

**Nos. 11-1351, 11-1413**

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**HYUNDAI AMERICA SHIPPING AGENCY, INC.**

**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**Petitioner/Cross-Respondent** \* **Nos. 11-1351,**  
\* **11-1413**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

\*  
\*  
\* **Board Case No.**  
\* **28-CA-22892**  
\*  
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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 27(a)(4) and 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

**A. Parties and Amici**

Hyundai America Shipping Agency, Inc. (“the Company”) was the respondent before the National Labor Relations Board (“the Board”), and is the petitioner/cross-respondent in Case. Nos. 11-1351, 11-1413 herein. The Board is the respondent/cross-petitioner in Case Nos. 11-1351, 11-1413 herein. The Board’s General Counsel was a party before the Board. Sandra McCullough, an individual, was the charging party before the Board.

## **B. Rulings Under Review**

The ruling under review is a decision and order of the Board (Chairman Liebman and Members Becker and Pearce), in *Hyundai America Shipping Agency, Inc.*, Case No. 28-CA-22892, issued on August 26, 2011, and reported at 357 NLRB No. 80 (2011). The Board found that the Company committed multiple violations of Section 8(a)(1) of the Act by maintaining or enforcing work rules that employees would reasonably read to restrict their protected statutory rights.

## **C. Related Cases**

The case on review was not previously before this Court or any other Court. Board Counsel are unaware of any related cases either pending in this Court or any other court other than the case noted by the Company in its Certificate As To Parties, Rulings, and Related Cases.

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Dated at Washington, DC  
this 30th day of April, 2012

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Hyundai America Shipping Agency, Inc. (“the Company”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board Order issued

against the Company. The Board's Order issued on August 26, 2011, and is reported at 357 NLRB No. 80 (2011) (A133-137).<sup>1</sup>

The Board had subject matter jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Order is final with respect to all parties. The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review of Board orders may be filed in this Court, and Section 10(e) of the Act (29 U.S.C. § 10(e)), which allows the Board, in that circumstance, to cross-apply for enforcement.

The Company filed its petition for review on September 28, 2011. The Board filed its cross-application for enforcement on October 26, 2011. Both filings were timely because the Act places no limit on the time for filing actions to review or enforce Board orders.

### **STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by maintaining or enforcing five

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<sup>1</sup> Record references ("A") are to the Joint Appendix. References preceding a semicolon are to the Board's findings; those following are the supporting evidence. "Br." references the Company's opening brief.

overbroad work rules that employees would reasonably interpret to limit their statutorily protected activities. The specific work rules at issue unlawfully restrict:

- Employee disclosures of information from company electronic communications and information systems;
- Employee disclosures of information from personnel files;
- Employee complaints to fellow employees;
- Employee discussions of matters under company investigation; and
- Employee performance of non-work activities during working hours.

2. Whether the Board reasonably determined that the complaint allegations regarding the work rules were closely related to the unfair labor practice charge.

### **RELEVANT STATUTORY PROVISIONS**

Relevant sections of the Act are reproduced in the Addendum to this brief.

### **STATEMENT OF THE CASE**

Based on a timely unfair labor practice charge filed by former employee Sandra McCullough, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S. C. § 158(a)(1)) by discharging McCullough for violating work rules restricting employee disclosures of information and other protected employee activity, and that the work rules themselves were unlawful. The judge then issued a decision and recommended

order dismissing the allegation that McCullough's discharge was unlawful, and finding that the Company maintained or enforced seven rules that violated Section 8(a)(1) of the Act. In so concluding, the judge found that the allegations regarding the rules were closely related to the charge filed by McCullough.

On review, the Board adopted the administrative law judge's rulings, findings, and conclusions, except for his findings that two of the seven rules were unlawful. Below are summaries of the Board's findings of facts, and its conclusions and Order.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. Introduction; the Company Handbook and Work Rules**

The Company is headquartered in Texas and imports and exports cargo from all over the world. The Company has three regional customer service centers in the United States, including the one at issue here, which is located in Scottsdale, Arizona, but is referred to as "the Phoenix facility." (A121, n.5; 26, 28) The Phoenix facility is responsible for coordinating the import and export of goods for customers through ports on the Pacific coast, and employs about 63 employees. (A121; 27.) Diane Gunn is the Company's Assistant Vice President of National Logistics and is responsible for the operation of the Phoenix facility. Brandi Andrews is the Company's Assistant Human Resources Manager. (A121, 129-130; 8, 15-16.)

The Company maintains an employee handbook which it provides to all employees. The handbook includes many work rules that employees are instructed to follow under penalty of discipline. In particular, the handbook contains the following rules regarding company electronic communications systems, personnel files, employee complaints, and employee conduct during working hours:

[E]mployees should only disclose information or messages from [company electronic systems] to authorized persons;

.....

[A]ny unauthorized disclosure of information from an employee's personnel file is a ground for discipline, including discharge;

.....

[Employees should] [v]oice your complaints directly to your immediate superior or to Human Resources . . . . [and c]omplaining to your fellow employees will not resolve problems; [and]

.....

[Employees should not] perform[ ] activities other than [c]ompany work during working hours.

(A126-129; 44-46, 98-103.) In addition to handbook rules, Assistant Human Resources Manager Andrews regularly instructs employees orally not to disclose information regarding matters that are under investigation by the Company.

(A121, 129-130; 15-16, 18-19, 32.)

