

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

DATE: March 3, 2006

TO : Dorothy Moore-Duncan, Regional Director
Region 4

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

SUBJECT: AlliedBarton Security Services	512-5012-0133-5000
Cases 4-CA-34212, 1-CA-42870,	512-5012-1725-0100
5-CA-32694, 19-CA-30048	512-5012-1737-0100
and 20-CA-32724	512-5012-6718
	512-5012-6787
	512-5012-9300

These cases were submitted for Advice to determine the lawfulness of certain provisions of the Respondent's employee handbook. We conclude that the Employer violated Section 8(a)(1) of the Act by maintaining facially overbroad no distribution, confidentiality, and union button/insignia rules. We further conclude, however, that the handbook provisions concerning solicitation and employee conflicts of interest are not unlawful.

Charging Party Service Employees International Union (SEIU) is attempting to organize security guards employed by AlliedBarton Security Services at some of its locations nationwide. It has filed a series of charges alleging that the Employer is maintaining unlawful provisions in its employee handbook. The Union contends that the work rules are unlawful because employees would reasonably construe them as restricting their exercise of Section 7 rights. The Union does not contend that the Employer has either promulgated them in response to Union activity or has enforced them in such a manner as to restrict Section 7 activity. In large part, the Employer has declined to provide a position statement.

We conclude as follows that three of the provisions in the Employer's employee handbook are unlawful, while the remaining provisions are not unlawful on their face.

A) No Distribution/No Solicitation Rule

The Employer's handbook contains a provision entitled "No-Solicitation," which states:

During your work time or the working time of other employees, you are prohibited from

soliciting for any purpose (including, without limitation, soliciting for funds, business, or membership in organizations from other employees, or collecting monies from other Company employees, client employees or the public. **In work areas or in any areas used by you**, you are prohibited at all times from distributing any form of literature or other materials. (emphasis added)

The Union contends that the Employer's rule is ambiguous and unlawfully overbroad where it prohibits any solicitation during "the working time of other employees." The Union suggests that employees could view solicitation between non-working employees as being prohibited if any AlliedBarton employees were working at that time.¹ The Union notes that the Employer operates 24 hour shifts and that an AlliedBarton employee is always on working time. The Union further contends that the ban on distribution "in any area used by" employees is unlawfully overbroad.

An employer violates Section 8(a)(1) by maintaining a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights."² A work rule that explicitly prohibits employees from engaging in Section 7 activity is unlawful. If the rule does not explicitly prohibit Section 7 activity, the work rule is unlawful if (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer promulgated the rule in response to Section 7 activity; or (3) the employer has applied the rule to restrict employees in the exercise of their Section 7 rights.³ The Board "refrain[s] from reading particular phrases in isolation, and it must

¹ The Union alleged in Case 19-CA-30048 that AlliedBarton unlawfully disciplined an employee for violating its no solicitation clause. The evidence indicates that the Employer believed that the soliciting and receiving employees had both been on work time. Thus, there is no contention that the Employer has ever enforced its policy in the manner suggested by the Union.

² Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. per curiam 203 F.3d 52 (D.C. Cir. 1999).

³ Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 1-2 (2004).

not presume improper interference with employee rights."⁴ In the absence of a reasonable interpretation under which the rule would restrict Section 7 activity, the Board will not find a violation "simply because the rule *could* be interpreted that way."⁵

An employer may ban solicitation on work time and the distribution of literature on work time and in working areas. However, prohibitions against solicitation on employees' non-working time and distribution in non-working areas are unlawful, absent special circumstances making such rules necessary to maintain production or discipline.⁶ Moreover, ambiguities in rules restricting employee solicitation and/or distribution are to be construed against the drafter, since the rules explicitly touch upon Section 7 activities.⁷

We conclude that an AlliedBarton employee would not reasonably interpret this no-solicitation clause to constitute a complete ban on solicitation at AlliedBarton's 24-hour facilities, as the Charging Party suggests. Not all ambiguities invalidate an otherwise lawful rule; rather, the rule must create confusion in the mind of the reader. There is nothing specifically in this rule that would lead to the Charging Party's expansive interpretation, which the Employer could have simply expressed by banning solicitation "at any time." Rather, we conclude that a more natural, less strained interpretation of the Employer's ban on solicitation "[d]uring your work time or the working time of other employees" lawfully prohibits solicitation only during the work time of the solicitor or the employee being solicited.⁸

⁴ Id., slip op. at 1.

⁵ Id., slip op. at 2.

⁶ RCN Corp., 333 NLRB 295, 300 (2001), citing Beth Israel Hospital v. NLRB, 437 U.S. 483 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Stoddard-Quirk Mfg. Corp., 138 NLRB 615 (1962).

⁷ Palms Hotel and Casino, 344 NLRB No. 159, slip op. at 6 (2005).

