

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: September 24, 2003

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Cintas Corporation 506-2017-1700
Case 28-CA-18488 512-0125-2500
512-5012-0133-1100
512-5012-6720
512-5012-6722
512-5012-6735
512-5012-6737
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This Section 8(a)(1) case was submitted for advice on the lawfulness of the following four sets of rules: (1) limiting off-duty employee access to the plant; (2) prohibiting employees from using "abusive or offensive" language; barring the e-mail use of words that "verbally abuse" or are "inappropriate, defamatory, vulgar or threatening" [towards employees] or "make discriminatory statements" and also barring any nonbusiness use of e-mail; (3) barring employees from disclosing confidential information about themselves and other employees; and (4) prohibiting conduct which "disrupts business activities."

We conclude that the rules barring the disclosure of confidential information are unlawful, but the rule limiting off-duty access and the rules governing the use of language and disruptive behavior are not unlawful.

FACTS

The Employer is a multistate operation which supplies corporate identity uniforms and performs related services. The Union is conducting an organizing campaign in all of the Employer's plants in the United States and Canada. The Employer's employee handbook long predates the organizing campaign and the Union does not claim that the rules in issue have been enforced against union or protected activity.

1. Rule Affecting Off-Duty Employee Access to the Plant

The Employer's Admission to the Building rule provides:

You should enter the plant or office as directed by your supervisor and only at times necessary to perform your assigned duties. All visitors to the plant or office, including family members and partners [employees] who are not scheduled to work, must enter the facility through the main office entrance, where they may be required to sign in and receive a visitor's badge. While on site, visitors should be escorted by the partner [employee] they are visiting.

The plant interiors apparently contain both work areas and nonworking areas.¹

2. Rules Prohibiting Arguably Protected Language and Nonbusiness E-mail

The rules governing the use of language and e-mail are set forth in several places. The "Discipline Policy," contains 24 unnumbered examples of behavior that could result in disciplinary action including: dishonesty; destruction of company property; tardiness; unsafe work practices; engaging in illegal activities while on company premises; illegal drug use or possession; on the job alcohol use; sexual harassment; and taking company property. The Union alleges that one of the listed behaviors, the "use of abusive or offensive language," is unlawfully overbroad.

The E-Mail/Internet rule bars the use of e-mail to make discriminatory statements, and to

make statements that might constitute sexual or other harassment under the company's policies; or make statements regarding or otherwise disclose trade secrets, confidential information or other proprietary information.

The Union alleges that the rule is unlawfully overbroad in barring employees from using e-mail to

verbally abuse or otherwise use inappropriate, defamatory, vulgar or threatening language towards

¹ The Lunch Periods and Breaks rule suggests there are nonworking areas inside the plants because it provides that "eating and drinking is only permitted in authorized areas."

customers, vendors, other partners, or any other person or entity...

Finally, the Union alleges that the rule unlawfully requires that the company's e-mail system should be used "only for company business."

3. Confidential Information Rules.

The Employer's handbook contains a section entitled "We Have High Principles and Moral Values," which, in part states:

We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners [i.e., employees], new business efforts, customers, accounting and financial matters.

In addition, the Employer's "Discipline Policy," bars "violating a confidence or unauthorized release of confidential information."

4. Rule Against Disruption

Among the unenumerated behaviors which could lead to discharge under the Employer's Discipline Policy is "conduct that disrupts business activities."

ACTION

We conclude that the rules barring the disclosure of confidential information are unlawful, but the rule limiting off-duty access and the rules governing the use of language and disruptive behavior are not unlawful.

1. The rule limiting off-duty employee access is not unlawful.

In Tri-County Medical Center, 222 NLRB 1089 (1976), the Board held that a rule barring off-duty employees access would be presumptively unlawful unless it:

- (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaged in union activity.

In Hudson Oxygen Therapy Sales Co., 264 NLRB 61, n. 2, 72 (1982) the Board approved a finding by the ALJ that the employer's rule was unlawful because it denied off-duty employees access to parking lots, gates, "lunchrooms, and other nonworking areas." Hudson Oxygen thus appears to apply Tri-County to the nonworking areas of not only the outside but also the non-work area inside of an employer's premises. We note, however, that the Board has not reiterated this apparent holding of Hudson Oxygen regarding interior areas. Moreover, recent Board cases clearly suggest that the Board views Tri-County as applicable only to nonworking outside areas.²

Moreover, the above Tri-County cases involve a total ban on off-duty access. Research uncovered no cases dealing with mere limitations on off-duty employee access such as is presented here. However, in analogous circumstances involving access of nonemployee union agents to construction sites, where the union agents represented employees of subcontractors and the union-subcontractor bargaining agreement granted union access, the Board has "recognized a general contractor's right to enforce reasonable and nondiscriminatory security rules . . ."³ The Board has found these types of access rules to be reasonable and lawful where the rules required the union agents to make

² See Golub Corp., 338 NLRB No. 62, slip op. at 1, 2, at n. 6 (Board states that rule which denies off-duty employees entry to "outside nonworking areas" is presumptively unlawful citing Tri-County); Hillhaven Highland House, 336 NLRB 646, 647 (2001) (Board describes Tri-County as holding that a rule which denies off-duty employees entry to "outside nonworking areas of the employer's facility" is invalid). Neither case cites Hudson Oxygen.

