be permissible. See *Southern Maryland Hosp.*, 293 NLRB at 1222 (finding that Respondent's act of combining a lawful prohibition with an unlawful prohibition resulted in an overly broad, unlawful rule). Accordingly, the ALJ

correctly found that Respondent's rule against a negative attitude violates Section 8(a)(1) of the Act. (ALJD at p. 17)

III. CONCLUSION

Based on the foregoing, the Board should deny Respondent's Cross-Exceptions and adopt the findings and conclusions of the ALJ as set forth above and as sought by CAGC's Exceptions in this matter.

Dated at Phoenix, Arizona, this 27th day of December 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION, Case 28-CA-22892, was served via e-filing, or as otherwise set forth below on this 27th day of December 2010, on the following:

Lester A. Heltzer, Executive Secretary Office of the Executive Secretary National Labor Relations Board 1099 14th Street, NW, Room 11602 Washington, DC 20570-0001

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