

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TARGET CORPORATION

29-CA-30804

29-CA-30820

and

29-CA-30880

29-RC-12058

**UNITED FOOD & COMMERCIAL WORKERS
LOCAL 1500**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF IN OPPOSITION TO RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. PROCEDURAL HISTORY

This case was litigated before Administrative Law Judge Steven Davis during seven days of hearing in February 2012. On May 18, 2012, Judge Davis ("**ALJ**") issued his thorough 40-page decision ("**Decision**") in which he found that Target Corporation ("**Respondent**") committed numerous violations of the National Labor Relations Act, as alleged in the Amended Consolidated Complaint. The ALJ found, *inter alia*, that Respondent promulgated and maintained numerous unlawful handbook provisions; threatened employees with discipline and unspecified reprisals; distributed a leaflet containing a threat to close the store; created an impression of surveillance of employees' protected activities on behalf of United Food & Commercial Workers Local 1500 ("**Union**"); enforced an unlawful no-solicitation policy; showed a video to employees stating that Respondent would enforce its unlawful no-solicitation policy; and interrogated employees about their Union activities.¹

On June 29, 2012, Respondent filed 79 exceptions to certain of the ALJ's findings, along with a brief in support of its exceptions. Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel ("**General Counsel**") hereby submits its Answering Brief in Opposition to Respondent's Exceptions and Supporting Brief.

¹ On June 29, 2012, Counsel for the Acting General Counsel filed limited exceptions with respect to the ALJ inadvertently omitting, from the Conclusions of Law, Order, and Notice sections of the Decision, his findings that Respondent violated Section 8(a)(1) by: (1) giving employees the impression that their activities on behalf of the Union were under surveillance; and, (2) threatening employees with unspecified reprisals for their support for and/or activities on behalf of the Union.

II. STATEMENT OF THE FACTS

All relevant and material facts have been completely and accurately set forth in the ALJ's Decision (ALJD p. 3-46)², except as otherwise noted herein.

III. ARGUMENT³

An analysis of the record evidence and relevant, well-established Board law fully supports each of the ALJ's findings and conclusions to which Respondent has excepted. The General Counsel submits that Respondent's exceptions are wholly without merit and should be rejected, and the Board should affirm the ALJ's Decision and Order, except as noted in the General Counsel's limited exceptions.

a. **RESPONDENT FAILED TO PROVE THAT THE ALJ'S CREDIBILITY FINDINGS ARE INCORRECT (Exceptions 7, 10, 14, 19, 43, 49)**

To the extent that Respondent has excepted to the ALJ's credibility findings (e.g., Exceptions 7, 10, 14, 19, 43, 49), it is well-settled that the Board's policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *See also Bralco Metals, Inc.*, 227 NLRB 973, 973 (1977) (the "Board is reluctant to overturn the credibility findings of an Administrative Law

² References are abbreviated as follows: "ALJD" denotes the Decision; "Resp. Ex." denotes Respondent's exhibits. "CP. Ex." denotes Union's exhibits. "GC Ex." denotes General Counsel's exhibits. "Tr." denotes the official transcript of the Hearing. "Resp. Br." denotes Respondent's Brief in Support of its Exceptions.

³ Respondent argues that the Board should issue no decision in this case because, it argues, "three of the current putative members of the Board" were not validly appointed by the President. In similar circumstances, the Board has found that it is not appropriate for it to decide whether Presidential appointments are valid. Instead, the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001) (citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)); *Center for Social Change*, 358 NLRB No. 24 (2012). Accordingly, as it recently did in *Center for Social Change*, the Board should deny Respondent's request to refrain from deciding this case now.

Judge"); *E.S. Sutton Realty Co.*, 336 NLRB 405, 405 fn. 2 (2001) ("only in rare cases" will it do so). Here, as more specifically argued below, Respondent failed to prove that any of the ALJ's credibility findings are incorrect. Moreover, as more fully outlined below, in its desperate attempt to damage the credibility of the General Counsel's witnesses, Respondent inappropriately references facts and exhibits not in the record.

b. **THE ALJ CORRECTLY DETERMINED THAT RESPONDENT'S HANDBOOK POLICIES ARE UNLAWFUL (Exceptions 23-72)**

The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining certain unlawful rules and policies in two versions of its Team Member Handbook—"2008 (Rev. 7/09)" ("**2009 Handbook**")⁴ (GC Ex. 8), and "2011 (Rev. 2/11)" ("**2011 Handbook**")⁵ (GC Ex. 9).

i. The ALJ Correctly Applied Board Law

1. The *Lutheran Heritage Village-Livonia* Standard

As the ALJ correctly explained, the Board's standard in evaluating work rules is clearly set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) ("***Lutheran Heritage***"). (ALJD 24:48-52; 25:1-16). An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Id.* (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999)).

⁴ The 2009 Handbook was the only handbook applicable to employees at the store from July 2009, until at least the last week of June 2011 (after the election). (Tr. 422). It was distributed to employees by management at new hire orientations to those employees hired from July 2009 until at least the last week of June 2011, and employees signed orientation completion forms acknowledging receipt of same. (Tr. 422). Of the employees eligible to vote in the election, at least 126 employees received and acknowledged the 2009 Handbook, as they were hired between July 2009 and June 2011. (See Resp. Ex. 41).

⁵ The 2011 Handbook is a newer version of the 2009 Handbook. (Tr. 423). Respondent made it available to all employees at the store during the last week of June 2011 (after the election), and announced to some employees that it was available. (Tr. 423). Although the 2011 Handbook is a newer version of the 2009 Handbook, Respondent never informed employees that any of the rules and policies in the 2009 Handbook were rescinded or no longer in effect. (Tr. 87, 299, 399, 425, 606, 620).

The Board applies a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. *Lutheran Heritage*, 343 NLRB at 647. If the rule does not explicitly restrict protected activities, it will violate the Act upon a showing that: (1) employees would reasonably construe the language 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.*

In determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading, and must refrain from reading particular phrases in isolation and not presume improper interference with employee rights. *Id.* (citing *Lafayette Park Hotel*, 326 NLRB at 825, 827). In addition, in analyzing a rule, where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it. *Lafayette Park Hotel*, 326 NLRB at 828. Moreover, the finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency to coerce employees in the exercise of fundamental rights protected by the Act. *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), *enfd.* 987 F.2d 1376 (8th Cir. 1993).

Contrary to Respondent’s assertion throughout its Brief, it is clear that the ALJ did consider the context in which the rules and policies were maintained. The context made it even more likely that the rules and policies violated the Act. First, a substantial number of employees were undisputedly aware of the handbook because they either specifically acknowledged receiving it at new hire orientation (at which they were instructed to review it), or because the handbook was available for them to pick up in the store. (Tr. 87, 194-198, 299-301, 422-424, 584, 866, 899, 962, 995; CP Ex. 12). Second, the handbook was the only written source of

information about employees' terms and conditions of employment that was readily accessible to them at the store. (Tr. 1007). Third, Respondent never told employees that the handbook rules and policies did not prohibit them from engaging in otherwise lawful Union or protected activities. (Tr. 593, 608, 750, 824, 896-897, 928, 942, 958, 970, 1005-1006). Fourth, Respondent announced that it would, and did enforce some of its unlawful policies. (ALJD 22:5-7; 28:30-37, 29). Finally, the rules and policies were in effect during a campaign involving strong emotions and in which Respondent sought to convince employees not to vote for the Union by distributing leaflets, showing videos, and giving speeches at mandatory small group meetings. (Tr. 583, 742, 744, 751; GC Ex. 4; CP Ex. 10(a)-10(p), 11; Resp. Ex. 32, 35-37). Under these and the other circumstances cited by the ALJ, the ALJ properly concluded that Respondent's handbook policies violated the Act under the *Lutheran Heritage* standard.

