

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

_____	X		
TARGET CORPORATION	:		
	:		
Respondent,	:		
	:	Case Nos.	29-CA-30804
-and-	:		29-CA-30820
	:		29-CA-30880
UNITED FOOD AND COMMERCIAL WORKERS	:		29-RC-12058
LOCAL 1500	:		
	:		
Charging Party.	:		
_____	X		

**BRIEF OF CHARGING PARTY UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 1500 IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. THE ALJ ERRED BY FAILING TO ORDER A NATIONWIDE REMEDY FOR THE HANDBOOK VIOLATIONS [EXCEPTION 1-3]

The ALJ erred by failing to require that the Employer post the Notice at all of its facilities nationwide, to cease and desist and take affirmative action regarding the Handbook rules he found to be unlawful. The ALJ found that Respondent violated Section 8(a)(1) of the Act by promulgating and since maintaining eight¹ rules in its 2009 Team Member Handbook, four of which also appear in its 2011 Team Member Handbook (collectively, “Handbook”). ALJD 36-37. The ALJ stated:

Inasmuch as I have found the Respondent has maintained unlawful rules in its Handbook, I shall recommend that it be ordered to rescind those rules, remove them from the Team Member Handbook, and advise its employees in writing that these rules are no longer being maintained or enforced.

ALJD 37:50-38:2.

The ALJD recommended, *inter alia*, that Respondent be ordered to do the following:

- 1) cease and desist from maintaining and enforcing the rules in its Team Member Handbook found to be unlawful, three of which he described as applicable only to the Valley Stream store; ALJD 38: 12-44;
- 2) rescind the unlawful rules, remove them from the Team Member Handbook and advise its employees in writing that the rules are no longer being maintained or enforced. ALJD 39:20-21; and
- 3) post at its facility in Valley Stream, NY copies of the recommended Notice, which referenced the misstated rules. ALJD 39: 23-24.

¹ The Complaint alleges and the ALJ found eight unlawful rules. Two rules similarly describe Respondent's No Distribution Policy (Cmplt P 7(a) & 8(b)) and three relate to the use of confidential information and fall under Respondent's Information Security Policy (Cmplt P 7(b),(c) & (d)). The ALJ grouped these rules together in five categories. For clarity, we adopt the ALJ's convention of referring to five categories of rules, but maintain that Respondent promulgated and maintained eight rules, as the ALJ found.

FACTS

The Employer operates 1755 retail stores nationwide. ALJD 2:47-48. Target's Human Resources department is based at Respondent's headquarters in Minneapolis ("Headquarters"). ALJD 3:9-10; Tr. 503, 579, 602.² The Human Resources department sets uniform employment policies for all Target stores nationwide. Tr. 579. Its Employee Relations team prepares the Handbook. Tr. 617. Target's Labor Relations team at Headquarters directed the Employer's antiunion campaign and dispatched personnel to assist with it at the Valley Stream store. Tr. 490-92, 654-55, 660, 773, 837-47.

Dawn Major, who is Human Resources director for Respondent's East Coast Region and is located at Headquarters, has responsibility for 443 stores. Tr. 576-77. She testified regarding overall corporate policies and the preparation, application, and distribution of the Handbook. She also testified regarding application of the rules found to be unlawful. ALJD 18:1-26, 19:14-19, 33:23-24. Explaining distribution to employees of any updates of the Handbook, she testified:

Given the number of team members that are employed at Target in the hundreds of thousands, it would be you know, not cost effective to recreate copies each time we have a handbook updated.

Tr. 584. Major testified that all employees acknowledge receipt of the handbook upon hire and that the acknowledgements are kept in Headquarters. Tr. 584.

The content of the Handbook itself confirms its nationwide applicability. See, for example, a message from Executive Vice President of Human Resources Jodee Kozlak (GC Ex. 8 at 1); the specification of legal requirements by state, e.g., State Specific Rest Break and Meal

² We cite to Respondent's Brief in Support of Exceptions as R Br. ____; to the hearing transcript as Tr. ____; to the parties' hearing exhibits as R Ex. ____, CP Ex. ____, and GC Ex. ____.