**B. The Company Discharges Employee McCullough; the Company States that She Is Being Discharged for Multiple Reasons, Including Violations of Work Rules**

Sandra McCullough began work at the Phoenix facility in June 2004. As a customer service representative in the import department, her job consisted

primarily of answering calls from customers and assisting them with getting their cargo released. (A121; 20-21.) Over the years, McCullough complained to fellow employees and human resources personnel on numerous occasions that managers had committed sexual harassment and other improprieties. She sometimes “blind copied” other employees on her e-mail correspondence with management about these matters. (A124; 22, 23, 24, 36.)

On August 4, 2009, Assistant Vice President Gunn wrote a memorandum to her immediate managers recommending that the Company discharge McCullough and specifying the exact reasons she should be discharged. (A125-126; 9, 14, 89, 113-115.) The reasons all involved violations of work rules, and are as follows:

Dishonesty regarding issuance of a personal check for an import shipment and stating customer is requesting a refund.

.....

Blind carbon copying third parties on confidential e-mails concerning investigations.

.....

E-mail sent by Ms. McCullough regarding another employees [sic] absence—Harmful Gossip.

.....

Complaints from several employees stating Ms. McCullough was creating a hostile work environment by encouraging them to go to HR with all complaints and exaggerate if necessary. . . . Second issue regarding harassment is regarding a sexual comment made to an employee regarding the appearance of part of her body.

.....

Reports of substance abuse during work hours.

(A125-126; 89.) On August 5, Gunn informed McCullough that the Company had decided to discharge her for the above reasons. Each of the above reasons played a factor in Gunn's determination to discharge McCullough, and those reasons had a cumulative effect on her decision. (A126; 10.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Members Becker and Pearce) found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by maintaining or enforcing five overly broad work rules.<sup>2</sup> (A116.) Specifically, the Board found that the Company violated Section 8(a)(1) by maintaining or enforcing unlawful rules restricting: (1) the disclosure of information from the its electronic communication systems; (2) the disclosure of information from employees' personnel files; (3) employee complaints to fellow employees; (4) employee discussion or disclosure of any matters under investigation by its human resources department; and (5) employee performance of non-work activities during "working hours." (A116.)

The Board's Order requires the Company to cease and desist from maintaining or enforcing the unlawful rules, and from in any like or related

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<sup>2</sup> Chairman Liebman and Member Becker (Member Pearce, dissenting) also adopted the judge's dismissal of the allegation that McCullough's discharge was unlawful, and reversed the judge's findings that two other rules, one of which

manner, interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. (A118-119.) Affirmatively, the Board's Order requires the Company to revise or rescind the unlawful rules, and to physically post and electronically distribute the Board's remedial notice. (A118-119.)

### **STANDARDS OF REVIEW**

The Court “applies the familiar substantial evidence test to the Board’s findings of fact and application of law to the facts, and accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the [C]ourt might have reached a different conclusion *de novo*.” *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998) (internal citations omitted). Under that test, the Board’s findings are “conclusive” if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Court also will abide the Board’s interpretation of the Act “if it is reasonable and consistent with controlling precedent.” *Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

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prohibited “harmful gossip” and the other which prohibited a “negative attitude,” were also unlawful. (A116, 117 n.3, 118.)

## **SUMMARY OF ARGUMENT**

The Board reasonably found that the Company violated Section 8(a)(1) of the Act by unlawfully maintaining or enforcing five overbroad rules regarding electronic communications, personnel files, employee complaints, investigative confidentiality, and conduct during “working hours.” Indeed, the Board’s findings that these rules were unlawful fit squarely within Board and court precedent prohibiting rules that employees would reasonably understand to restrict their protected rights to discuss wages and other terms and conditions of employment.

The Company has failed to establish any viable defense for its rules’ entrenchment on its employees’ Section 7 rights. It raises, for instance, meritless claims of confidentiality and other purported justifications that are insufficient under law or otherwise contrary to the record evidence. Further, even if the Company had established a valid business reason for any of the rules, it failed to demonstrate that a more narrowly drafted rule would have been insufficient to accomplish its goal. The Company also advances tired contentions that have been repeatedly rejected by this Court, such as claims that the Board was required to base its findings on evidence that the employees’ exercise of protected activities had actually been chilled by the rules, and that each of the rules had actually been enforced against employees.

The Company's final contention that the Board wrongly denied its motion to strike the complaint allegations that the rules were unlawful is also wholly without merit. Under settled principles, the Board reasonably found that the complaint allegations that the work rules were unlawful were "closely related" to the timely unfair labor practice charge filed by McCullough alleging that she had been unlawfully discharged. Accordingly, the Board properly denied the Company's motion.

## **ARGUMENT**

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING OR ENFORCING FIVE OVERBROAD WORK RULES**

The Board reasonably found (A116-119) that five of the Company's work rules violate Section 8(a)(1) of the Act because employees would reasonably interpret them to restrict their statutorily protected activities, most prominently, their right to disclose and discuss information concerning terms and conditions of their employment with coworkers. The Company has failed to present any basis for the Court to disturb the Board's reasonable findings.

#### **A. An Employer's Work Rule Is Unlawful if It Restricts Employee Activities Protected by Section 7 of the Act**

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right "to self-organization, to form, join, or assist labor organizations, to bargain

collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” In turn, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.”

As the Supreme Court has recognized, Section 7 rights “are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). *Accord NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Courts have accordingly interpreted Section 7 to include employees’ right to discuss wages and other terms of employment with other individuals. For example, employees have the right to discuss these matters with other employees (*see Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978)), customers and clients (*Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003)), and union officials (*Cintas Corp. v. NLRB*, 482 F.3d 463, 469 (D.C. Cir. 2007)). Accordingly, an employer violates Section 8(a)(1) of the Act by maintaining work rules that infringe on employees’ rights under Section 7 to discuss wages and other terms and conditions of employment. *See Beth Israel Hosp.*, 437 U.S. at 491, *Cintas Corp.*, 482 F.3d at 469; *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007).