2. Enforcement Not Necessary

Respondent argues that the ALJ erred by concluding that even if the rules at issue were not enforced, Respondent remains responsible for their maintenance. (Resp. Br. 33). This is plainly wrong and contrary to Board law. The ALJ correctly applied Board law when he found that Respondent's handbook rules are unlawful even in the absence of enforcement. Consistent with the above-noted precedent, even just the maintenance of an unlawful rule serves to "inhibit employees from engaging in otherwise protected organizational activity, and, therefore, the absence of evidence of enforcement of a rule does not preclude the finding of a violation or the issuance of a remedial order." *J.C. Penney Co.*, 266 NLRB 1223, 1224 (1983). *See also NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968) ("mere existence" of an overbroad but unenforced no-solicitation rule is unlawful because it "may chill the exercise of the employees' [Section] 7 rights"). Stated differently, "the mere existence of an overly broad rule tends to

restrain and interfere with employees' rights under the Act even if not enforced," *Staco, Inc.*, 244 NLRB 461, 469 (1979), and that the rule's mere existence tends to "inhibit the union activities of conscientious minded employees," *Custom Trim Products*, 255 NLRB 787 (1981).

The Board recently made this point clear when it rejected an employer's argument that its maintenance of certain rules was not unlawful because employees talked freely and without restraint about the topics covered by the rules. *Security Walls, LLC*, 356 NLRB No. 87, fn. 1 (2011). Similarly, here, the Board should reject Respondent's argument that non-enforcement and evidence that some employees acted in contravention of the rules somehow makes the rules lawful. If Respondent's argument were correct, it would mean that no employer who promulgated and maintained unlawful rules could be found to have violated the Act if the rule succeeded in chilling employees' Section 7 rights and employees dared not violate the rule for fear of discipline. This logic is absurd and surely not what the Board intended. Accordingly, the Board should affirm the ALJ's finding that Respondent's rules are unlawful even if they were not enforced, and even if some employees engaged in conduct prohibited by the rules.

ii. Information Security Policy (Exceptions 23-39)

The ALJ correctly concluded that the rules and policies within the "Information Security Policy" of Respondent's 2009 Handbook are unlawful. (ALJD 25:36-27:32). As accurately outlined by the ALJ, Respondent's "Use Technology Appropriately" policy (GC Ex. 8, p. 54), provides, in relevant part, that employees must not "release confidential guest, team member or company information." Respondent's "Communicating Confidential Information" policy (GC Ex. 8, p. 53), provides, in relevant part, that employees should never share confidential information with another employee unless the employee has a need to know information to do his or her job. It further instructs that employees must confirm that there is proper authorization

to share confidential information with someone outside the company, and if unsure, to ask a supervisor. Finally, Respondent's "Unauthorized Access to Confidential Information" policy (GC Ex. 8, p. 53), provides, in relevant part, that employees must report any unauthorized access or misuse of confidential information to a supervisor, and that a violation of the policies regarding confidential information will result in corrective action, up to and including termination, and potentially legal action, including criminal prosecution.

The Handbook defines "confidential information" extremely broadly: "All Target information that is not public must be treated as confidential," and given that only several examples are provided, it is clear that the Handbook does not cover everything that Respondent intended to be treated as confidential. (GC Ex. 8, p. 51-52). In essence, the rules cited above prohibit employees from sharing broadly defined "confidential information" with anyone, at any time, and in any place, and require employees to report violations to a supervisor.

Based on a thorough analysis of the facts and Board law, the ALJ correctly determined that the Information Security Policy explicitly restricted employees' Section 7 rights to discuss their wages, hours and working conditions with their colleagues. (ALJD 26:20-23). The ALJ further correctly determined that employees would reasonably construe the language to prohibit Section 7 activity. (ALJD 26: 23-27).

Respondent argues that the ALJ's conclusion was premised on four erroneous factual findings. (Resp. Br. 15). First, Respondent states that the ALJ incorrectly determined that wages and benefits are not made public. In Respondent's view, the fact that a few employees discussed their wages makes that information "public." When deciding between whether wages (and benefits) are public or confidential, no reasonable employee would conclude that such information is public. At best, the rules are ambiguous in that "confidential information" is

defined broadly and only limited examples are provided. Because ambiguities in a rule are resolved against the promulgator rather than the employees who are required to obey it, *Lafayette Park Hotel*, 326 NLRB at 828, the ALJ correctly determined that wages and benefits are not made public. (ALJD 25:52).

Second, Respondent argues that the ALJ failed to properly apply the test under *Lutheran Heritage*, and argues that employees could not reasonably construe the Information Security policy to prohibit Section 7 activity. (Resp. Br. 16). Although the ALJ did not explicitly cite the name of the case in his discussion of Respondent's Information Security policy, his reasoning demonstrates that he thoroughly and correctly applied it. Pursuant to *Lutheran Heritage*, and as the ALJ stated, the rule is unlawful because "it explicitly restricts [Section 7 activities]." (ALJD 26:20-21). As such, the second part of the *Lutheran Heritage* test—the only part of the test that uses the objective standard—was not required. (ALJD 26:23-24); *Lutheran Heritage*, 343 NLRB at 647. Nonetheless, the ALJ went a step further, and correctly concluded that even under the second part of the test, the rule was unlawful because employees would reasonably construe it to prohibit Section 7 activities. The ALJ's conclusion was based on the record evidence: the policies do not provide that employees are free to discuss wages or other terms and conditions of employment, and employees were never told they could do so. (Tr. 750, 824, 897, 928, 942). In addition, the subjective effect of the policies on only a few employees who testified at the hearing is not determinative of the outcome, especially where there are almost 300 employees in the store. (Tr. 709).

Third, Respondent contends that the ALJ read language into the policy which did not exist. (Resp. Br. 16). Specifically, the ALJ wrote that the wording "personnel information" is included in the listing of confidential documents, and as such, employees are left to determine

what that term means. (ALJD 26:29-33). As a result, the ALJ found that the rule was overly broad, with language that employees may reasonably construe as restricting the exercise of their Section 7 rights. (*Id.*). While Respondent is technically correct that the wording "personnel information" is not explicitly included in the examples of confidential documents, the ALJ's inadvertent inclusion of it does not change the outcome. Although Respondent claims that wages, benefits, and other terms of employment were not confidential information, Respondent's witness acknowledged that "team member personnel records," which *are* explicitly included as an example of confidential information, include information about wages and benefits. (Tr. 598, 605).

Fourth, and similarly, Respondent, argues that the ALJ erred by interpreting "personnel records" to include "personnel information." However, Respondent's own witness admitted, and common sense dictates, that personnel records include information about wages and benefits. (Tr. 598, 605). As the ALJ pointed out, the Board in *Iris, U.S.A.*, 336 NLRB 1013 (2010) found unlawful a similar confidentiality rule that included "personnel records" as confidential. In that case, the judge had noted that "personnel records" contain various kinds of information about employees, including their wages. *Id.* at 1016.

Finally, Respondent has failed to sufficiently distinguish *Iris, U.S.A.* from the facts of this case. Respondent is correct that the judge in *Iris, U.S.A.* found the rule in that case distinguishable from the unlawful rules in *Lafayette Park* and *K-Mart*, 330 NLRB 263 (1999), because the rule in *Iris, U.S.A.* specifically prohibited disclosure of employee information *to fellow employees* (emphasis argued by Respondent). (Resp. Br. 17). However, Respondent conveniently ignores that the ALJ went on to clarify that he distinguished *Lafayette Park* and *K-Mart* because the employers in those cases prohibited exclusively *company* documents from

disclosure—"hotel-private information" in *Lafayette Park*, and "company business and documents" in *K-Mart*—as opposed to *employee* information. In *Lafayette Park and K-Mart*, the Board found that an employee could not reasonably construe the rules' prohibition to include discussions about wages, hours and working conditions, since neither prohibition specifically implicated employee information. Here, in contrast, and as the ALJ correctly found, the Handbook specifically prohibits the disclosure of *employee*-related information: "confidential ... team member information" and defines confidential information as anything that is not public, including "team member personnel records," which Respondent's own witness admitted contains employee information (Tr. 598, 605). Here, the ALJ thoroughly and correctly analyzed the full extent of the distinction made in *Iris, U.S.A.* and properly found that Respondent's Information Security policy is unlawful.