Break Rules, GC Ex. 8 at 25; GC Ex. 9 at 29; FMLA rules applicable in California, GC Ex. 8 at 30-31 and Ex. 9 at 33-35; and the instruction that employees use the Handbook as a guide to learn about company policies and expectations. GC Ex. 8 at 7; GC Ex. 9 at 33.

The ALJ's recommended Order provides that, *inter alia*, Target "shall cease and desist from (a) [m]aintaining and enforcing the following rules in our Team Member Handbook." ALJD 38:10-14. This injunction is followed by a list of the eight rules and policies found unlawful; three of which he limits to Valley Stream:

A no-distribution rule that prohibits its employees from distributing any literature at any time on its Valley Stream premises, which include non-work areas. ALJD 38:16-71;

A No Solicitation/No Distribution Policy prohibiting solicitation or distribution of literature by its employees at all times at the Valley Stream facility and premises, which includes non-work areas. ALJD 38:36-38;

A Parking Lot policy directing its employees to report anyone they do not know who is loitering in its Valley Stream parking lot. ALJD 38:43-44.

In fact, however, the Handbook text contains no reference to the Valley Stream store or any of Target's other 1754 retail facilities. See GC Exs. 8 & 9 *passim*.

ARGUMENT

Board Law Requires that Respondent Post a Notice Nationwide that References All Unlawful Handbook Rules, Cease and Desist and Take Affirmative Action Regarding All Unlawful Handbook Rules At All Its Facilities and Advise All Employees at All Stores Nationwide Regarding All Unlawful Handbook Provisions.

Where an Employer's unlawful policies are maintained companywide, the Board remedy will apply to all of its facilities. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005); *Albertsons, Inc.*, 300 NLRB 1013, 1013 n.2 (1990). The ALJ found that the Handbook, which is in use nationwide, contains unlawful provisions. However, he failed to order that a remedial notice be posted at all Target locations nationwide. Therefore, the Board should modify the ALJ's Order

to provide for a nationwide posting. See *Guardsmark* 344 NLRB at 809 (modifying the ALJ's proposed order to require nationwide posting when ALJ had required only a single facility posting); *Longs Drug Stores California, Inc.*, 347 NLRB 500, 501 (2006) (same); see also *Cintas Corp.*, 344 NLRB 943, 943-44 (2005) (upholding ALJ order of nationwide posting and notification to all employees of the rule rescission).

A nationwide remedy is required because the Record shows that the Handbook is applicable to employees at all Target stores. The Handbook, distributed to employees nationwide, instructs employees to use it to "learn what Target expects from you" in addition to enumerating certain reporting obligations for violations of rules, such as appear in the no solicitation / no distribution and information security rules. See GC Ex. 8 at 44, and 53-54. See also, ALJD 36:20-21. Respondent's personnel operations are highly centralized, as is confirmed by the fact that Headquarters directed the anti-union campaign at the Valley Stream store. The Minneapolis Headquarters formulates personnel policies and gives representatives at the local and regional level instructions regarding policies distributed nationwide. Major, a Headquarters executive, described only one Handbook, which she testified was issued by Headquarters. She testified that corporate policy regarding distribution of the Handbook requires that employees acknowledge receipt upon hire in writing and that the acknowledgements are retained at Headquarters. Major confirmed that the Handbook applies to "hundreds of thousands" employees. Further, the Handbook on its face shows it is used nationwide, as portions reference state-specific employment laws. Thus, as in *Long Drug Stores* and *Guardsmark*, the undisputed evidence shows that the Handbook is applied nationwide. Compare *Marriott Corp.*, 313 NLRB 896, 896 (1994) (finding no merit to General Counsel's exceptions to the ALJ's single facility

posting where there was no evidence that the unlawful rules were promulgated or maintained at any other facilities).