In reviewing Board determinations of the legality of employer work rules, the courts have recognized that, “[i]n each case, the Board in the first instance must strike ‘the appropriate balance between organizational [rights of employees] and employer rights in the particular industry to which each [rule] is applicable.’”

*Montgomery Ward & Co. v. NLRB*, 692 F.2d 1115, 1121 (7th Cir. 1982) (quoting *Beth Israel Hosp.*, 437 U.S. at 506). “The Board thus adjusts and accommodates both the employees’ rights to organize and the employer’s right to maintain work discipline according to the particular circumstances.” *Hughes Props., Inc. v. NLRB*, 758 F.2d 1320, 1322 (9th Cir. 1985). Therefore, courts will “defer to the Board’s balancing if it is supported by substantial evidence.” *Montgomery Ward & Co.*, 692 F.2d at 1121.

Beyond those general precepts, the Board, with this Court’s approval, will find that a Section 8(a)(1) violation is shown where an employer maintains a rule or policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board elaborated on this standard, setting forth a specific analytical framework for determining whether a given employer rule “would reasonably tend to chill” Section 7 activity. *Id.*

Under the *Lutheran Heritage* framework, the Board first considers whether an employer's rule "explicitly restricts activities protected by Section 7." 343 NLRB at 646. If the rule explicitly restricts such activities, the Board will find the mere maintenance of that rule violates Section 8(a)(1). *Id.* If the rule does not explicitly restrict such activities, the Board proceeds to ask whether:

"(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." *Id.* at 647. An affirmative answer to any of these questions will warrant the finding of a Section 8(a)(1) violation. *Id.* Moreover, any ambiguity in a rule must be construed against the promulgator of the rule. *Lafayette Park*, 326 NLRB at 828.

Finally, an employer's enforcement of an unlawful rule is itself unlawful. *Jeanette Corp. v. NLRB*, 532 F.2d 916, 920 (3rd Cir. 1976) (a rule that is invalid on its face under Section 8(a)(1) "cannot be enforced"). Thus, an employer's enforcement of an unlawful rule constitutes a Section 8(a)(1) violation. *Id.*; *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249, 1258 (10th Cir. 2005).

**B. The Board Reasonably Found that the Company Maintained or Enforced Five Overbroad Rules that Employees Would Reasonably Interpret To Restrict Protected Activities**

Applying the above principles, the Board reasonably concluded (A116, 126-130) that the Company maintained rules regarding electronic communications, personnel files, employee complaints, investigative confidentiality, and “working hours” that unlawfully restricted its employees’ Section 7 right to discuss their terms and conditions of employment. The Board also reasonably found (A116, 132-133) that the Company unlawfully enforced its employee complaint rule against employee McCullough, and unlawfully enforced its investigative confidentiality rule against McCullough and others. The Company tries to justify its rules by asserting that it needs them to protect its confidentiality concerns. Its concerns, however, are simply too vague, and its rules are too broadly written, to make the requisite showing. Nor does the Company advance its case by citing inapplicable case law. Thus, the Company utterly fails to present any viable defense to the Board’s findings.

**1. The electronic communications rule**

Substantial evidence supports the Board’s finding (A127) that the Company’s rule prohibiting disclosures from the Company’s electronic communications and information systems violated Section 8(a)(1) of the Act. Contrary to the Company’s contentions (Br. 18-21), the Board fully considered the

context of the rule and properly rejected the Company's unsupported assertion that its rule was necessary to protect confidential company information. Moreover, the Company's claims that in order to establish a violation of the Act, the Board must make a finding that the rule actually "chilled" employee rights or that the Company actually enforced the rule, are contrary to well-settled law.

The Company's rule provides that employees "should only disclose information or messages from [its electronics and communications systems] to authorized persons." (A98.) Echoing precedent involving similar rules, the Board explained (A127) that the rule was overly broad because it "prohibits employees' disclosures of any information exchanged on company email, instant messages, and phone systems, which could reasonably include discussions of wage and salary information, disciplinary actions, performance evaluations, and other kinds of information that are of common concern among employees, and which they are entitled to know and discuss with each other." *See Cintas Corp.*, 344 NLRB 943, 943 (2005) (finding overbroad a confidentiality provision prohibiting "the release of 'any information' regarding [employees because it] could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union"), *enforced*, 482 F.3d 463 (D.C. Cir. 2007); *Double Eagle*, 341 NLRB 112, 114 (2004) (finding a violation of the Act by maintenance of rule stating: "You are not,

under any circumstances permitted to communicate any confidential or sensitive information concerning the [c]ompany or any of its employees to any nonemployee without approval from [the employer]”), *enforced* 414 F.3d 1249 (10th Cir. 2005).

The Company attempts to defend (Br. 18-21) its electronic communications rule by asserting that the Board improperly read it in isolation and failed to properly consider the Company’s confidentiality concerns. Both arguments fail. As an initial matter, the Board did not ignore the context of the rule. To the contrary, the Board considered the rule in its entirety, readily acknowledging (A126-127) that earlier language in the handbook limiting the use of Company equipment was lawful. Nonetheless, consistent with the above case law, the Board reasonably found (A127) that the identified language went beyond the lawful strictures of the Act.

Moreover, the Board reasonably found (A127, 127n.12) that the Company failed to limit its prohibitions in these rules to matters that are “truly confidential.” Although the Company asserts (Br. 19) that its electronic communications rule was meant to be limited to “dealings with the [Customs-Trade Partnership Against Terrorism (C-TPAT)] program that limit communications to authorized individuals,” there is no such restriction mentioned in the rule, nor does the Company point to one. Moreover, even if the Company had valid confidentiality concerns, a more narrowly drafted provision would have been sufficient to

accomplish the Company's purported goal of protecting C-TPAT information. *See Cintas Corp.*, 482 F.3d at 470 (“A more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting confidential information”).