Based on the above, the Board should reject Respondent's exceptions and affirm the ALJ's holding that Respondent's "Use Technology Appropriately," "Communicating Confidential Information" and "Unauthorized Access to Confidential Information" rules within its Information Security Policy are unlawful.

iii. No Solicitation/No Distribution Policies (Exceptions 23-27; 40-58)

Respondent excepts to the ALJ's finding that its No Solicitation/No Distribution rules violated Section 8(a)(1). (ALJD 29:26-37). Contrary to Respondent's arguments, Board law and the record evidence fully support the ALJ's conclusion.

The No Solicitation/No Distribution rule in Respondent's 2009 Handbook (GC Ex. 8, pp. 27-28) provides, in relevant part, that employees "must never pass out any literature ... on Target premises if these activities are for personal profit, commercial purposes or any charitable organization that is not part of our Community Relations program." Target Premises is defined

broadly as "[a]ll the buildings, grounds, vehicles and parking areas Target uses to conduct its business," (GC Ex. 8, p. 64), and "commercial purpose" is not defined in the handbook. In addition to this provision, found only in the 2009 Handbook, both the 2009 and 2011 Handbooks set forth Respondent's full No Solicitation/No Distribution policy. The relevant section of the full policy states that "[c]ertain activities are prohibited at all times on Target premises. Soliciting, distributing literature, ... are always off limits if they are: for personal profit, for commercial purposes, [or] for a charitable organization" (GC Ex. 8, p. 44-45; GC Ex. 9, p. 42-43).

As the ALJ properly recognized, well-established Board law holds that while an employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution, such restrictions must be clearly limited in scope so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in non-work areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983). A no-distribution or no-solicitation rule, maintained by an employer, that is not limited to work time or to work areas, is presumptively invalid on its face, because the rule explicitly prohibits employee activity that the Board has repeatedly found to be protected by Section 7. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962); *2 Sisters Food Group*, 357 NLRB No. 168, *2 (2011) (citing *Lutheran Heritage*, 343 NLRB at 646 fn. 5); *Our Way*, 268 NLRB at 394.

Respondent's prohibition of solicitation and distribution in these rules is overbroad in that it is not limited to work time or to work areas. In fact, the prohibition applies *at all times* and to the broadly defined "Target premises," which clearly includes non-work areas such as parking lots. Thus, under *Stoddard-Quirk*, the rule is presumptively unlawful on its face. Moreover,

Respondent failed to establish, through any record evidence, any legitimate business reason that would justify the otherwise unlawful rules.

In light of the prohibition's breadth, the fact that it only applies only to solicitation and distribution "for personal profit, for commercial purposes, or for a charitable organization" does not save the rules from being unlawful. In *2 Sisters Food Group, supra*, the Board held the employer's work rule unlawful where it prohibited the "unauthorized soliciting of contributions on company premises." (emphasis added). The Board, in rejecting the employer's argument that the prohibition was lawful because it was limited to the solicitation of contributions, found that the solicitation of contributions to support an incipient organizing drive, to help a fired fellow employee, and for many similar purposes, is protected by Section 7. 357 NLRB No. 168, *2. The Board, citing *Lutheran Heritage*, therefore found that the rule explicitly prohibited Section 7 activity. Here, although the rule does not discuss "contributions," its reference to activities "for commercial purposes" similarly restricts the Section 7 activities of soliciting and distributing literature for the Union, especially where Respondent, through its distribution of its own anti-union leaflets (in work areas and in work time), portrayed the Union as a business. See, e.g., CP Ex. 10(c) ("Like any other failing business the union needs to increase revenue to stay in business"); CP Ex. 10(d) (likening the international union to the local union's corporate headquarters); Tr. 747. The videos Respondent showed to employees also undoubtedly portray the Union as a business. (See GC Ex. 6(a), (b)). Given this portrayal, a reasonable employee would conclude that soliciting or distributing literature on behalf or in support of the Union, a commercial entity, was prohibited by the rule. This is especially true where Respondent announced in a video that it would enforce the rules, and where Respondent did enforce the rules against employees who were engaged in Union activities. (ALJD 28-29).

Therefore, contrary to Respondent's contention, the ALJ correctly applied *Lutheran Heritage*. As the Board found in *2 Sisters Food Group*, the rules are unlawful under *Lutheran Heritage* in that they explicitly restrict Section 7 activities. In the alternative, the rules are unlawful under *Lutheran Heritage* because employees would reasonably construe them to prohibit Section 7 activity. Despite the fact that some employees may have been able to solicit or distribute literature in support of the Union, non-enforcement of the rules on these employees does not make it lawful. "The mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if not enforced," *Staco, Inc.*, 244 NLRB 461, 469. Moreover, as explained by the ALJ and below, Respondent did enforce the unlawful rule. (ALJD 28:30-32; 29:1-2).

The ALJ also correctly found that Respondent's reliance on *Register-Guard*, 351 NLRB 1110 (2007) was misplaced. (ALJD 29:4-5). In addition to the reasons stated by the ALJ (ALJD 29:4-19), *Register-Guard* is inapplicable where, as here, the rules in question are ambiguous, at best. In *Register-Guard*, the policy at issue stated, in relevant part, that "communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations." *Register-Guard*, 351 NLRB at 1111. The Board found that the employer could lawfully bar employees' non-work-related use of its email system, unless the employer acted in a manner that discriminated against Section 7 activity. *Id.* at 1116. The Board held that where the policy on its face did not discriminate against Section 7 activity, the employer did not violate Section 8(a)(1) of the Act by maintaining it. *Id.* Here, the rule is invalid on its face, where the qualifications ("for personal profit, commercial purposes or any charitable organization") are particularly ambiguous. In *Register-Guard*, the rule refers to "commercial ventures," which clearly implies an outside

business undertaking. In Respondent's rule, the use of the term "commercial *purposes*," is ambiguous, where *purpose* has a much broader meaning (i.e., an aim or a goal) than *venture*. Unlike the rule in *Register-Guard*, Respondent's rule does not limit employee activity to "non-job related solicitations," which phrase had foreclosed any ambiguity. Stated differently, the rules here, because of their ambiguity and broad prohibition (at all times and anywhere on Respondent's premises), are not clearly drawn on non-Section 7 lines and are therefore facially unlawful. Respondent's exceptions based on *Register-Guard* should be rejected.

Thus, even if *Register-Guard* is found to be applicable to Respondent's No Solicitation/No Distribution rules, the rules are still unlawful. This is especially true because that the ambiguity in Respondent's rules must be resolved against Respondent, rather than the employees who are required to obey them. *Lafayette Park Hotel*, 326 NLRB at 828. Consequently, the Board should affirm the ALJ's conclusion that Respondent's No Solicitation/No Distribution rules in its 2009 and 2011 Handbooks violated Section 8(a)(1).

iv. After Hours Rule (Exceptions 23-27; 59-64)

Respondent excepts to the ALJ's conclusion that Respondent's "After Hours" rule is unlawful, arguing that the ALJ erred by finding that employees would reasonably construe its language to prohibit Section 7 activity. (Resp. Br. 23). The ALJ correctly found that employees would reasonably construe the language of Respondent's "After Hours" rule, found in both its 2009 and 2011 Handbooks (GC Ex. 8, p. 20; GC Ex. 9, p. 25) to prohibit Section 7 activity. (ALJD 30:35-36; ALJD 31:1-4). The ALJ properly concluded that the rule, which requires employees to leave the premises after hours, and only be on Respondent's property during their scheduled shift or for other authorized company business, is overbroad and unlawful under *Tri-County Medical Center*, 222 NLRB 1089 (1976).