Moreover, consistent with *Guardsmark*, we urge that the ALJ's order be clarified to explicitly require Respondent to notify all employees nationwide in writing that the rules are no longer being maintained or enforced. In *Guardsmark*, the Board rejected the judge's remedy that permitted the employer to rescind the unlawful provisions when it next issued a revised handbook in the future. 344 NLRB at 811-12. In reversing, the Board held that "immediate rescission of the unlawful rules and modification of the handbook will best effectuate the remedy ... that certain of Respondent's work rules unlawfully chill the exercise of employee rights under Section 7." *Id.* The ALJ's Remedy and Order is ambiguous as to Respondent's obligations. The ALJ found eight rules in the Handbook unlawful and has ordered them to be rescinded. The record is clear that the Handbook is in use nationwide. Neither operationally nor lawfully could Respondent rescind the rules at Valley Stream, but fail to do so at its other store locations.

Therefore, the Board should order that Respondent immediately notify employees at all locations nationwide of the rescission. Otherwise, the hundreds of thousands working at stores other than Valley Stream will not know that they may engage in protected conduct without fear of being subjected to the unlawful rules under threat of discipline for any violation. *Id.* at 812; see also *Cintas Corp.* 344 NLRB at 943 (2005) (rejecting respondent's argument that requiring it to notify all employees nationally is unduly burdensome).

Respondent may argue that a national remedy is not warranted because the issue was not raised before the ALJ. This argument has no merit and this request is properly before the Board. A party is entitled to file exceptions regarding the scope of the judge's remedy for the violations found. *Utility Workers Union of America*, 356 NLRB No. 158, slip op. at 1 (2011) (modifying

order in light of exceptions filed regarding scope of judge's remedy for violations found). Charging Party is entitled to make this request for a nationwide remedy, regardless of whether General Counsel files a similar exception. *Kaumagraph Corp.*, 313 NLRB 624, 625 (1994). A nationwide posting is the standard remedy for unlawful rules in handbooks that are used by companies nationwide. See e.g. *Guardsmark*; 344 NLRB at 809, *Cintas*, 344 NLRB at 943-44. It is not a special remedy that would have required pleading in the complaint. See Casehandling Manual, Part One, Sec. 10266.1 Moreover, this case is in the same posture before the Board as were *Guardsmark* and *Long Drug Stores*, i.e., reversal of an ALJ decision that failed to order a national remedy, where, as here, there was record evidence that the rules were applied nationally.

Therefore, we urge the Board to modify the ALJ's order to require a nationwide remedy for the Handbook violations he found. Accordingly, the Order and Notice should be modified to require Respondent to 1) cease and desist companywide from maintaining and enforcing all eight Handbook violations found unlawful; 2) take the affirmative action at all stores nationwide of rescinding, removing from the Handbook, and giving notice of rescission to its employees that the rules are no longer being maintained or enforced; and 3) post at all stores nationwide an amended Notice setting forth all remedies of the Handbook violations. The Notice posted at Valley Stream store should include remedial language for the additional Section 8(a)(1) violations found at Valley Stream.

In the alternative, should the Board view the record as not having presented Respondent with sufficient opportunity to present for certain stores "special circumstances" justifying a given store's exemption from the nationwide remedy under *Raley's, Inc.* 311 NLRB 1244, 1244 n.2 (1993), it should remand the case for hearing on that limited issue.

II. THE ALJ ERRED BY OMITTING FINDINGS FROM THE CONCLUSIONS OF LAW. [EXCEPTIONS 4-6]

As alleged in Complaint ¶10(a), the ALJ found that Respondent unlawfully created the impression in employee Sonia Williams that her Union activities were under surveillance. ALJD 14:3-4. Also, as alleged in Complaint ¶11, the ALJ found that Respondent threatened employee Tashawna Green with unspecified reprisals for her support for and/or activities on behalf of the Union. ALJD 13:25-26. Yet, the ALJ failed to include either of these two legal conclusions in his recommended Conclusions of Law, Order or Notice. ALJD 36-40, Appendix. We request that the Board make the following additions to the Conclusions of Law:

Respondent has violated Section 8(a)(1) of the Act:

By giving employees the impression that their activities on behalf of the Union were under surveillance.