Established precedent also easily dispenses with the Company's false mantra, (Br. 20), asserted with regards to the electronic communications rule and repeated for every other rule at issue (Br. 21, 18, 22, 24), that the Board was required to make a finding that the rules had an actual chilling effect on employees. As this Court has explained in rejecting this argument, “[t]he Board is merely required to determine whether employees would reasonably construe the [challenged] language to prohibit Section 7 activity . . . and not whether employees have thus construed the rule.” *Cintas Corp.*, 482 F.3d at 467 (citations omitted). *See Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992) (the finding of a violation is not premised on . . . subjective impact), *enforced*, 987 F.2d 1376 (8th Cir. 1993).

Nor is there any merit to the Company's related argument (Br. 20, 21, 18, 22, 24) that the Board was required to find that the rules were actually enforced. This Court has explicitly held to the contrary, stating that “[t]he mere maintenance of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice even absent evidence of

enforcement.” *Cintas*, 482 F.3d at 468 (D.C. Cir. 2007). Thus, the Company misstates the law by repeatedly asserting (Br. 18-24) that this Court’s decisions in *Adtranz Inc. v. NLRB*, 253 F.3d 19, 29 (D.C. Cir. 2001), and *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1079 (D.C. Cir. 2003), require either a finding that a rule has actually had a chilling effect on employees, or has actually been enforced, before the Board can find a violation.

Accordingly, as this Court recognized in *Guardsmark, LLC v. NLRB*, 457 F.3d 369, 376 (D.C. Cir. 2007), a finding like the one the Board made here, that employees would reasonably interpret the challenged rules to chill Section 7 activity, is sufficient to establish a violation of Section 8(a)(1) of the Act. The Court should therefore uphold the Board’s finding that the Company violated the Act by maintaining the above rule limiting its employees’ rights to discuss wages and other terms and conditions of employment.

## **2. The personnel file rule**

Substantial evidence supports the Board’s finding (A127) that the Company’s personnel file rule also violated Section 8(a)(1) of the Act. Moreover, the Company’s weak attempts (Br. 19-21) to defend its rule are unavailing.

As the Board reasonably found (A127), the “broadly worded” personnel file rule “prohibits employees from ‘[a]ny unauthorized disclosure of information’ from an employee’s personnel file,” and such information “would 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.” *See* p. 5. On that basis, the Board properly concluded (A127) that “much of the information” in the personnel file is “precisely the type” of information that employees have the right to communicate with each other, or to provide to unions or governmental agencies.

The Board also noted (A127) that it has repeatedly 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 employments, restrain and coerce employees in violation of Section 8(a)(1) of the Act.” *See, e.g., Cintas*, 344 NLRB at 943, *enforced*, 482 F.3d 463 (D.C. Cir. 2007) (prohibition on the release of “any information” regarding employees); *see also Double Eagle*, 341 NLRB at 114; *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001) (prohibition restricting employees from revealing “information” about “employees” was unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3 (1991) (handbook provision prohibiting employees from disclosing “confidential information regarding fellow employees” was unlawful).

The Company’s attempt (Br. 20) to shield its rule by analogizing it to the lawful rule in *Community Hospitals*, 335 F.3d at 1079 (D.C. Cir. 2003), misses the

mark. The Company's rule (A99) specifically refers to information related to employee performance, which is a clear example of protected terms and conditions of employment. In contrast, the rule in *Community Hospitals*, while referencing "confidential information concerning patients or employees," did not necessarily encompass information concerning employee terms and conditions of employment, *Community Hosps.*, 335 F.3d at 1088, and was thus qualitatively different.

The Company's other confidentiality claim (Br. 19, 21), based on *Asheville School, Inc.*, 347 NLRB 877 (2006), is also without merit. Unlike in *Asheville*, where the Board found the employer did not violate the Act by disciplining its payroll accountant who had special custody of wage and personnel information, 347 NLRB at 881, the personnel file rule here does not apply only to such a specialized employee. Although the Company's personnel rule mentions that its human resources department maintains the personnel files, its prohibition on disclosure is not limited to employees in that department. Thus, the Company's bald assertion (Br. 21) that "the rule is not necessarily addressed to rank and file employees . . . but rather those employees with access to such files, such as Human Resources and Payroll employees," cannot save the rule as it is written.

### **3. The employee complaint rule**

The Board reasonably found (A127-128, 132) that the Company's rule prohibiting employees from complaining to fellow employees violated Section

8(a)(1) of the Act. Contrary to the Company's contentions (Br. 22-23), the Board reasonably concluded (A127-128), based on the clear language of the handbook and well-settled principles, that this rule, too, constitutes an unlawful prohibition on employees' Section 7 right to discuss terms and conditions of employment with other employees.

The Company's rule states that employees should voice their complaints "directly to [their] immediate superior or to Human Resources," and then warns employees that "complaining to [their] fellow employees will not resolve problems." The rule also instructs employees that "constructive complaints communicated through the appropriate channels may help improve the workplace for all." (A102) The Board reasonably found (A128) that the text of the employee complaint rule would be read by employees to restrict "employees from complaining about any work related matters, including wages, hours, or

working conditions, to fellow employees or interested third parties.”<sup>3</sup> See *Guardsmark LLC v. NLRB*, 475 F.3d 369, 375-77 (D.C. Cir. 2007) (unlawful rule instructed employees not to “register complaints” with representatives of the client and directed employees to “follow the chain of command” and report only to their “immediate supervisor”); *SNE Enters., Inc.*, 347 NLRB 472, 492 (2007) (Board found rule violated Section 8(a)(1) of the Act by prohibiting employee from speaking with coworkers about a disciplinary incident and then discharging the employee for violating that provision).