In *Tri-County Medical Center*, the Board established that an employer's rule barring off-duty employees from access to its facility is valid only if 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 engaging in union activity. Except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid. *Id.* at 1089.

In *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), the Board affirmed the judge's finding that a handbook provision that prohibited employees from "entering company property after hours without authorization" violated Section 8(a)(1) of the Act under *Tri-County Medical Center*. In that case, the employer operated around the clock. Thus, the rule there operated to forbid employees to come onto the property after their shifts have ended but while the employer was still operating. The Board found that under *Tri-County, supra*, the employer could not lawfully bar off-duty employees from coming onto the exterior of the property, absent some business justification. In that case, there was no justification shown. *See also Lafayette Park Hotel*, 326 NLRB 824, 848 (1998) (absent business justification, no-access rule not limited to working areas found unlawful). In *Fairfax Hospital*, 310 NLRB 299 (1993), the Board adopted the judge's rejection of the employer's proffered business justification that its no-access rule was adopted to address crime in the parking lots. In that case, the judge, among other factors, observed that none of the illegal conduct was engaged in by returning employees or employees who stayed after their working hours. *Fairfax Hospital*, 310 NLRB at 309.

Respondent's After Hours rule fails to meet the first requirement of *Tri-County Medical Center's* three-part test: it does not limit access solely with respect to the interior of the plant and

other working areas. In fact, the handbook defines "Target Premises" very broadly, including all the buildings, grounds, vehicles and parking areas Target uses to conduct business. (GC Ex. 8, p. 64). There is no evidence in the record that would suggest that the grounds, vehicles, and parking areas are working areas. Any employee looking at the rule in connection with the broad definition of "Target Premises" would reasonably interpret it as prohibiting them from being in the parking lot and other non-work areas while off-duty. As such, the maintenance of that rule would reasonably tend to chill employees in the exercise of their Section 7 rights. Accordingly, the rule violates Section 8(a)(1) of the Act unless it is justified by business reasons. Here, like the employer in *Fairfax Hospital*, Respondent has failed to establish any valid business reasons that could justify such a broad prohibition on off-duty employees' activities on its premises. Even assuming Respondent had a concern about criminal activity in the parking lot, the ALJ properly found that there was no evidence to suggest that any of Respondent's employees were responsible for any of the alleged safety incidents. (ALJD 30:16-18; Tr. 640-641).

Respondent argues that the ALJ erred by failing to consider the After Hours rule along with the "Visitors" paragraph below it, and the "Store team member purchase guidelines." (Resp. Br. 23). Respondent, however, selectively cites only part of each rule. A full reading of the rules shows that while they may all touch upon employees' access to Respondent's property in some form, they should not be considered together. The full Visitors rule states:

As a new team member you may want to show your friends and family where you work. If you do, remember these things:

- Please don't ask your friends or family to visit you while you're working.
- Only Target team members and authorized personnel are allowed in non-public areas of the store, such as the team member lounge or stockroom.
- If you are not scheduled to work, please do not visit the non-public areas of the store except for authorized company business such as picking up your paycheck.

(GC Ex. 8, p 20; GC Ex. 9, p. 25).

Similarly, the selective quote in Respondent's brief from its "Store team member purchase guidelines" that team members "should only shop during breaks, meal periods or when they are off duty," is but one bullet point out of almost two full pages of guidelines all relating to employee purchases in its 2009 handbook. (GC Ex. 8, p. 33). In the 2011 handbook, the quoted provision is provided after the introductory remark that "Target has developed the following guidelines to ensure that guests have a meaningful opportunity to purchase merchandise," and as just one of a full page of examples how "Individuals cannot use their Target team member status to gain an advantage over guests when it comes to purchasing merchandise." (GC Ex. 9, p. 37). No reasonable employee would meaningfully juxtapose the selectively quoted provisions where they are not laid out as part of the same rule. While the Visitors rule happens to follow the After Hours rule, it is unmistakably demarcated by a separate heading. The team member purchase guidelines fall 12-13 pages after the After Hours and Visitors rules. If Respondent intended them to be read together, Respondent would have included them within the same heading.

Besides being laid out separately, the rules also clearly cover different topics. The After Hours rule is limited to what employees must do after their shift. The Visitors rule, as stated in its own introduction, is designed to inform employees what to do when showing friends and family where they work. The team member purchase guidelines are aimed at informing employees of their rights when shopping in the store. Given that the rules are designed to address widely different topics, and are not part of the same heading, no reasonable employee would consider them together. The ALJ properly recognized this and found the After Hours rule unlawful. (ALJD 31:1-3).

Respondent again attempts to escape liability for the rule by claiming that it was not enforced on employees who visited the premises after hours. For example, Respondent

presented evidence to show that employees routinely returned to the premises to shop, check the schedule, pick up their paycheck, or to attend a company event. (Tr. 464, 594, 1005). As the ALJ noted, these activities all fall under "other company authorized business," for which the rule explicitly states that employees can return to the premises. (ALJD 30:21-25). In its brief, Respondent cites 13 different pages of the transcript for the proposition that employees often engaged in other "non-authorized company business" such as "socializing, bringing food to friends, watching TV, singing Karaoke and relaxing in the break room." (Resp. Br. 25). In doing so, Respondent greatly mischaracterizes and exaggerates the record evidence. First, many of these activities *were* company authorized events as part of Respondent's "fast fun and friendly events." (Tr. 970). Second, even if one employee testified that he or she engaged in one of these arguably non-company authorized activities, it was rarely corroborated by another employee. Instead, the overwhelming record evidence established that if an employee returned to the store after hours, it was for "company authorized business," permitted by the rule. Thus, the argument that employees routinely returned to the premises is unconvincing, and the ALJ properly rejected it in finding that the After Hours rule was unlawful. (ALJD 30:21-25; 31:1-3).

Moreover, the absence of enforcement of the rule is immaterial where the rule has a reasonable tendency to coerce employees in the exercise of fundamental rights protected by the Act. *Radisson Plaza Minneapolis*, 307 NLRB at 94. As the ALJ correctly found, Respondent never informed employees that they were permitted to return to the premises after their shift. (ALJD 19:9-12). That a small group of employees out of about 300 at the store was able to circumvent Respondent's unlawful rule does not make it any less unlawful under well-established Board precedent which provides that the mere existence of an overly broad rule violates Section 8(a)(1). *Staco, Inc.*, 244 NLRB 461, 469. Accordingly, Respondent's

exceptions should be rejected and the ALJ's finding that Respondent's After Hours rule violates Section 8(a)(1) should be affirmed.

v. Parking Policy (Exceptions 23-27; 65-68)

Respondent excepts to the ALJ's finding that Respondent's Parking Policy was unlawful, arguing that the ALJ misapplied *Lutheran Heritage*. The policy, found in both the 2009 and 2011 Handbooks, requires employees to notify Assets Protection or a supervisor if they see people they don't know loitering around the team member parking area. (GC Ex. 8, p. 19; GC Ex. 9, p. 24). Contrary to Respondent's arguments, the ALJ correctly found that Respondent's parking policy violates Section 8(a)(1). (ALJD 31).

The ALJ recognized that with almost 300 employees working at the store on different shifts, it is quite probable that not all employees know each other. (ALJD 31:22-25). Respondent's argument that employees would recognize a coworker by having worked together, or, at the very least, by their wearing red & khaki, is unconvincing. (Resp. Br. 28). It ignores the fact that Respondent's facility is open around the clock and a day-shift employee might never encounter a night-shift employee. (Tr. 709-710). It also ignores the fact that employees who are off-duty and engaging in Union activities will often not be wearing their uniform. Because employees have a right to engage in protected union activities, including solicitation and distribution in non-work areas during non-work time, a requirement that leads employees to report such activity to management violates the Act. *See Lutheran Heritage*, 343 NLRB 646, fn. 16 (2004).