By threatening employees with unspecified reprisals for their support and/or activities on behalf of the Union.

We request that the Board make the following additions to the recommended Order:

Respondent shall cease and desist from ...

Giving employees the impression that their activities on behalf of the Union are under surveillance.

Threatening employees with unspecified reprisals for their support for and / or activities on behalf of the Union.

We request that the Board make the following additions to the proposed Notice:

WE WILL NOT give you the impression that we are monitoring your Union activities.

WE WILL NOT threaten you with unspecified reprisals for engaging in Union activities.

III. THE ALJ ERRED BY FAILING TO ORDER AN ELECTRONIC POSTING OF THE NOTICE. [EXCEPTION 7]

The ALJ erred in failing to require that the remedial notice be distributed electronically. *J. Picini Flooring*, 356 NLRB No. 9, slip op. at 1 (2010). In *J. Picini*, the Board modified the Board's standard remedial notice language to add a provision for electronic posting. 356 NLRB No. 9, slip op. at 4.

The Board held in *J. Picini* that whether an electronic notice is appropriate in a given case is to be resolved at the compliance stage. *Id.* at 4. The Board has since confirmed that holding. See e.g., *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 1 n.2 (2011) (modifying the ALJ's order to provide for the posting of the remedial notice in accordance with *J. Picini*, notwithstanding the ALJ's finding that the record did not justify electronic postings). We urge the Board to modify the recommended Order at Section 2(b) concerning posting obligations, to include the following language as required by *J. Picini*:

In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

J. Picini, 356 NLRB No. 9, slip op at 4.

IV. THE ALJ ERRED BY FAILING TO MAKE AN EXPLICIT FINDING THAT A VIDEO REINFORCING THE UNLAWFUL NO SOLICITATION/NO DISTRIBUTION POLICIES WAS SHOWN DURING THE CRITICAL PERIOD. [EXCEPTION 8]

The Representation Case section of the Decision, ALJD 34-36, identified Respondent's conduct during the critical period³ that required setting aside of the election. The ALJ stated twice that Respondent's showing of the video, which told employees that Target would enforce

³ The critical period commenced on April 21. See GC Ex. 1, *Report on Objections*, 1/20/12, p.6, n. 2.

its no-solicitation/no-distribution rules, constituted objectionable conduct. ALJD 36:12-13, 21-22. He therefore had found that the video was shown during the critical period, as opposed to what he called the course of the campaign, but failed to explicitly articulate this finding.

The ALJ found that, during the course of the campaign, Respondent showed videos, ALJD 3:4-5, at mandatory employee meetings that took place between April and June 2011. ALJD 5:39-42. One video was titled “Think Hard Protect Your Signature”, which contained the message that “you can rely on us [Target] to enforce all solicitation, distribution, and harassment policies.” ALJD 6:1-3; 28: 12-14; GC Ex. 6. The ALJ relied on the showing of that video to support his decision to overturn the election because its unlawful message was disseminated to the entire bargaining unit. ALJD 36:12-13, 21-22.

The ALJ did not make an explicit finding as to when between April and June the Respondent showed employees the “Think Hard Protect Your Signature” video. He found only that Pena showed this video at the first series of Respondent’s anti-union meetings during the campaign period.⁴ However, the record evidence establishes clearly that Respondent ran a video containing the message that Respondent would enforce its unlawful no solicitation/no distribution rules at employee meetings during the *critical period* and therefore the ALJ was correct to rely on it.