³ Peck-Jones Construction Corp., 338 NLRB No. 4 (2002). See also C.E. Wylie Construction Co., 295 NLRB 1050, note 2 (1989), enfd. in relevant part 934 F.2d 234 (9th Cir. 1991), on remand 310 NLRB 721 (1993); Wolgast Corp., 334 NLRB 203, 204, 212 (2001).

their presence known,⁴ to sign in,⁵ and also to be accompanied by agents of the general contractor.⁶

The rule here is not a total ban on off-duty employee access to interior, nonworking areas of the plant. Off-duty employees may obtain interior access if they report to the main office, sign in, wear a visitor's badge, and be escorted by the on-duty employee while in the plant. The Board has approved substantially similar restrictions upon the access of union agents to employees working on general contractor-controlled construction sites. In light of that approval, we would not argue that the similar, nondiscriminatory restrictions here are unreasonable and unlawful.

2. The rules barring "abusive or offensive language" and the e-mail rules are lawful.

The rule barring "abusive or offensive language" is accompanied by 23 other behaviors that could result in discipline. The e-mail/internet rules bar employees from using e-mail for anything except company business, and even then from using abusive, inappropriate, defamatory, vulgar, threatening, discriminatory, or sexually improper language.

In Lafayette Park Hotel, the Board found unlawfully overbroad a rule that prohibited "false, vicious, profane

⁴ Villa Avila, 253 NLRB 76, 80 (1980), enfd. as modified 673 F.2d 281 (9th Cir. 1982); CDK Contracting Co., 308 NLRB 1117 (1992).

⁵ See Wolgast Corp., above at 204, 212.

⁶ CDK Contracting, supra, 308 NLRB at 1117, n. 1. We consider distinguishable from CDK those cases finding a violation based upon the specific conduct of a general contractor, rather than upon the mere existence of the general contractor's escort rule. The Board has found violations where a general contractor took notes while following union agents around the site, Mayer Group, 296 NLRB 25 (1989), and initially denied access because of the alleged unavailability of an escort. Subbiando & Associates, Inc., 295 NLRB 1108 (1989). In contrast, the Board in CDK held that a "reasonable and nondiscriminatory" escort rule, standing alone, would not be unlawful and rejected the ALJ's analysis that such a rule would unlawfully interfere with Section 7 activity.

or malicious statements" because that would prohibit labor speech, such as false but not maliciously defamatory statements, which is protected by Section 7.⁷ Similarly in Adtranz,⁸ the Board found unlawful an employer rule prohibiting "abusive or threatening language" because "abusive language" was not defined in the rule and reasonably could be interpreted to include lawful union organizing propaganda or rhetoric.⁹

More recently in Tradesman International, 338 NLRB No. 49 (2002), the Board found lawful a rule barring "slanderous or detrimental statements" towards the employer or any of its employees. The Board held that employees could not reasonably read the rule as applying to protected activity. In several recent cases, Advice has dismissed allegations that rules prohibiting "abusive" language were unlawful where those rules appeared among a list of other rules addressing serious, job-related misconduct. Advice concluded that employees would reasonably construe "abusive" language in that context as not addressing Section 7 conduct.¹⁰ In contrast, the rules outlawing

⁷ 326 NLRB 824, 828 (1998), enfd. mem 203 F.3d 52 (D.C. Cir 1999).

⁸ Adtranz ADB Daimler-Benz Transportation N.A., Inc., 331 NLRB 291 (2000), enf. denied 253 F.3d 19 (D.C. Cir. 2001).

⁹ 331 NLRB at 293, citing Linn v. United Plant Guards, 383 U.S. 53 (1966) (union campaign rhetoric is protected even when it includes "intemperate, abusive, and inaccurate statements"). See also Flamingo Hilton-Laughlin, 330 NLRB 287 (rule prohibiting loud, abusive or foul language" unlawful); Great Lakes Steel, 236 NLRB 1033, 1036-37 (1978), enfd. 625 F.2d 131 (6th Cir. 1980) (rule prohibiting distribution of literature which was "libelous, defamatory, scurrilous, abusive or insulting" unlawful).

¹⁰ See ATT Broadband and Internet Services, Case 12-CA-21220, Advice Memorandum dated November 6, 2001 (other rules on list barred discrimination, harassment, retaliation, mistreatment of customers, and conduct for which the employer could be found to have violated Title VII of the Civil Rights Act); Cobalt Painting, Inc., Case 20-CA-30243-1, Advice Memorandum dated October 24, 2001 (other rules on list barred discrimination and harassment); Webvan Group, Case 32-CA-18695, Advice Memorandum dated July 16, 2001 (other rules on list outlawed possession of

"abusive language" in Adtranz and Flamingo Hotel stood alone, without contextual definition.