The Company’s assertion (Br. 22) that the rule does not impose any penalty or prohibition on communications, but rather only “suggests” that complaints be made to management, is disingenuous given the rule’s adjoining language that “complaining to your fellow employees will not resolve problems” and the rule’s positioning as an “employee conduct” policy. Indeed, as the Board recognized (A128), the rule, which directs employees to go directly to management, “goes beyond merely stating a preference.” Moreover, the Company’s related claim that its rule is on par with the rule found lawful in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), falls flat. In *Aroostook*, the employer, a small medical center, had a rule that explicitly

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<sup>3</sup> The Company incorrectly asserts (Br. 22) that the Board only found part of the above-quoted language to be unlawful. To the contrary, the Board found (A116,

concerned employees discussing grievances “within earshot of patients.” 81 F.3d at 211. The circumstances here are wholly different, and do not involve the special concerns that arise in the medical context.

Also missing the mark is the Company’s claim (Br. 22-23) that the language in its rule stating that complaining to other employees “will not resolve problems” is a protected opinion under Section 8(c) of the Act (29 U.S.C. §158(c)). Section 8(c) provides that an employer may express opinions as long as such views are not accompanied by a threat of reprisal. To be sure, the Company’s rule that employee complaints to other employees “will not resolve problems” taken out of context could certainly be a protected opinion. Here, however, the statement appears in an employee code of conduct rule and is coupled with the employer’s express command that employees instead take all complaints directly to management. In this context, the statement is outside the ambit of Section 8(c) of the Act.

Finally, the Company’s assertion (Br. 22-23) that “at most, the policy may be read to discourage ‘griping,’ which was found lawful” in *Asheville*, 347 NLRB 877 (2006), is also misplaced. In *Asheville*, the Board found that the discriminatee at issue was disciplined not for engaging in protected concerted activity, but rather for airing her own personal “gripes.” 347 NLRB at 881-82. As shown above, however, the rule here is overbroad and would be reasonably read by employees to

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128) that all of the above-quoted language was unlawful.

encompass not just an employee's personal "gripe," but also a wide array of protected communications. Thus, the Company has provided no grounds for overturning the Board's finding that the rule restricting employee communication violates Section 8(a)(1) of the Act.

#### **4. The investigative confidentiality rule**

Substantial evidence supports the Board's finding (A116, 128-129, 132) that the Company's rule prohibiting employee discussion of matters under company investigation violated Section 8(a)(1) of the Act. *See* p. 5. Contrary to the Company's contentions (Br. 13-18), the Board reasonably concluded (A128-129) that this rule unlawfully infringed on employees' Section 7 rights to discuss protected terms and conditions of employment with other employees, and the Company failed to establish confidentiality interests sufficient to render lawful its incursion into Section 7 rights.

To begin, the Board reasonably found (A128) that the Company's oral rule that employees were not to disclose matters under investigation by its human resources department, like the above-discussed rule, would reasonably be read by employees to chill their discussion of terms and conditions of employment. Indeed, the Board's finding is fully consistent with a body of precedent that restricting discussion of such matters impermissibly infringes on employees' Section 7 rights. *See SNE Enters., Inc.*, 347 NLRB 472, 492 (2006), *enforced*

*mem.*, 257 F. App'x 642 (4th Cir. 2007) (employer unlawfully maintained rule prohibiting employees from discussing disciplinary action taken against them by their coworkers); *Phoenix Transit Sys.*, 337 NLRB 510, 510, 513-14 (2002), *enforced mem.*, 63 F. App'x 524 (D.C. Cir. 2003) (employer unlawfully maintained rule prohibiting employees from discussing their sexual harassment complaints among themselves); *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 176, 177-78 (1997), *enforced*, 200 F.3d 230 (5th Cir. 1999) (employer unlawfully discharged employee for failing to follow instructions to keep an ongoing investigation confidential); *All American Gourmet*, 292 NLRB 1111, 1129, 1130 (1989) (rule that prohibited an employees' discussion of sexual harassment complaint with other employees impermissibly broad).

The Company's primary challenge (Br. 15-18), that the Board's finding is "inconsistent with Board law," is simply wrong. For example, the Company's reliance (Br. 15-16) on *Caesar's Palace*, 336 NLRB 271 (2001), is misplaced because that case is wholly inapplicable to the facts of this case. There, the Board found that in a rare circumstance, an employer's specific concerns about keeping a particularly sensitive investigation confidential may outweigh employee interests. *Caesar's Palace*, 336 NLRB at 271-72 (employer received a complaint from an employee that a coworker dealt drugs on company property, stole company property, and threatened the lives of employees). As the Board here noted (A130),

the employer in *Caesar* established specific and “immediate” concerns, such as “prevent[ing] a cover-up . . . ensur[ing] that witnesses were not put in danger, evidence was not destroyed, and testimony was not fabricated.” Here, on the other hand, the Board noted (A130) that the Company failed to establish a sufficiently particularized confidentiality interest, and simply gave employees “admonitions . . . in every case, without any individual review to determine whether such confidentiality is truly necessary.”

The Company’s attempt (Br. 16-17) to distinguish its rule from the rule found unlawful in *Phoenix Transit*, 337 NLRB 510 (2002), is also misplaced. Although the Board in *Phoenix* noted, as one basis for its decision, that the investigation had ended before the employer asserted its confidentiality concern, it did not rely solely on that fact. As it did here, the Board in *Phoenix* also relied on the fact that the rule improperly prohibited discussion “among the affected employees.” *Phoenix*, 337 NLRB at 510. Thus, *Phoenix* in no way impugns the Board’s reliance on that case here, as the Company suggests.