Two videos with very similar titles were received into evidence: “Think Hard Protect Your Signature” (GC Ex. 6) and “Think Hard Before You Sign.” CP Ex. 4. Employee witnesses testified that they were shown one or the other or both of them during the critical period, either at a Respondent anti-union meeting or at a new hire orientation.⁵ As their titles suggest, the two

⁴ Others witnesses testified that they saw the videos at meetings run by the HR team See, *e.g.*, Tr. 947.

⁵ See *infra* notes 10-14.

videos are virtually identical. GC Ex. 6(a) and (b) and CP Ex. 4(a) and (b).⁶ Each features one male and one female actor, both dressed in the Target uniform of a red shirt and khaki slacks, standing in a Target store.⁷ Similar graphics appear in each video. The thrust of each video is the same: unions are a business only interested in collecting employee dues and have no place at Target. Both videos emphasized that Target will enforce the unlawful no solicitation/no distribution policies. Their dialogues are nearly indistinguishable:

RICARDO: At Target, we recognize your right to join a union. But we also recognize your right NOT to join. You have the right to refuse.

ABBY: You also have the right to work without fear of union harassment or solicitation. So if you're ever approached while on-the-job or anywhere else, you have the right to discuss the situation with any member of the leadership team.

RICARDO: **And you can rely on us to enforce all solicitation, distribution, and harassment policies.** Unions want you to hurry up and sign. And start paying dues. But what do YOU want?

“Think Hard Protect Your Signature,” GC Ex. 6(b) at 16-17 (emphasis added).

-and-

DOUG: You'll always have the right to make a choice here at Target. And that includes refusing to sign any union authorization.

MARIA: You also have the right to work without fear of union harassment or solicitation. If you're approached while you are working, you have the right to discuss the situation with any member of the leadership team. Remember, the door is always open and you can speak with them directly. **Target will enforce solicitation, distribution, and harassment policies.**

DOUG: That's right. We feel strongly that once you learn the

⁶ CP Ex. 4 is also known as the “Gawker video” because it appears on the Gawker website. Tr. 706 Some witnesses referred to CP Ex 4 as the Gawker video rather than by its title, “Think Hard Before You Sign.”

⁷ Respondent showed several videos during the campaign period. ALJD 6 and 7:1-11. The two “Think Hard” videos are the only videos in evidence that show people dressed in Target uniforms.

facts, you'll decide that having a union at Target might benefit the union because they could collect your dues.

MARIA: But it's not in the best interest of the company or the team members.

"Think Hard Before You Sign," CP Ex. 4(a) at 5 (emphasis added). Scripts of both videos are GC 6(b) and CP 4(b), respectively.

"Think Hard Before You Sign" (CP Ex 4) has an African-American actress and a Caucasian male actor. "Think Hard Protect Your Signature" (GC Ex. 6) has an Hispanic actress and an Hispanic actor. Respondent labor/human relations representatives admitted that CP Ex. 4 and GC Ex. 6 have similar content and the actors in both appear in the same context (Tr. 508-509). GC Ex. 6 is an update of CP Ex. 4. Respondent witnesses testified that "Think Hard Before You Sign" (CP Ex. 4) is the older of the two (Tr. 512) and referred to it as the "old" video (Tr. 1014) and to GC Ex. 6 as the "new" video (Tr. 716, 1015).

Throughout April, May and June 2011, Respondent held a series of mandatory meetings at which Respondent showed several anti-union Target videos. The ALJ found, and Respondent's witnesses testified, that Respondent showed employees "Think Hard Protect Your Signature" at these meetings. GC Ex. 6; Tr. 493-97, 716, 747. However, Respondent's representatives disagreed as to exactly when that video was shown. Labor Relations Group Manager Equez testified that GC Ex. 6 was first shown "in early April" and that it was shown numerous times. Tr. 497 - 498. However, Equez was not present when it was shown. Tr. 492. Store Team Lead Pena testified that she held anti-union meetings at which "Protect Your Signature" was shown "I think like April." Tr. 716, 747. Executive Team Lead, HR Stone was

certain that “Think Hard Protect Your Signature”⁸ was not shown in the store until the end of June, because that was when it “was released.” Tr. 1014-15.