Respondent claims that the ALJ, by limiting his review to the phrase "people you don't know," missed the point that all other aspects of the policy pertain to safety. (Resp. Br. 28). That argument is not borne out by a review of the ALJ's decision. In his discussion, the ALJ

clearly recognized other parts of the rule, such as that employees should lock their car, and use the buddy system. (ALJD 31:8-10).

Respondent then claims that the rule serves a legitimate business purpose given the safety and security incidents in and around the parking lot. As with the After Hours rule, and like the employer in *Fairfax Hospital, supra*, Respondent has failed to establish any valid business reasons that could justify such a broad prohibition on off-duty employees' activities on its premises. Moreover, Respondent's specious argument was eviscerated by Respondent's own witnesses. Despite Respondent's claim of "safety" concerns, one of Respondent's witnesses testified that she was not aware of any security issues in the parking lot. (Tr. 787). Respondent's other witnesses testified only generally, and exaggeratedly (e.g., without providing any details, referring to a "slashing" that did not even take place on Respondent's premises), about incidents in the parking lot. (Tr. 596, 636-637, 687, 738, 757, 972). Except for one witness who testified to a dumpster fire in April 2011, no other witnesses could provide any specific details about such incidents, including in some cases even what month or year the incidents allegedly took place. (Tr. 636). Most notably, there was no evidence to suggest that any of Respondent's employees were responsible for any of the alleged safety incidents. (Tr. 640, 641, 693, 757). For the same reasons as in *Fairfax Hospital*, Respondent's exaggerated claim of "safety" concerns that had nothing to do with employees, was properly rejected by the ALJ.

In addition, as with the other unlawful rules, non-enforcement of the rule is immaterial and is not a valid defense because the rule has a reasonable tendency to coerce employees in the exercise of fundamental rights protected by the Act. *Radisson Plaza Minneapolis*, 307 NLRB at 94.

vi. Dress Code (Exceptions 23-27; 69-72)

Respondent excepts to the ALJ's finding that Respondent's "Dress Code" is unlawful, arguing that employees would not reasonably construe its language to prohibit Section 7 activities. The rule, found in both the 2009 and 2011 Handbooks, provides, among other things, that employees cannot wear any buttons or logos on their clothing (unless approved by a team leader). (GC Ex. 8, p. 21; GC Ex. 9, p. 15-16). Respondent's argument should be rejected because the ALJ correctly found, based on *Lutheran Heritage* and other well-established Board law, that the rule violated Section 8(a)(1).

It is well established that employees have a statutorily-protected right to wear union insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003). At the same time, however, an employer may lawfully restrict the wearing of union insignia where "special circumstances"⁶ justify the restriction. *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004); *Albis Plastics*, 335 NLRB 923, 924 (2001). The employer bears the burden of proving such special circumstances. *Pathmark Stores, supra*; *Inland Counties Legal Services*, 317 NLRB 941, 942 (1995).

In *Albertsons, Inc.*, 351 NLRB 254 (2007), the Board adopted the judge's finding that a rule which stated that "[n]o other badges [besides a name badge] or pins shall be worn unless authorized by the Store Director." The Board did not disturb the judge's conclusion that the rule, which would cover union badges and pins of all types and sizes, would apply to all store employees during their non-working time as well as their working time, and would encompass all store areas, including any break or lunchrooms designated for employee use, was overbroad,

⁶ Special circumstances justify restrictions on union insignia or apparel "when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.*, 342 NLRB 649, 650 (2004). Mere contact with customers does not, standing alone, justify an employer prohibiting the wearing of union buttons or insignia. *Floridan Hotel of Tampa, Inc.*, 137 NLRB 1484 (1962) enfd. as modified on other grounds 318 F.2d 545 (5th Cir. 1963). An employer's status as a retail employer does not, standing alone, constitute a special circumstance justifying the proscription of union insignia.

and the employer had not established any special circumstances to justify the overbroad nature of the rule. *Id.*

Like the rule in *Albertsons*, the rule in this case, which prohibits employees from wearing any buttons or logos on their clothing unless approved by their team leader, is unlawful under well-established Board law. As in *Albertsons*, the rule here encompasses Union buttons and logos, and applies to all store employees on and off the clock, in work areas and non-work areas, including the breakroom. As such, it violates the employees' statutorily-protected right to wear union insignia.

Moreover, as the ALJ properly found, Respondent failed to meet its burden of establishing "special circumstances" that would justify the rule. (ALJD 32:1-23). As the ALJ correctly explained, the Board has held that the mere fact that Respondent operates a retail store does not constitute a special circumstance justifying the proscription of union insignia. *See United Parcel Service*, 312 NLRB 596 (1993), *enfd. denied* 41 F.3d 1068 (6th Cir. 1994); *See also, Nordstrom Inc.*, 264 NLRB 698, 701-702 (1982) (retail store's interest in maintaining "the fashionable image of the selling floor employees" insufficient to prevent an employee from wearing an unobtrusive small union pin on the selling floor.). Finally, the rule is also unlawful under *Lutheran Heritage* because it explicitly restricts the Section 7 activity of wearing insignia, which would, of course, include Union insignia. 343 NLRB at 647.

Although there was no evidence that employees were disciplined for wearing a "Target Change" bracelet during the campaign, or for wearing any buttons or logos, Respondent never informed employees that they were permitted to wear Union, or any, buttons or logos on their clothing at the store (with the exception of a required name badge). (Tr. 593, 608, 750, 896, 928, 942, 958, 1006). Moreover, employees, including Jennifer Pebrow (called by Respondent),

testified that they were either told, or knew, that they are not supposed to wear buttons or logos on their clothing at the store. (Tr. 95, 310, 425, 426, 448, 933). Given this context, which was considered by the ALJ in analyzing the facts under the *Lutheran Heritage* objective standard, the ALJ properly concluded that employees would reasonably construe the rule to prohibit Section 7 activity. Similarly, the ALJ correctly concluded that the fact that employees, according to the rule, had to obtain their supervisor's approval to wear a certain logo or pin, was also unlawful. (ALJD 32:32-37).

c. **THE ALJ PROPERLY FOUND THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY THREATENING STORE CLOSURE IN A HANDOUT (Exceptions 1-3)**

The ALJ correctly determined that Respondent's "Will the Store Close?" handout contained an unlawful threat of store closure in violation of Section 8(a)(1). (ALJD 11:49-50). The ALJ concluded, after properly applying Board precedent, that the handout lost its protection under Section 8(c). The content of the leaflet is accurately outlined by the ALJ. (ALJD 4-5).

It is well settled that an employer is free to predict the economic consequences it foresees from unionization, so long as the prediction is carefully phrased on the basis of objective fact to convey its belief as to demonstrably probable consequences beyond its control. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). If there is any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion. *Id.* See, e.g., *Eldorado Tool*, 325 NLRB 222 (1997) (finding unlawful the employer's "UAW Wall of Shame"—a factually accurate display naming plants with UAW-represented employees that had closed—where it contained no explanation or basis for assertion that UAW was to blame for closings of other

plants, and no objective facts as the basis for a belief that for reasons beyond employer's control, selection of the UAW as the employees' bargaining representative might well cause the employer's plant to suffer the same fate). Employees, who are particularly sensitive to rumors of plant closings, understand such hints to be coercive threats rather than honest forecasts. *Gissel*, 395 U.S. at 620-621.

In *Homer D. Bronson Co.*, 349 NLRB 512 (2007), the Board found that the employer, in campaign speeches and posters, unlawfully threatened employees with plant closure and job loss if they chose union representation. In so finding, the Board particularly relied on speeches that contained no objective facts to support the employer's clear implication that the referenced plant closings were caused solely by the fact that the "strike happy" union represented those employees. 349 NLRB at 513. The Board concluded that the employer's messages created the impression in the minds of employees that there was an "inevitable linkage between unionization and job loss." 349 NLRB at 513, 538.