The Company’s hyperbolic contention (Br. 9, 13-15) that the Board’s finding will cause employers to violate federal and state law is wholly without support. None of the statutes, regulations, or case law to which the Company refers (Br. 14, 17) requires it to maintain the blanket, generic confidentiality

prohibition at issue here. Moreover, such an argument cannot excuse the Company from liability where, as here, “a more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the employer’s presumed interest in protecting confidential information.” *Cintas Corp.*, 482 F.3d at 470.

Nor does *IBM*, 341 NLRB 1288, 1291-93 (2004), require a different result, as the Company (Br. 15-16) contends. The Board in *IBM* recognized that an employer has a confidentiality interest in investigations, but did not require the sweeping admonition adopted by the Company here. This is especially true, given the Board’s finding (A130) that there was “no evidence that the [Company] conducts any [] preliminary analysis” before broadly prohibiting all employee discussion of such matters.

In sum, “[t]he Board is best suited to interpret its own precedent and to apply it to the facts of a particular case.” *NLRB v. Glover Bottled Gas Corp.*, 905 F.2d 681, 685 (2d Cir. 1990). Here, the Board acted reasonably and well within the parameters of settled law in finding (A129-130) that the Company’s overbroad rule prohibiting employee discussion of matters under investigation violated Section 8(a)(1) of the Act.

## 5. The “working hours” rule

The Board also reasonably found (A129) that the Company’s prohibition against “performing activities other than Company work during working hours” (*see* p. 5) violates Section 8(a)(1) of the Act because it is facially invalid and overbroad. In *Our Way Inc.*, 268 NLRB 394, 395 (1983), on which the Board relied (A129), the Board held that rules like this one using the phrase “working hours” are presumptively invalid because “that term connotes periods that include the employees’ own time.” *Id.* at 394; *see United Servs. Auto. Ass’n v. NLRB*, 387 F.3d 908, 914 (D.C. Cir. 2004) (approving long-held Board policy that phrase “working hours,” as opposed to “working time,” is presumptively invalid). Thus, the Board properly concluded (A129) that employees would reasonably read the Company’s rule to “believe their Section 7 activity was prohibited even during breaks and lunches,” and consequently, that the rule was presumptively invalid.

Further, the Company has failed (Br. 23-24) to rebut this presumption. Under such circumstances, an employer must show that the rule “was communicated or applied to employees in such a way as to convey an intent clearly to permit [protected activity] during breaktime or other periods where employees are not actually at work.” *Our Way*, 268 NLRB at 395 n.6. *Accord Awrey Bakeries, Inc.*, 335 NLRB 138, 139-40 (2001), *enforced mem.*, 59 F. App’x 690 (6th Cir. 2003).

Here, the Company weakly claims (Br. 23-24) that pages of its handbook preceding the rule in question clarify that the Company only intended to restrict employee activities during “working time.” But the handbook does no such thing. Rather, the preceding pages simply create ambiguity by cryptically referring to “legitimate employee rights,” without defining them (A102), and defining the phrase “working time” (A97) but not “working hours.” Accordingly, the Company has provided no reason to overturn the Board’s reasonable finding (A129) that the Company also violated Section 8(a)(1) of the Act by maintaining this rule.

**II. THE BOARD REASONABLY DETERMINED THAT THE COMPLAINT ALLEGATIONS REGARDING THE WORK RULES WERE CLOSELY RELATED TO THE UNFAIR LABOR PRACTICE CHARGE**

The Company contends (Br. 10-13) that the Board wrongly denied its motion to strike the General Counsel’s complaint allegations regarding the unlawful rules because the rules were not explicitly alleged to be unlawful in the unfair labor practice charge that employee McCullough filed over her discharge. However, this contention ignores both the law and the facts. Indeed, well-settled precedent allows the General Counsel, as he did here, to allege misconduct in a complaint not explicitly contained in a charge, so long as the matters are “closely related.” As we now show, the Board reasonably found (A121, n.4), applying

settled principles, that the allegations that the Company's rules were unlawful were closely related to McCullough's unfair labor practice charge.

### **A. Procedural Background**

McCullough filed her unfair labor practice charge on February 5, 2010. The charge alleged a violation of Section 8(a)(1) of the Act, and stated that “[the Company] has interfered with, restrained and coerced its employees in the exercise of their Section 7 rights by its actions including terminating Sandra L. McCullough because she engaged in protected concerted activities.” (A42) The General Counsel's investigation revealed that the Company relied on several unlawful work rules, discussed extensively above, to form the basis for McCullough's discharge. Accordingly, the complaint alleged that not only McCullough's discharge, but also the rules on which it was based and related handbook rules violated Section 8(a)(1) of the Act.<sup>4</sup>

Prior to the hearing, the Company filed a motion to strike the complaint allegations concerning the Company's written and oral rules, asserting that those allegations were not closely related to the unfair labor practice charge. (A4, 53-57.) Administrative Law Judge William Kocol ruled that “those provisions were

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<sup>4</sup> The Board found (A120, n.3), and the Company has not challenged, that “[w]hile the complaint does not explicitly allege that the enumerated rules are per se (on their face) unlawful,” the General Counsel's on-the-record clarifying statement, to

closely related to the underlying allegations in the complaint,” and denied the motion. (A4.) At the hearing in front of Administrative Law Judge Gregory Meyerson, the Company renewed its motion to strike, and Judge Meyerson denied it, subject to renewal in a post-hearing brief. (A4-5.) Judge Meyerson, like his colleague, concluded that the “provisions in the employee handbook” are “closely related to the allegations in the complaint, to the discharge of [McCullough].” (A4-5.)