HR representative Stone and Store Team Lead Pena also disagreed regarding when rollout of “new” video (GC Ex. 6) occurred. Stone testified that “the new one . . . was released at the end of June” (Tr. 1015), but Pena maintained that the “new company rollout on a video . . . a Think video” was in April (Tr. 716).

HR representative Stone admitted that, in addition to the anti-union meetings, Respondent held new hire orientation sessions at the Valley Stream facility on April 22, April 29, April 30, May 3 and May 7, all of which were during the critical period. Tr. 1013-14, CP Exs. 12, 13. Stone further admitted that Respondent showed a video at new employee orientations, which she referred to as the “regular” video (Tr. 1015), and beginning in June, the “new” video (GC Ex. 6) was shown at orientations (Tr. 1011-1012).

The uncontradicted testimony of Jason Daley, a new hire, establishes that the “Think Hard Before You Sign” video (CP Ex. 4) was shown during the April 30 orientation he attended. Tr. 1037-38, 1042-43. Indeed, given Stone’s differentiation of the “new” video (G.C. Ex. 6), first shown in June, from the “regular” video, shown at orientations prior to June, a reader of the record could reasonably conclude that the “regular” video is CP Ex. 4.⁹

⁸ Executive Team Lead, Human Resources Stone confused the titles of the two videos; she incorrectly testified that “the old one . . . with the black girl” was named “Think Hard Protect Your Signature” (Tr. 1014).

⁹ Charging Party’s subpoena required Target to produce any additional videos that might have been shown at orientation; none were produced. (Tr. 1015). We request that the Board draw an adverse inference that one of these two “Think Hard” videos were shown at the new hire orientation sessions held during the critical period. CP’s subpoena requested “For the period of June 30, 2009 to June 30, 2011, copies of any videos shown at new employee orientations.” (GC Ex. 14). After fighting, unsuccessfully, for protective orders (Tr. 31-34, 47-61, 348, 495-96) and repeatedly misrepresenting the number of videos shown (Tr. 160, 166, 205-208, 348, 405-07), Respondent reluctantly produced only the following videos: “Think Hard Protect Your Signature” (GC Ex. 6), “Think Hard Before You Sign” (CP Ex. 4), “The Essentials of Collective Bargaining”, and “The Essentials: Strikes.” (Tr. 492-93, 706).

Multiple employee witnesses testified that Respondent held anti-union meetings between May and early June at which one of the two “Think Hard” videos was shown. Brown Tr. 533-535, 537-538;¹⁰ Green Tr. 548-51;¹¹ Bracey Tr. 553-58, 561-62;¹² Wilson Tr. 810-15;¹³ Smaine Tr. 924, 928;¹⁴ King Tr. 946-947, 956.¹⁵ Just as HR Executive Team Lead Stone confused the names of the videos, given the videos’ identical format and message, it would not be surprising if employees confused the order in which they saw the two “Think Hard” videos during the critical period.

In sum, the testimony of both Respondent representatives and employee witnesses establishes indisputably that at least one “Think Hard” video emphasizing that Target will enforce the unlawful no solicitation/no distribution rules was shown during the critical period at both Respondent anti-union employee meetings and new hire orientations. Regardless of which “Think Hard” video it was - - “Think Hard Protect Your Signature” or “Think Hard Before You Sign” or both - - the record reflects that a video reinforcing the unlawful rules and that the Union is a business, was widely shown during the critical period.

¹⁰ Brown testified she watched CP Ex. 4 at an anti-union meeting “in May” (Tr. 537) and saw GC 6 “two or three weeks before the election” Tr. 538-539.

¹¹ Green testified she was shown GC Ex. 6 “around the ending of May”, around her daughter’s birthday Tr. 548-549, 551.