In *Homer D. Bronson*, the Board distinguished the facts of that case from two other cases, *Stanadyne Automotive Corp.*, 345 NLRB 85 (2005)⁷, and *Smithfield Foods, Inc.*, 347 NLRB 1225 (2006), in which the Board found campaign speech to be protected by Section 8(c) of the Act. 349 NLRB at 513-514. The Board wrote that although the employer's campaign speeches and posters in *Stanadyne* also referred to closed facilities where employees had been represented by the petitioning union, the Board majority in that case emphasized that the employer "repeatedly made clear" and "said several times" that it was not making predictions. *Id.* (citing *Stanadyne*, 345 NLRB at 90, 91). Similarly, the Board majority found it significant that the employer in *Stanadyne*, several times, "expressly disclaimed any certainty about the connection

⁷ The Second Circuit granted review in part, and vacated in part, the Board's decision, but on unrelated grounds. 520 F.3d 192 (2d Cir. 2008). After remand, the Board supplemented its decision, again on unrelated grounds. 352 NLRB 1002 (2008).

between the previous closures" and the union. 349 NLRB at 514 (quoting *Smithfield Foods*, 347 NLRB at 1228). In *Homer D. Bronson*, the employer used the adage that "those who cannot read history are bound to repeat it," which, the Board majority found, left no doubt in employees' minds that, if the employees chose to be represented by the union, history would repeat itself, and the Respondent would, on its own initiative, choose to close or move. 349 NLRB at 514.

As in *Eldorado Tool* and *Homer D. Bronson*, and as the ALJ correctly found, the message communicated to employees in Respondent's leaflet (GC Ex. 4) goes beyond the limits of Section 8(c) of the Act by failing to make fact-based predictions of economic consequences beyond Respondent's control. The title, "Will the Store Close if the Union Gets In," clearly indicates that the leaflet intends to predict the answer, and it does so in the affirmative. The leaflet emphasizes other store closings where the Union represented employees ("32 store closing announced by A&P February 2011"; "The local was happy only 4 NY stores were closing"). However, in doing so, Respondent fails to state in the leaflet any factual basis whatsoever to support the clear implication that the Union was responsible for the closure of these other stores, or for the loss of thousands of jobs. The leaflet continues to state that Target's future depends on its economic health, and concludes by stating *in capital letters*: "WHEN WAS THE LAST TIME YOU HEARD OF A UNION ... BENEFITING A COMPANY'S ECONOMIC HEALTH?" Instead of the leaflet stating *how* or *why* a union could cause Respondent to become unprofitable, the leaflet only creates the "logical inference" that if the Union wins the election, Respondent will close the store, as unions have caused other stores to close, and because unions do not promote a company's economic health. In the absence of objective facts, the leaflet serves only to create the impression that there was an "inevitable

linkage between unionization and job loss."⁸ *Homer D. Bronson Co.*, 349 NLRB at 513, 538. Respondent's reference to the Caldor closing ("We all owe our jobs to the closing of the Caldor store that was in our building. It had the union. It closed.") even invokes the "history repeats itself" rationale the Board found unlawful in *Homer D. Bronson*. 349 NLRB at 513.

Like the communications in *Homer D. Bronson*, the leaflet in the instant case is similarly distinguishable from *Stanadyne* and *Smithfield*. Respondent, other than a general introductory remark that there are "no guarantees," neither repeatedly made clear that it was not making predictions, nor expressly disclaimed any certainty about the connection between the previous closures and the Union. Even worse, Respondent emphasized that the decision to stay open was one entirely within its control ("Our store will stay open only so long as it meets Target's economic and operational⁹ needs."). The ambiguous reference to "operational needs" runs afoul of *Gissel* in that it conveys that Respondent "may or may not take action solely on its own initiative for reasons unrelated to economic necessities and known only to [Respondent]." *Gissel Packing*, 395 U.S. at 618. As such, the language in Respondent's leaflet is clearly "no longer a reasonable prediction based on available facts, but a threat of retaliation based on misrepresentation and coercion." *Id.*

Respondent's claim that no witness testified that they understood the leaflet to mean that having a union would lead to a possibility of store close closure is immaterial. *See, e.g., Westwood Health Care Center*, 330 NLRB 935, fn. 17 (2000) (under an objective test, whether

⁸ Indeed, Respondent's numerous references to closing, repeated use of larger print, often bold-faced and underlined in connection with its discussion of past closings, evince an attempt to create a visceral connection in the minds of its employees between the advent of the union, and going out of business.

⁹ Respondent had previously communicated to employees the message that a union might not allow it the flexibility it needs to stay competitive. *See, e.g., GC Ex. 6(b)*, a video shown to employees: ("We need to be able to move quickly and adapt to new opportunities as the needs of our guests evolve. That takes flexibility. And we've GOT that today, which is why we're so successful. But how would things be for us if we were to unionize?").

or not a particular employee was actually coerced or considered himself to be coerced is irrelevant). The ALJ clearly considered the entirety of the handout and correctly applied Board precedent. (ALJD 11:49-50).

In sum, it is not in dispute that Respondent distributed the leaflet (GC Ex. 4) to employees, and employees testified that it was during the campaign in May 2011. The Board should affirm the ALJ's conclusion that the leaflet fails to meet the requirements of *Gissel* and its progeny, and therefore violates Section 8(a)(1) of the Act.¹⁰

d. **THE ALJ PROPERLY FOUND THAT RESPONDENT VIOLATED SECTION 8(A)(1) BY OTHER STATEMENTS AND CONDUCT**

i. **Threat of Discharge (Exceptions 4-8)**

The ALJ correctly held, based on the credible testimony of employees Tashawna Green and Matthew King, that in early March 2011, Respondent, by Team Leader Debbie Joseph, threatened employees with discharge for talking about the Union in violation of Section 8(a)(1). (ALJD 12-13).

Respondent unfoundedly attacks the ALJ's decision to credit Green's testimony. (Resp. Br. 37). Not only has Respondent failed to meet its substantial burden of establishing that the ALJ's credibility determination was incorrect, there are additional factors that support the ALJ's decision to credit Green and find the violation. First, Green's account of the incident was consistent with her sworn affidavit given to a Board Agent three months after the incident. (See

¹⁰ Respondent's claim that the Union first injected the issue of store closure in the campaign "in its initial handout to Valley Stream employees in the first week of April 2011" (Resp. Br. 36) is inapposite. The Union's text, quoted by Respondent, addressing the myth that companies close due to unions, is contained in part of a 13-page "Election Preparation Kit" not specific to any particular campaign. (Resp. Ex. 40). Although Respondent received a copy of it on April 8, 2011, there is no record evidence establishing when it was distributed by the Union to the employees. There is also no indication that it was even distributed to a substantial number of employees, and the employees who were not in the bargaining unit would not have received the kit at all. Even assuming Respondent drafted the leaflet in response to the isolated provision in the Election Preparation Kit, Respondent, having drafted it, is solely responsible for its content.

Resp. Ex. 3 (June 10, 2011 affidavit, p. 1)). In both her affidavit and during direct examination, Green testified that Team Leader Joseph stated that the employees could be discharged for talking about a union. (*Id.*; Tr. 96). In addition, Green's testimony was corroborated by King, a neutral witness who was not involved in organizing the store. In that regard, King testified clearly and unmistakably that he and Green were talking about a Union when Joseph said they could be disciplined for talking about "stuff like that." (Tr. 179). Finally, Joseph did not deny having made the unlawful threat. Instead, Joseph testified, implausibly, that she did not recall the incident. (Tr. 179).