⁸ The decisions in Magnesium Casting Co., 250 NLRB 692, 709 (1980), enfd. 668 F.2d 13 (1st Cir. 1981) (table) and The Times Publishing Company, 231 NLRB 207, 211 (1977), enf. granted in part and remanded in part, 576 F.2d 1107 (5th

However, the Employer's ban on distribution "in any areas used by you ... at all times" prohibits employees from distributing materials in non-working areas during non-work time. Such a restriction is clearly unlawful.

B) Union Buttons and Insignia

Under the heading, "Personal Appearance and Public Perceptions, Jewelry," the handbook states:

The only items permitted to be on an AlliedBarton uniform are issued name tags and AlliedBarton issued service pins.

We conclude that this rule is unlawful but only insofar as it is overbroad because it applies to employees who are wearing their uniforms but are not on duty.

Although employees have a presumptive right to wear union paraphernalia while at work, an employer can demonstrate special circumstances that would justify prohibition of such a practice.⁹ One such special circumstance involves an employer's business interest in preserving employees' uniformity of appearance in

Cir. 1978), order affd., 605 F.2d 847 (5th Cir. 1979), do not compel a different conclusion. In both cases, the Board affirmed ALJDs, without comment, that held that rules were unlawfully overbroad where they prohibited, in the case of Magnesium Casting, "all solicitation and distribution during an employee's working time," and, in the case of Times Publishing, solicitation "during the working time of any staffer." The ALJs reasoned that the rules could be interpreted by employees as prohibiting protected conduct while any employee was working at the employers' 24-hour facilities. These decisions were not informed by the Board's subsequent clarifications in Lafayette Park and Lutheran Heritage Village-Livonia that it would give a rule a reasonable reading and refrain from finding a violation simply because a rule could be interpreted as restricting Section 7 rights. Here, we conclude that the Employer's no solicitation rule does not impart the sort of confusion that might lead a reasonable employee to believe that protected activity is prohibited.

⁹ Republic Aviation, supra.

particular occupations where employees wear employer-issued uniforms and deal with the public.¹⁰ An employer meets its burden of showing special circumstances in that context where it demonstrates that union insignia "may reasonably interfere with the public image which the employer has established as part of its business plan through appearance rules for its employees."¹¹

We conclude that special circumstances exist here, at least while employees are on duty. The Employer's handbook illustrates the importance of the uniform to the security industry, which relies on the message conveyed by the uniform to an even greater degree than do other industries where the Board has permitted limitations on union insignia. The uniform that these employees wear is designed to enable them to easily command respect, so that they can protect lives and property, control unsafe situations, and apprehend criminals. The uniform sends a message to all people encountered by the security officer that an authority figure is present. Although the wearing of a Union pin may not necessarily interfere with the public's recognition of the officers as security officers, it could interfere with the message of authority that the Employer hopes its officers will convey. Furthermore, it is likely that the Employer's business would suffer if its clients determined that its officers did not adequately convey a presence of authority. Under these circumstances, we conclude that the Employer may lawfully prohibit on-duty security officers from wearing any buttons or insignia, including Union insignia, on their uniforms.¹²

However, the rule as written applies to AlliedBarton uniforms at all times, without distinguishing between employees when they are on- or off-duty. The Employer contends that an employee should reasonably interpret this blanket prohibition as applying only while on-duty, because other, neighboring restrictions (for instance, concerning improper jewelry, eyeglasses, hats and footwear) prohibit the wearing of inappropriate articles only while on-duty. The Employer's total ban on union insignia, however, is

¹⁰ See Con-way Central Express, 333 NLRB 1073, 1076 (2001); UPS, 195 NLRB 441 (1972).

¹¹ UPS, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994).

¹² See the Advice memorandum in Pinkerton's, Inc., Cases 18-CA-16257 and 16332 (January 3, 2003).

clear and direct, and contains no temporal limitations. We conclude that the placement of the rule beside these other provisions -- standing alone -- is insufficient to correct the ambiguity introduced by the Employer.¹³ Since the Employer does not have a legitimate interest in prohibiting the wearing of insignia when employees are off-duty, which we conclude is a reasonable interpretation of this rule, the rule is overbroad to this extent.

C) Confidentiality

The Employer's handbook contains a provision entitled "Confidentiality," which states, in pertinent part:

AlliedBarton is committed to preserving the right of privacy to all our employees and customers, and to protecting our collective interests. The following information is considered confidential. Be sure to follow all applicable laws and company policies when using or sharing such information:

- . Employee information, including personnel files, evaluations, disciplinary matters and psychological assessments.

[...]

Failure to maintain confidentiality could subject you or AlliedBarton to civil and/or criminal lawsuits or give both AlliedBarton and our customers' competitors an unfair advantage. A breach of duty to protect information will subject you to discipline up to and including termination.