¹² Bracey testified she saw GC Ex. 6 “in the beginning of May” (Tr. 557) and that the last video she saw was CP Ex. 4 “two and a half weeks” before the election Tr. 558, 560. Referring to CP Ex. 4, Bracey testified that “I remember that there’s a black girl in here . . . [b]ecause the others that I saw didn’t have black people, you know, really upfront talking” (Tr. 554); “that black woman with the bad [hair] weave” (Tr. 558); “I remember her because, you know, we were talking about, you know, her weave, and it should have been a litter (sic) perm up in there, cause it was nappy up there” (Tr. 560).

¹³ Wilson, who was a Respondent witness, testified she saw two different videos, both showing people in Target uniforms, at Respondent’s first and second employee meetings. Tr. 811-813, 815. As noted, GC Ex. 6 and CP Ex. 4 are the only videos in which people wear Target uniforms.

¹⁴ Smaine, a Respondent witness, testified that he was shown a video in which the people were wearing Target uniforms (Tr. 924) at the beginning of June, before the election (Tr. 927-928).

¹⁵ In response to Respondent counsel’s question if he attended any employee meetings “April through June, the election date” (Tr. 946), Respondent witness King testified he saw “Think Hard Protect Your Signature” at an employee meeting run by the HR team (Tr. 947, 956).

V. THE ALJ ERRED BY FAILING TO EXPLICITLY RELY ON THE WIDE DISTRIBUTION OF THE STORE CLOSING LEAFLET AND THE ADDITIONAL SECTION 8(a)(1) THREATS, INTERROGATION, AND IMPRESSION OF SURVEILLANCE IN SETTING ASIDE THE ELECTION. [EXCEPTION 9]

As the ALJ found, Respondent committed numerous unfair labor practices during the critical period. Applying *Dal Tex Optical Co.*, 137 NLRB 1782 (1962), the ALJ found that the unfair labor practices constituted objectionable conduct that warrant setting aside the election. ALJD 36:24-28. In addition to relying on the Handbook violations, the ALJ explicitly pointed to his findings that Respondent reinforced the unlawful no solicitation no distribution rules during the campaign period by showing the “Think Hard Protect Your Signature” video to employees; the evidence that those rules were enforced against employees; the evidence that the rules were not rescinded; and that employees received the Handbooks upon their hire and certified that they read the Handbook. ALJD 36:12-22. By sustaining all the objections to the election alleged, the ALJ relied implicitly on the additional objections found, which include the store closing leaflet distributed to all employees (ALJD 11:49-50); the interrogation of employees as to their Union activities (ALJD 14:46-47); and the threat that employees would be disciplined for supporting the Union. ALJD 13:25-26.

The ALJ correctly found Respondent’s leaflet entitled “WILL THE STORE CLOSE IF THE UNION GETS IN?” to be an unlawful threat to close the store should employees select the Union (ALJD 11:49-50) and, under *Dal-Tex Optical Co.*, to interfere with the election.¹⁶ ALJD 34:52 – 35:5; See GC Ex. 4. Respondent distributed the leaflet to all employees before the election. ALJD 4:25 & 10:50; Tr. 80-81, 86-87, 298-99, CP Ex. 1.

¹⁶ We argue in our Answering Brief to Respondent’s Exceptions, at Point II, that the ALJ’s finding was supported by the record and by Board law.

The ALJ erred by not explicitly relying upon the wide distribution of the store closing leaflet to set aside the election. Threats of plant closure have long been viewed as handedly destroying laboratory conditions and are among the “hallmark” violations that warrant setting aside an election. See *Gissel Packing Co.*, 395 U.S. 575, 618 (1969); *Jamaica Towing Co.*, 632 F.2d 208, 212 (2d Cir. 1980). Not only did Respondent distribute its threatening leaflet to all employees, Pena, the highest ranking manager in the store, signed the leaflet. See GC Ex. 4. The wide-spread distribution of this threat alone, and certainly in conjunction with Respondent’s other unlawful conduct, supports the ALJ’s decision to set aside the election. *The Jewish Home for the Elderly of Fairfield*, 343 NLRB 1069, 1121-23 (2004), *enf’d*, 174 Fed. Appx. 631 (2d Cir. 2006) (setting aside an election based on multiple unfair labor practices that, taken cumulatively, affected the entire bargaining unit). See *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1019 (2001) (setting aside an election based on a single 8(a)(1) unfair labor practice of maintaining a single unlawful handbook rule because that rule applied to the entire bargaining unit); *Vestal Nursing Ctr.*, 328 NLRB at 103-04 (setting aside an election based in part on determination that misconduct affected the entire bargaining unit); compare *Clark Equipment Co.*, 278 NLRB 498, 504-05 (1986) (absence of widespread dissemination was a critical factor in the Board’s decision to let the election results stand).