Next, Respondent argues that the ALJ erred in concluding that their testimony was "mutually corroborative" when Green testified that Joseph mentioned the Union, whereas King testified that she did not. Of course, "mutually corroborative" does not require the testimony to be exactly the same, and the ALJ recognized that there was some discrepancy between their testimonies. (ALJD 12:45-47). Minor differences in testimony are to be expected and reflect the kind of natural variations which result from differences in memory and viewpoint. The ALJ observed that the testimony of Green and King shared common facts, such as they both identified the area in which they were situated at the time of their conversation, and that Joseph was in the area. *Id.*

Based on these factors, and the fact that the ALJ already thoroughly considered and rejected Respondent's arguments, the Board should affirm the ALJ's finding that in March 2011, Respondent, by Team Leader Joseph, threatened employees with discipline for talking about the Union in violation of Section 8(a)(1).

ii. Threat of Unspecified Reprisals (Exceptions 9-12)

The ALJ correctly held, based on Green's credible testimony, that in May 2011, Respondent, by Supervisor Nicole Barrett, threatened employees with unspecified reprisals when she said that Green should be careful in what she does because "you never know what could happen." (ALJD 13:15-26). Respondent failed to call Barrett, or any other witness, to deny the incident. Thus, the threat went unrefuted.

Again, Respondent attacks Green's credibility but has failed to meet its heavy burden of establishing that the ALJ's credibility determination was incorrect. Not only did Green's testimony clearly detail the relevant facts, it was also consistent with her affidavit given to a Board Agent less than one month after the incident. (See Resp. Ex. 3 (June 10, 2011 affidavit, p. 1)). In both her affidavit and on the stand, Green testified that Barrett, directly referencing a *Newsday* article about the organizing drive with Green's photograph and quote in it, stated that Green should be careful because "you never know what could [or what's going to] happen." (*Id.* p. 2; Tr. 77).

Next, Respondent, grasping at straws, argues that Barrett's statement has "many possible meanings for a reasonable person" and is too vague to constitute a threat. (Resp. Br. 39). In making this implausible argument, Respondent ignores the context of the statement. Barrett made the comment in response to the newspaper article about the organizing drive with Green's photograph and quote in it. In light of this unmistakable context, the ALJ correctly concluded that Barrett's statement was an unlawful threat. (ALJD 12-13).

Inasmuch as Barrett's statement was unrefuted, the Board should affirm the ALJ's conclusion that in May 2011, Respondent, by Barrett, threatened an employee with unspecified reprisals in violation of Section 8(a)(1).

iii. Impression of Surveillance (Exceptions 13-17)

The ALJ correctly held that on or about April 28, 2011, Respondent, by Laura Peña, created the impression of surveillance of employees' Union activity in violation of Section 8(a)(1). (ALJD 14:4-5). As the ALJ explained, the Board's test for determining whether an employer has created an unlawful impression of surveillance is whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295-1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). (ALJD 13:36-40).

The ALJ correctly applied *Stevens Creek Chrysler, supra*, and *Conley Trucking*, 349 NLRB 308, 315 (2007), in which the Board held that an employer creates an impression of surveillance when it notifies its employees that it is aware of their union activities but fails to tell them the source of that information. In arguing that the ALJ's finding that Peña did not tell Williams how she became aware of the solicitation is contradicted by the evidence, Respondent mischaracterizes the record evidence, including its own witness's testimony. As Respondent notes, Peña testified:

We asked her to come in to talk about soliciting team members while they were working based on some concerns that were brought up by team members in two different situations. We brought her in the office and told her to please not solicit team members while she was working and that team member was working.

(Tr. 727:18-23). Contrary to Respondent's characterization of it, the cited testimony merely establishes *why* Peña called Williams into the office, not that Peña actually told Williams *how* she learned of the solicitation. A reasonable reading of the testimony shows that the first sentence is Peña's basis for calling Williams into the office ("we asked her to come in to talk about..."), and the second sentence is Peña's account of the meeting itself ("we told her to..."). Based on this testimony, Peña failed to tell Williams how she learned of the solicitation. This

interpretation is clarified by Peña's later testimony—conveniently omitted by Respondent—in which she recounts the meeting on cross-examination:

As a result of multiple team members telling me that they were being bothered and as a result of one of my leaders watching her talk to a team member, I asked her in the office and I asked her to please remember our policies and procedures going forward, that she can solicit just remember to not do it while other team members were working and she was working on the clock.

(Tr. 755). Once again, the testimony demonstrates *why* Peña called Williams into the office, but also, and most importantly, establishes that Peña failed to tell Williams the source of the information. Moreover, in this additional testimony, Peña admits that she also learned of the information from one of her team leaders who had "watched" Williams. (*Id.*) This clearly creates the impression of surveillance.

Besides mischaracterizing the evidence, Respondent inappropriately attempts to taint Williams' credibility by citing, without qualification, a rejected exhibit—a warning unrelated to the facts at issue in the Amended Consolidated Complaint. (Resp. Br. 40). The ALJ correctly recognized that it had no relevance, and properly excluded it, and testimony related to it. Respondent compounds its inappropriate reference to facts not in evidence by stating, without citation, that Williams' charge against Respondent was investigated and found to be meritless.

Based on the record evidence—the only evidence that can be considered—Williams' unrebutted, credible testimony established the violation on or about April 28, 2011 in Peña's office. Peña told Williams that it had been "brought to [her] attention" that she had been soliciting on behalf of the Union, and that she had to stop. (Tr. 296). As explained above, Respondent's own witness's testimony failed to establish that Peña communicated to Williams how she learned of Williams' solicitation. Thus, the ALJ, correctly applying *Stevens Creek Chrysler* and *Conley Trucking*, properly held that Williams reasonably assumed that her Union activity had been watched by Respondent. (ALJD 14:1-4). The Board should affirm the ALJ's

finding that Respondent violated 8(a)(1) of the Act by creating an impression of surveillance of her Union activities.

iv. Interrogation (Exceptions 18-22)

The ALJ correctly held that on June 9, 2011, Respondent, by Michael Casolino, in the parking lot, interrogated two employees regarding their activities on behalf of the Union. (ALJD 14:46-47). Respondent advances two arguments in support of its exceptions to the ALJ's finding. First, Respondent attacks the ALJ's well-grounded decision to credit Waddy's testimony over Casolino's. (Resp. Br. 40-41). Second, Respondent claims that Casolino's statements were not unlawful. (Resp. Br. 41). Both arguments are without merit.

The ALJ's decision to credit Waddy over Casolino is well-supported by the record evidence. As the ALJ noted, Waddy's account of the June 9, 2011 meeting in the parking lot with employees Devon Jones and Raul Stewart was "clear" and "precise." (ALJD 14:13-15). Even if there were somehow any doubt about her testimony, Waddy made a contemporaneous written report at the time of the incident which confirms her version of events. (GC Ex. 18). Respondent conveniently ignores this key evidence which leaves no doubt that Waddy's testimony was credible.

Similarly, the ALJ's decision not to credit Respondent's witnesses, and Casolino in particular, is equally well-supported by the record evidence. In contrast to Waddy's consistent testimony, Respondent's witnesses gave three contradicting accounts of what happened in the parking lot, with each one providing a different explanation as to how Casolino came to be in the parking lot. (Tr. 669-675, 728-729, 763, 680-690). As the ALJ recognized, Casolino testified that he approached Waddy alone as her was doing a "random walk" through the parking lot. (ALJD 14:18-19). Peña testified that she saw Waddy hand out leaflets and asked Casolino to tell

her to stop soliciting in the lot. (ALJD 14:19-21). Security guard Bharat testified that he asked Casolino to accompany him to approach Waddy and that he (Bharat) alone, spoke to Waddy. (ALJD 14:21-22). Waddy's contemporaneous report and consistent testimony must be credited over Respondent's witnesses' wildly inconsistent accounts, especially in light of the Board's well-established policy not to overrule an ALJ's credibility resolutions.