The Company renewed its motion to strike in its post-hearing brief, and Judge Meyerson again denied it (A121 n.4). He further stated (A121, n.4) that “[t]hese collective matters are both factually and legally closely related,” noting that the General Counsel had alleged that McCullough was discharged “not only because she engaged in protected concerted activity, but also because in the course of engaging in that protected activity, she was in violation of [the Company’s rules] . . . [which] are also alleged . . . to be unlawful.” Accordingly, the judge concluded (A121, n.4) that the allegations met the closely-related test. The Board summarily adopted (A116) the ruling on the motion to strike.

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which the Company did not object (Tr. 51-52), properly alleged that the rules were also unlawful on their face.

**B. The General Counsel May Allege Misconduct That Was Not Alleged in the Charge as Long as the Matters Are Closely Related**

It is undisputed that McCullough filed her unfair labor practice charge on February 5, 2010, within six months after the Company discharged her on August 5, 2009. (A42) Accordingly, the General Counsel could allege conduct in the complaint based on McCullough's timely-filed charge. *See* Section 10(b) of the Act (29 U.S.C. § 160(b) (charge must be filed within six months of alleged unfair labor practices). Although the General Counsel may prosecute only conduct about which a charge has been filed, the General Counsel may allege conduct in a complaint that was not contained in a charge so long as the matters are "related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-09 (1959).

The Board has developed a three-part test, which has been approved by this Court, to determine whether allegations are sufficiently "closely related" to a charge for purposes of Section 10(b) of the Act. *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1021 (D.C. Cir. 1995) (approving Board's "closely related" test as "a permissible construction of Section 10(b) [of the Act]"). Under the test, the Board examines whether the complaint allegation (1) involves the same legal theory as the charge allegation and (2) arises from the same factual circumstances

or series of events as the charge allegation, and (3) “may look” at whether a respondent would raise similar defenses as to the charge allegation. *Redd-I Inc.*, 290 NLRB 1115, 1118 (1988). *See also Drug Plastics*, 44 F.3d at 1021; *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944-45 (D.C. Cir. 1999); *TIC-The Indus. Co. Southeast, Inc. v. NLRB*, 126 F.3d 334, 339 (D.C. Cir. 1997).

**C. The Board Reasonably Determined That the Allegations Were Closely Related to the Charge**

The Board reasonably applied well-settled principles and found (A121 n.4.) that “the collective matters” of the Company’s “employee handbook language and its employment practices,” and the “allegations of misconduct directed towards [McCullough]” were both “legally” and “factually” closely related, and thus properly related back to the timely-filed charge. Accordingly, the Board properly denied (A121 n.4) the Company’s motion to strike.

First, the Board reasonably found (A121 n.4) that in these circumstances, the charge and the allegations are “legally” closely related. As demonstrated, Section 8(a)(1) of the Act prohibits interference with employee rights under Section 7 of the Act, such as the right to discuss wages and other terms and conditions of employment. *See pp. 11-13.* Moreover, discipline imposed pursuant to an unlawfully overbroad rule may itself be unlawful under Section 8(a)(1) of the Act.

*Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004), *enforced*, 414 F.3d 1249, 1258 (10th Cir. 2005), and cases cited at p. 13.

The charge—that the Company violated Section 8(a)(1) of the Act by discharging McCullough because she engaged in protected activities—is part of the same legal theory specified in the complaint. Indeed, the complaint alleges that the Company violated the same Section of the Act by the same discharge of McCullough, and specifies that her unlawful discharge was based on her violation of work rules that themselves infringed on protected activities. (A46, ¶(j)). Thus, the Board reasonably determined (A121, n.4) that the charge was closely related to the complaint allegations that McCullough “was discharged . . . because in the course of engaging in [] protected concerted activity, she was in violation of certain of [the Company’s] employee handbook language and its employment practices.”

The Company incorrectly asserts (Br 11-12) that the charge and complaint do not share the same legal theory, by pointing to the Board’s analysis (A116, 131-135) under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899

(1st Cir. 1981).<sup>5</sup> However, the relatedness of the charges and the complaint is viewed at the time of the allegations, rather than after the presentation of evidence. *Drug Plastics*, 44 F.3d at 1020. And, as the judge acknowledged (A133, n.14), the General Counsel also alleged that the Company discharged McCullough based on the unlawful rules themselves. *See Double Eagle Hotel & Casino*, 341 NLRB 112, 112 n.3 (2004) (discipline pursuant to an unlawful rule is itself unlawful). Thus, it is irrelevant that the Board decided the allegation based on the legal theory in *Wright Line*. *Accord Carney Hospital*, 350 NLRB 627, 630 n.11 (2007) (allegation may be found timely under *Redd-I* even if the allegation to which it is closely related is ultimately held to be without merit).

Second, the Board reasonably found (A121, n.4) that the complaint allegations and the charge are “factually” related under the second prong of the Board’s “closely related” test. The Board will find this factor satisfied “where the two sets of allegations demonstrate similar conduct, usually during the same time period with a similar object, or there is a causal nexus between the allegations and

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<sup>5</sup> The Board uses *Wright Line* to analyze violations of Section 8(a)(1) that “turn[ ] on employer motivation.” *See Wright Line*, 251 NLRB at 1089. Under *Wright Line*, the Board first requires the General Counsel to make a prima facie showing that protected conduct was a motivating factor in the employer’s decision to take an adverse action. *Wright Line*, 251 NLRB at 1089. If the General Counsel makes this showing, the burden of proof shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Id.*

they are part of a chain or progression of events, or they are part of an overall plan to undermine union activity.” *Carney Hosp.*, 350 NLRB at 630; *see also The Earthgrains Co. & Bakery*, 351 NLRB 733, 734 (2007).

