

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

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

ANSWERING BRIEF OF CHARGING PARTY UNITED FOOD AND  
COMMERCIAL WORKERS LOCAL 1500 TO RESPONDENT'S EXCEPTIONS

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## PRELIMINARY STATEMENT

Charging Party United Food and Commercial Workers Union Local 1500 (“Charging Party” or “the Union”) respectfully submits this Answering Brief to Respondent’s Exceptions to the Administrative Law Judge’s (ALJ) Decision of May 18, 2012. The ALJ found Respondent committed numerous unfair labor practices that interfered with the June 17, 2011 Board conducted election and directed that its results be set aside and a second election be conducted. With limited exception, the ALJ’s findings and conclusions should be affirmed.<sup>1</sup>

On April 21, 2011<sup>2</sup>, the Union filed a petition to represent employees at the Target Valley Stream store location.<sup>3</sup>

During the critical period from April 21 through June 17, as the ALJ found, the Respondent engaged in numerous unfair labor practices and objectionable conduct, which had the purpose and effect of preventing its workers from exercising their Section 7 rights and making a free choice regarding unionization. Respondent threatened closing of the store if the employees voted for the Union; threatened employees with discipline and unspecified reprisals for their Union activity and support; maintained eight<sup>4</sup> unlawful handbook provisions; enforced those unlawful provisions; required employers to view anti-union videos that reiterated its unlawful handbook policies prohibiting solicitation and distribution; and interrogated employees regarding their Union activities. In light of these findings, the ALJ correctly set aside the election results.

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<sup>1</sup> See Charging Party’s limited exceptions to the ALJ’s Decision (“ALJD”) filed July 27, 2012.

<sup>2</sup> All dates occur in 2011 unless otherwise indicated.

<sup>3</sup> A petition in Case No. 29-RC-12030 was filed on April 21, 2011, and withdrawn on May 11, 2011. A petition was filed on May 10, 2011 for the same unit. *Report on Objections* at 6, n.2.

<sup>4</sup> The Complaint alleges and the ALJ found eight unlawful rules. Two rules similarly describe Respondent’s No Distribution Policy (Cmplt ¶ 7(a) & 8(b)) and three relate to the use of confidential information and fall under Respondent’s Information Security Policy (Cmplt ¶ 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.

We address Respondent's Exceptions to the Handbook rules, the store closing leaflet, as well as the ALJ's direction of a second election.

### **FACTS**

The relevant facts have been set forth in the ALJ's decision, except as noted herein, and argued in Charging Party's Exceptions to the ALJD.

### **ARGUMENT**

#### **I. The ALJ Correctly Found that the Handbook Provisions Violate Section 8(a)(1) because They Reasonably Tend to Chill Employees in the Exercise of their Section 7 Rights.**

##### **A. The ALJ Applied the Correct Standard**

Under Board law, an employer rule will be found unlawful, even if it does not explicitly restrict activity protected by Section 7, upon a showing of any one of the following:

- (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.

*Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has long held, with Court of Appeals affirmation, that “mere maintenance” of a rule that “would reasonably tend to chill employees in the exercise of their Section 7 rights” is an unfair labor practice “even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). See also *Cintas Corp.*, 344 NLRB, 943, 946 (2005) *enfd.* 482 F.3d 463, 467 (D.C. Cir. 2007) (“mere existence of such a rule, even if it is not enforced constitutes an unlawful interference with employees’ Section 7 rights in violation of Section 8(a)(1) of the Act.”); *Custom Trim Products*, 255 NLRB 787, 788 (1981) (no evidence that the rule was implemented; rule’s mere existence “tended to ‘inhibit the union activities of conscientious minded employees.’”). The test applied under *Lutheran Heritage* is objective – how would a reasonable employee construe the rule. *Lutheran*

*Heritage*, 343 NLRB at 647. In determining a reasonable reading of a rule, any ambiguity is construed against the employer as the rule's author. *Roomstores of Phoenix, LLC*, 357 NLRB No. 143 at 26 (2011).

Respondent argues that the ALJ erred "by failing to apply the 'reasonable employee' standard under *Lutheran Heritage* and opting to substitute his personal interpretation of the policies for that of the reasonable Valley Stream employee."<sup>5</sup> R Br. 2,10. This is incorrect. The ALJ followed *Lutheran Heritage's* objective test.