Similarly, Respondent’s interrogation of employees in the parking lot, which the ALJ found unlawful (ALJD 14:46-47), occurred in front of several employees while employees were getting off work. ALJD 9:13-19; 10:32-34; Tr. 218-25, 273, 286. Therefore, this threat, too, can be presumed to have been widely disseminated.

We request that the Board clarify the ALJ's decision to reflect that the election was properly set aside due to the wide distribution of the store closing leaflet and the parking lot interrogation, in addition to the other allegations found.

VI. THE ALJ ERRED BY FAILING TO GRANT CHARGING PARTY'S MOTION TO PRECLUDE RESPONDENT FROM ADDUCING EVIDENCE THAT EMPLOYEES ENGAGED IN UNION ACTIVITIES IN APPARENT CONTRAVENTION OF THE HANDBOOK RULES. [EXCEPTION 10]

Over Counsel for the General Counsel's and Charging Party's repeated objections, the ALJ permitted Respondent to elicit testimony regarding employees' alleged contravention of the Handbook rules and received all Union campaign literature into evidence. R. Ex. 5-23; Tr. 124-126, 242-45, 382-83. The ALJ denied Charging Party's post-hearing motion to reconsider his rulings. ALJD 33:49-51, n.9.

The Complaint alleged Respondent unlawfully "promulgated" and "maintained" various rules in its handbook. Cmplt ¶¶ 7 & 8. Board law is clear that the "mere maintenance" of an overbroad and unlawful policy is sufficient to establish a violation. *Cintas Corp.*, 344 NLRB at 946 (2005) *enf'd.*, 482 F.3d 463, 470 (D.C. Cir. 2007). It is also true in the objections context. See *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 31 (2011).

Over Charging Party's standing objection, Respondent cross-examined multiple witnesses as to whether they had seen the Union literature, from whom they may have received it, and whether they distributed it. The ALJ allowed Respondent to elicit testimony regarding compliance with all of the alleged unlawful rules. Both the receipt of the Union literature and the line of questioning were improper because, under Board law, the sole issue was whether the rules were maintained. See Tr. 124-126, 242-45, 382-83. We urge the Board to grant Charging Party's motion and strike all record evidence regarding employees' alleged contravention of rules.

VII. THE ALJ INADVERTENTLY REFERRED TO THE UNLAWFUL CONFIDENTIALITY RULE AS THE “AFTER HOURS” RULE. [EXCEPTION 11]

In his discussion of the Information Security Policies, the ALJ inadvertently referred to the unlawful confidentiality rule as the “after hours” rule. See ALJD 25-27. We request that the sentence in which this error appears be corrected to read: "I accordingly find and conclude that the maintenance of the "information security policies" would reasonably tend to chill employees in the exercise of their Section 7 rights." See ALJD 27:19.

Dated: July 27, 2012

Respectfully submitted,

/s/ Jessica D. Ochs

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief in Support of Cross-Exceptions of UFCW Local 1500 to the Decision of the ALJ to be filed electronically via the NLRB's e-filing system. I further certify that I caused copies of the Exceptions to be served by e-mail upon:

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this 27th day of July, 2012.

/s/ *Jessica D. Ochs*
Jessica Drangel Ochs