Here, record evidence amply supports a causal nexus between the rules at issue in the complaint—which are part of the “chain or progression of events” leading to McCullough’s discharge—and the timely-filed charge over McCullough’s discharge. *Carney*, 350 NLRB at 630. McCullough’s discharge was based on the Company’s internal document repeatedly citing McCullough for violations of the Company’s “employee conduct” policies and “handbook”—some of the very policies and handbook rules alleged to be unlawful in the complaint. (A89.) Indeed, the document specifically referenced such rules as reasons for McCullough’s discharge. For example, it cited her for “blind carbon copying third parties on confidential e-mails concerning investigations,” “encouraging [employees]” to make complaints, and “e-mail[ing]. . . . *harmful gossip*” (emphasis added).<sup>6</sup> In addition, the Company’s electronic communication rule is implicated in both of the above reasons given for discharging McCullough, as they both fault her for her misuse of company e-mail. The remaining rules at issue—disclosures

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<sup>6</sup> As noted above at footnote 3, the Board ultimately dismissed the allegation that the harmful gossip rule was unlawful. However, as also demonstrated above, an allegation may be found timely under *Redd-I* even if the allegation to which it is

from personnel files and performing non-work activities during working hours—are clearly related to the other alleged violations concerning employee disclosures and activities. Indeed, they appear in the same “employee conduct” and “handbook” policies repeatedly cited in Assistant Vice President Gunn’s memo outlining the reasons for discharging McCullough.

The Company’s argument to the contrary (Br. 10-13), which is primarily based on the inapplicable decision by this Court in *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), is unavailing. In *Lotus Suites*, the charge was based on general boilerplate language, without specific factual allegations. In contrast, the charge here alleged a violation of Section 8(a)(1) of the Act based on a specific act (discharge) taken on a specific date (August 5) against a specific employee (McCullough), and the complaint hewed closely to the charge by alleging violations of some of the rules leading to the very same discharge.<sup>7</sup>

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closely related is ultimately held to be without merit. *Carney Hosp.*, 350 NLRB at 630 n.11.

<sup>7</sup> Although not cited to by the Company, *Precision Concrete*, 334 F.3d 88 (D.C. Cir. 2003), and cases cited therein in which this Court criticized the Board’s earlier application of the “factual relatedness” factor, do not require a different result. Indeed, those decisions were pre-*Carney*—the case cited above in which the Board, responding to this Court, refined its test in response to this Court’s concerns. Further, unlike here, those cases involved allegations linked only by their occurrence during the same union campaign.

Third, the Board's closely-related test provides that "the Board may also look to whether a respondent would raise similar defenses as to the charge allegation." *Redd-I Inc.*, 290 NLRB 1115, 1118 (1988). Apparently attempting to contest this factor, the Company points (Br. 11-12) to its *Wright Line* defense. To the contrary, as shown above at p. 34, the alternative *Wright Line* theory is a red herring because, at the time of the complaint, the General Counsel also made the requisite allegation that the discharge was unlawful because the rules themselves were unlawful.

Finally, the Company's remaining claim (Br. 12-13) that the allegations regarding the rules are untimely because they "were in effect for years" before the February 5, 2010 charge ignores the finding (A121 n.4) that the Company's longstanding rules, still in effect at the time of the hearing, "constitute an ongoing violation of the Act." As such, they are not subject to the time bar under Section 10(b) of the Act. *See Int'l Broth. of Elec. Workers Local 6, AFL-CIO*, 318 NLRB 109, 126 (1995) (the maintenance of an unlawful rule is a continuing violation).<sup>8</sup> Accordingly, the Board properly determined (A121 n.4) that the allegations

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<sup>8</sup> The Company's citation (Br. 13) to *Ross Stores, Inc. v. NLRB*, 235 F.3d 669 (D.C. Cir. 2001), is misplaced because the rule in *Ross* was merely an "isolated and unauthorized" invocation of an unlawful solicitation policy, *Ross Stores*, 235 F.3d at 674, wholly unlike the longstanding oral and written rules here.

regarding the Company's rules were "closely related" to the timely charge employee McCullough filed over her discharge.

**CONCLUSION**

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

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April 2012

# **ADDENDUM**

## STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act (“the Act”), 29 U.S.C. Section 151, et. seq., are excerpted below:

**Section 7 of the Act (29 U.S.C. § 157): Rights of employees as to organization, collective bargaining, etc.**

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

**Section 8 of the Act (29 U.S.C. § 158):**

**(a) Unfair labor practices by employer**

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(c) **Expression of views without threat of reprisal or force or promise of benefit**

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

**Section 10 of the Act (29 U.S.C. § 160):**

**(a) Powers of Board generally**

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

**(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable**

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United

States pursuant to [section 2072 of Title 28](#).

**(e) Petition to court for enforcement of order; proceedings; review of judgment**

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

**(f) Review of final order of Board on petition to court**

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in

section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive

**UNITED STATES COURT OF APPEALS  
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HYUNDAI AMERICA SHIPPING AGENCY, INC.	) ) )	
Petitioner/Cross-Respondent	)	Nos. 11-1351, 11-1413
v.	) )	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case No. 28-CA-22892
	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,318 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 30th day of April, 2012

**UNITED STATES COURT OF APPEALS  
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NATIONAL LABOR RELATIONS BOARD	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are a registered user or, if they are not by serving a true and correct copy at the address listed below:

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Dated at Washington, DC  
this 30th day of April, 2012