Here, the rules prohibit the use of language that is abusive, offensive, inappropriate, defamatory, vulgar, threatening, discriminatory, or sexually improper. We recognize that the terms abusive, offensive, inappropriate or vulgar - standing by themselves - may be interpreted as encompassing protected Section 7 rhetoric. However, these terms appear in the context of other rules which bar only serious employee misconduct. The circumstances surrounding the rules here are different than the circumstances surrounding similar rules found unlawful in Adtranz and Flamingo Hotel. We conclude that employees would reasonably interpret the rules here, in context, as not encompassing Section 7 protected speech.¹¹

As to the ban on personal use of e-mail and the internet, the Charging Party does not claim that any of the employees in the unit(s) it seeks to represent make use of the Employer's computers, e-mail or internet systems. Nor is there any evidence that other statutory employees make sufficient use of computers, e-mail or the internet to make them part of their "work areas."¹² Accordingly, these rules are not unlawfully overbroad.

weapons, threats of violence, and possession of controlled substances); Wal-Mart Stores, Case 32-CA-18745, Advice Memorandum dated May 11, 2001 (other rules on list outlawed fraud, theft, falsification of records, and possession of firearms); Mariner Post-Acute Network, Case 11-CA-18096, Advice Memorandum dated February 10, 1999 (other rules on list outlawed misuse of employer property, failure to follow safety regulations, and performing non-employer work during work hours).

¹¹ Finally, we find distinguishable the rule found unlawful in University Medical Center, 335 NLRB 1318 (2001), which barred "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct . . .". Unlike the terms appearing in context here, employees may reasonably have interpreted the ban on "other disrespectful" conduct to encompass Section 7 activity.

¹² See Memorandum OM 99-67, dated November 9, 1999, "Charges Involving Computer Related Issues"; Pratt & Whitney, Cases 12-CA-18722 et al, Advice Memorandum dated February 23, 1998.

3. The rule barring the disclosure of confidential information about employees is unlawful.

The Board has consistently held that a rule which employees may reasonably read to bar disclosure of their own, or their coworkers' wages, hours, and conditions of employment violates Section 8(a)(1).¹³ Here, the employee handbook asserts as confidential any information concerning, among others, employees and prohibits its dissemination. Based on the above precedent, we conclude that the confidentiality rules violate Section 8(a)(1).

4. The rule against "conduct that disrupts business activities" is lawful.

The Board has held that rules which addressed legitimate business concerns, provided examples of the kind of conduct they were intended to cover, and have not been enforced against employees engaged in protected activity, are lawful because employees would not reasonably read such rules as proscribing Section 7 activity.

In Lafayette Park Hotel, above, the Board found lawful standard 6 which barred conduct which did not "support" the employer's "goals and objectives," and also found lawful Standard 31 which barred

unlawful or improper conduct off the [employer's] premises... which affects the employee's relationship with the job, fellow employees,

¹³ See Flamingo Hilton-Laughlin, 330 NLRB 287, 288, n. 3, 291 (1999) (rule unlawfully barred employees from revealing confidential information about "customers, fellow employees, or Hotel business"); Brockton Hospital, 333 NLRB 1367, 1372, 1377 (2001), enfd. 294 F.3d 100, 106 (D.C. Cir. 2002) (rule unlawfully barred disclosure of information "concerning patients, associates [nurses], or hospital operations . . ."); University Medical Center, above, 335 NLRB at 1321, (Rule 8 unlawfully barred disclosure of confidential information concerning patients or employees); and IRIS, U.S.A., Inc., 336 NLRB 1013, n. 1, 1015 (2001) (rule unlawfully stated that "information, whether about IRIS, its customers, suppliers, or employees is strictly confidential"). Compare Ark Las Vegas, 335 NLRB 1284, 1290 (2001), where the rule said nothing about the disclosure of information about employees.

supervisors, or the [employer's] reputation or good will in the community.

In Flamingo Hilton-Laughlin, above at 288, the Board found lawful numbered rule 7 which barred "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the" employer. In Ark Las Vegas Restaurant, above, 335 NLRB 1284, n. 2, 1291, the Board found lawful Rule 68 which barred employees from

Participating in any conduct, on and off duty, that tends to being discredit to, or reflects adversely on, yourself, fellow [employees], the [employer], or its guests, or that adversely affects job performance or your ability to report to work as scheduled.

Finally, in Tradesman International, above, the Board found lawful a "conflicts of interest" rule which barred employees from engaging,

directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive, or damaging to the company.

The rule here appears among a list of 24 other prohibited behaviors, many of which constitute serious employee misconduct. In these circumstances, and also in accord with the above precedent, we conclude that the rule here is lawful.

In sum, the rules barring the disclosure of confidential information are unlawful, but the rule limiting off-duty access and the rules governing the use of language and disruptive behavior are not unlawful.

B.J.K.