There is also no basis to disturb the ALJ's finding that Casolino's questioning the employees what they were doing constituted an unlawful interrogation. Respondent's argument that "simply stating 'what are you doing?' is not unlawful interrogation" completely ignores the context of Casolino's statement. The ALJ, however, properly applied Board precedent which requires that the statements be evaluated under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176 (1984). The ALJ recognized that given that Casolino knew Waddy, and knew that she was the main organizer for the Union, he was questioning the two employees solely to find out what their involvement with Waddy and the Union was. (ALJD 14:37-42). Based on the totality of the circumstances, including that the question was asked by Casolino, a manager, only a week before the election, the ALJ properly concluded that Casolino's statements tended to restrain, coerce, or interfere with the employees' right to engage in union activities and therefore constituted an unlawful interrogation. *Emery Worldwide*, 309 NLRB 185, 186 (1992).

Thus, the Board should affirm the ALJ's finding that on June 9, 2011, Respondent, by Casolino, in the parking lot, interrogated two employees regarding their activities on behalf of the Union in violation of Section 8(a)(1) of the Act

v. Enforcement of Respondent's Unlawful No-Solicitation Policy (Exceptions 40-58)

1. Peña's Meeting with Williams on April 28, 2011

As stated above, the ALJ correctly credited Williams' testimony of the meeting on April 28, 2011 in which Peña created an impression of surveillance of Williams' Union activities when she told her, "Sonya, I know we're in the midst of a campaign, but it has been brought to my attention that you are soliciting team members for the Union." (ALJD 22:5-7). The ALJ properly found, based on Williams' credible testimony, that during the same meeting, Peña unlawfully told her that she could not solicit anywhere on "Target premises," even while off-duty. (ALJD 22:32-33; Tr. 296-297).

Once again, Respondent failed to prove that the ALJ erred by crediting Williams over Peña. Not only was Williams' testimony credible, Peña's testimony actually corroborates Williams' version of the facts. Williams testified that in response to Peña's statement that she could not solicit anywhere on Target premises, even while off-duty, Williams asked Peña where she could solicit (e.g., "the break room?" "the parking lot?" "the [adjoining] parking lot?"). (ALJD 22:9-15; Tr. 296-297). Although Peña testified that she only told Williams that Williams could not solicit while she or other employees were on-duty (Tr. 727, 755), she admitted that Williams asked if she could solicit in Respondent's adjoining parking lot, and replied that she was not certain, but she would find out. (ALJD 22:24-26). As the ALJ observed, the emphasis of the conversation was on the *location* of the solicitation, not whether the employees were on-duty. (ALJD 22:34-35). There is no reason why Williams would ask *where* she could solicit while on-duty if Peña had told her that she could not solicit at all while on-duty. The only credible explanation is that Williams was asking where she could solicit, while on her break or off-duty, because Peña had told her she could not solicit anywhere on Target's premises at any time.

Respondent argues that there can be no violation because Williams later solicited employees after the unlawful statement was made. (Resp. Br. 42). That argument flies in the face of well-established Board law. As the Board plainly stated in *Hanes Hosiery*, 219 NLRB 338, 338 (1975):

We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent's motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act.

Even assuming *arguendo* that Respondent's unlawful statement was unsuccessful with respect to Williams, the record evidence nonetheless establishes that the statement violates Section 8(a)(1) because it reasonably tends to interfere with the free exercise of employee rights under the Act. The statement was made by the only store manager, in the manager's office and in the presence of another member of management, and in the context of other unfair labor practices. (Tr. 296-297, 727).

Thus, the Board should affirm the ALJ's finding that on April 28, 2011, Respondent, by Peña, enforced Respondent's unlawful no solicitation policy by directing Williams not to solicit anywhere on Respondent's premises.

2. "Think Hard: Protect Your Signature" Video

For the reasons argued above, the ALJ properly held that Respondent's No-Solicitation/No Distribution policies were unlawful. Respondent admitted that it showed a video notifying employees that "you can rely on us to enforce all solicitation, distribution, and harassment policies." (GC Ex. 6(a); 6(b), p. 17; Tr. 496). The ALJ properly held that Respondent thereby affirmed its intent to unlawfully enforce the unlawful No-Solicitation/No Distribution policies, in violation of Section 8(a)(1). (ALJD 29).

3. Stone's Conversation with Green on June 9, 2011

The ALJ correctly held that on June 9, 2011, Respondent, by Karrien Stone, outside of the employee entrance, unlawfully enforced Respondent's unlawful No Solicitation policy by directing employees not to solicit for the Union on Respondent's property. (ALJD 28:30-37). Respondent argues that the ALJ erred by crediting Green's testimony over Stone's. (Resp. Br. 43). However, the ALJ's decision to credit Green over Stone is based on sound record evidence.

As the ALJ found, Green credibly testified that on June 9, 2011, Stone told Green, who was off duty and talking to an employee about the Union, that she could not solicit on Target's property. (ALJD 28:30-32). Not only was Green's testimony about the incident clear and concise, it is corroborated by her sworn affidavit taken by a Board Agent only one day after this incident occurred, on June 10, 2011. (See Resp. Ex. 3). As it improperly attempted to do with Williams, Respondent attempts to tarnish Green's credibility by brazenly referring to conclusory, unproven facts about her termination that are neither relevant nor contained in the record. (See Resp. Br. 44). Besides being highly inappropriate, Respondent's argument clearly fails in light of the Board's reluctance to disturb an ALJ's credibility determination.

In stark contrast to Green's testimony, the ALJ recognized that Stone's version of the incident was implausible. Stone testified that she only told Green to move away from the employee entrance because Green was blocking the door. (Tr. 976, 1006). As the ALJ noted, it would make no sense for Green to bother or block employees from entering, as Stone testified, when she was attempting to interest employees in the Union. (ALJD 28:34-35). Similarly, the ALJ also noted that it would make no sense for Green to stand in a place where she would be subjected to being hit by the door. (ALJD 28:35-37). Although Stone testified that she approached Green with a security guard, she would not have needed a security guard to accompany her if she was merely asking an employee to move away from the door. This

suggests an intention to convey power, or that Stone was anticipating a confrontation. In addition, Stone's testimony was not corroborated. Respondent, without any explanation, failed to call the security guard as a witness. (Tr. 976).

Further, Stone was not a credible witness. Throughout her testimony, she repeatedly could not recall events that other Respondent witnesses testified to. (Tr. 974). She had no recollection whatsoever of the meeting in Laura Peña's office where she and Peña instructed employee Sonia Williams not to solicit (Tr. 974) even though Peña testified to it and to Stone's involvement. (Tr. 727, 755). She also testified that she attended five or six of the 25th hour meetings run by Derek Jenkins, but did not recall him discussing the fact that the Valley Stream store had closed before (Tr. 983, 1003)—a fact that Jenkins himself testified to. (Tr. 849-850).

The Board should affirm the ALJ's finding that on June 9, 2011, Respondent, by Stone, violated Section 8(a)(1) by enforcing Respondent's unlawful No Solicitation policy by directing Green not to solicit for the Union on Respondent's property.

IV. CONCLUSION AND REMEDY (Exceptions 77-79)

In his Decision, the ALJ's findings of fact are based on a well-reasoned analysis of probative record evidence. Moreover, the ALJ accurately applied Board law to the facts of this case. In doing so, he correctly found that Respondent violated Section 8(a)(1) by maintaining numerous handbook provisions and through other statements and conduct. Thus, the Board should overrule Respondent's 79 exceptions and affirm the ALJ's rulings, findings of fact,

conclusions and proposed remedy, except as noted in the General Counsel's limited exceptions.

Dated at Brooklyn, New York, July 27, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Berger", written over a horizontal line.

Michael Berger
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National Labor Relations Board
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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

TARGET CORPORATION

29-CA-30804

and

29-CA-30820

29-CA-30880

29-RC-12058

**UNITED FOOD & COMMERCIAL WORKERS
LOCAL 1500**

Date: July 27, 2012

**STATEMENT OF SERVICE OF:
COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO
RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

By E-File

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