It is well established that employees have a presumptive Section 7 right to confer with fellow employees and third parties concerning their terms and conditions of employment.¹⁴

¹³ Ambiguities in a rule that explicitly touches upon Section 7 activities are to be construed against its drafter. See Palms Hotel and Casino, 344 NLRB No. 159, slip op. at 6.

¹⁴ See, e.g., Lafayette Park Hotel, 326 NLRB at 826 n.10 and cases cited therein.

We conclude that the provision regulating employees' ability to "use or share" confidential information is unlawfully overbroad because it restricts - without subsequent guidance - the disclosure of "employee information," specifically including employee evaluation and discipline. The Board has found a ban on the disclosure of essentially similar information to be unlawfully overbroad.¹⁵ Although this rule does not absolutely ban disclosure of this information, it mandates employee adherence to "all applicable laws and company policies." And, the Employer fails to instruct employees as to which company policy governs disclosure of employee information, or where an employee could find them. Thus, employees are left to resolve this ambiguity on their own, acting at their own peril. The rule, therefore, is unlawfully vague and overbroad.

D) Conflict of Interest

Under "Code of Ethics & Business Conduct Guidelines," the handbook contains a provision entitled, "Avoiding Conflict of Interest," which states:

While employed at AlliedBarton, our loyalty is to the Company. We refrain from any associations or activities that might conflict with the Company's interests. We also avoid doing business with competitors and accepting or giving excessive gifts to vendors or customers. We do not take advantage of our association with AlliedBarton for personal gain and avoid

¹⁵ See Jewish Home for the Elderly of Fairfield County, 343 NLRB No. 117, slip op. at 9 (2004) (facially unlawful rule prohibiting disclosure of, among other things, employees' performance evaluations and medical conditions); Flamingo Hilton-Laughlin, 330 NLRB 287, 288 n.3 (1999) (unlawful rule prohibiting disclosure of "confidential information regarding our customers, fellow employees, or Hotel business"); University Medical Center, 335 NLRB 1318, 1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003) (unlawful rule prohibiting "release or disclosure of confidential information concerning patients or employees"); IRIS USA, Inc., 336 NLRB 1013 (2001) (mere maintenance of rule unlawful where it prohibited disclosure of confidential information "whether about [the company], its customers, suppliers, or employees").

actions or relationships that might give even the appearance of a conflict of interest.

The Union asserts that the rule is facially overbroad because it fails to define or qualify "associations or activities." The Union further posits that an employee would reasonably interpret association with a union to be prohibited because the Union contends that AlliedBarton believes that unions are contrary to its interest.

Contrary to the Union and in agreement with the Region, we conclude that the Employer's "Conflict of Interest" provision is neither unlawfully overbroad nor ambiguous. A "conflict of interest" is a term of art, reasonably encompassing an interference with business duties and relationships. In Tradesmen International,¹⁶ the Board upheld a work rule that stated that "[e]mployees are not to engage, directly or indirectly either on or off the job, in any conduct which is disloyal, disruptive, competitive or damaging to the company." The rule specified that, "[s]uch prohibited activity also includes any illegal acts in restraint of trade ... [and] employment with another employer or organization while employed by Tradesmen ..." Citing Lafayette Park Hotel, the Board concluded that the rule addressed legitimate business concerns and that employees would recognize that the rule was intended to reach conduct similar to examples given in the rule rather than conduct protected by the Act.¹⁷

Like the regulation in Tradesmen, AlliedBarton's rule clearly sets forth examples of the conflicts employees should avoid, none of which either specifically or implicitly involve any Section 7 activity. Moreover, these specific examples of conflicts (for instance, avoiding doing business with competitors and accepting or giving excessive gifts) show that the Employer is seeking to prohibit employees from engaging in graft or establishing competing businesses, clearly legitimate business interests. We conclude that the mere maintenance of this rule does not reasonably tend to chill employees in the exercise of their Section 7 rights, since employees would

¹⁶ 338 NLRB 460-461 (2002).

¹⁷ The Board further noted that there was no evidence that the employer had promulgated or enforced the rule against employees for engaging in union or protected activity or that it had even exhibited anti-union animus. Tradesmen, 338 NLRB at 461.

understand that the rule is designed to protect the Employer from actual or apparent conflicts of interest as set forth in the rule itself, rather than implicating Section 7 rights. And, like the employer in Tradesmen, there is no evidence that the Employer either harbors unlawful anti-Union animus, or that it promulgated the rule in response to employees' Union or protected activities. Accordingly, we conclude that, without more, employees could not reasonably believe that the Employer includes employees' protected conduct as a conflict of interest under this rule.

In sum, the Region should issue complaint, absent withdrawal to allege the unlawful maintenance of policies regarding distribution, confidentiality and employee uniforms.

B.J.K.