*Lutheran Heritage* requires the trier of fact to make a judgment of how a reasonable employee would interpret the rules. The ALJ evaluated the language of each of the rules at issue and found that a reasonable employee would interpret the language to prohibit Section 7 activities. ALJD 33:5-8. In addition to the language of the rules, he correctly relied on the following record evidence: 1) the Handbook was in effect and widely distributed, 2) the rules remain in effect; 3) the lack of evidence that the rules had been rescinded or that store managers had been given permission to not enforce them; 4) the lack of evidence that employees had been told they were not bound by the rules. ALJD 34:21-25. Citing *Cintas*, the ALJ properly relied upon Board precedent that evidence of enforcement or chill is not required to support a finding that a rule is overbroad and thus unlawful. *Id.*

The ALJ's reliance on *Cintas* was appropriate. In *Cintas*, which involved a confidentiality rule, the company made the same argument as Respondent does here, i.e., that there was no evidence of a chilling effect upon employees, there was evidence that employees disregarded the rules, and no evidence of discipline for disregarding same. The Board, with court approval, held that the question was how an employee would read the rules. *Cintas*, *supra*

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<sup>5</sup> 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. \_\_\_\_.

at 946; see also *Radisson Place Minneapolis*, 307 NLRB 94, 94 (1992)(reversing in part an ALJ who, in dismissing the allegation, relied on absence of evidence that employees were warned or disciplined for contravening a confidentiality rule). Respondent cites no authority for its proposition that the ALJ erred by refusing to look at the “surrounding context.” R Br. 11.

B. The ALJ Correctly Rejected Respondent’s Defense to the Handbook Violations

In support of its Exceptions, Respondent argues that the ALJ erred by rejecting its defense. R Br. 31-34. Respondent contends that the ALJ ignored record evidence that employees were unaware of the rules, that the rules were loosely enforced if at all because the store was poorly managed, and that employees acted in contravention of the rules. Respondent is incorrect. The ALJ addressed these arguments and his rejection of the defenses was correct as a matter of fact and law.

1. The rules were maintained.

As the parties stipulated, Respondent’s handbook dated 2008, revised 2009, (herein, “the 2009 Handbook”), applied to employees from July 2009 until at least the last week of June 2011. Tr. 422; GC Ex. 8. Management distributed the 2009 Handbook to employees at new hire orientations, and employees signed orientation completion forms acknowledging receipt of same. Tr. 422, 995; CP Ex. 12; R Ex 41. The 2011 Handbook (GC Ex. 9) is a newer version of the 2009 Handbook and was made available to employees after the election. Tr. 423; GC Ex. 9; ALJD 15:13-19. Consistent with corporate policy, when Respondent published its 2011 version of the Handbook, the 2009 Handbook was not rescinded. Rather, Pena and her assistant managers informed employees of the new Handbook’s publication, and told the employees that the 2011 Handbook edition would be available to them upon request. ALJD 15: 16; Tr. 194-98, 299-301, 424, 584, 899, 962.

Respondent's own evidence demonstrates that the Handbook was widely distributed and a majority of employees signed an acknowledgement of receipt form. Respondent had on file 134 Handbook acknowledgment forms for employees eligible to vote in the election. Tr. 987-95; R. Ex. 41. Respondent relies on this exhibit -- which Respondent maintains demonstrates that 42% of employees eligible to vote did not receive the Handbook -- to support its contention that employees were unaware of the rules.<sup>6</sup> R Br. 32. Respondent also points to testimony of a single employee who testified that she had not read the Handbook. Id. However, no principle in Board law requires a survey of the workforce to ascertain whether threats or 8(a)(1) conduct were known to all employees. Such an exercise would be unworkable and would lead to the very subjective analysis Respondent purports to eschew. Consistent with the objective standard of *Lutheran Heritage*, it suffices that the rules were maintained.

Moreover, there is ample record evidence that Respondent sought to make employees aware of the rules. Employees attend a four to six hour new hire orientation at which Handbooks are distributed, employees are told to review the Handbook, policies are discussed, and employees sign confirmations of attendance and receipt. Tr. 87, 1037, 1043; CP. Ex. 14. That Respondent could not produce handbook receipt forms for all employees does not establish that employees did not receive a copy of the Handbook; only that they did not sign the form, or that Respondent could not locate it. Finally, the record is replete with evidence of additional means by which employees could receive copies of the Handbook and / or become aware of the rules. See, e.g., Tr. 195, 299, 424, 584, 866, 962. Pena testified that "it could be assumed" that employees at the store would consult the Handbook to find out about various terms and

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<sup>6</sup> In light of undisputed evidence that the Handbook was in effect and widely distributed, the percentage is irrelevant. However, the 42% figure was not previously cited and R. 41 does not appear to reflect same. Respondent writes that there are 273 employees during the critical period, a number that is unsupported by the record. See R. Br. 32.

conditions of their employment. Tr. 748. Respondent routinely ran small group meetings (“huddles”) at which team leads discussed store operations. ALJD 5:27-32; Tr. 583-84. The Handbook is the only written source of information about the workplace policies governing employees that was readily accessible to them during the months leading up to the June 17 election and was made available upon request Tr. 299, 1007.

2. The rules were enforced.

Similarly, the ALJ was correct to reject Respondent’s defense that policies were loosely enforced due to “poor management,” an argument Respondent repeats here.<sup>7</sup> R Br. 33. ALJD 33:5-47. There is ample evidence that the Handbook was in effect. Multiple witnesses testified that employees were told (at “huddles,” “chat sessions,” etc.) whenever a new edition of the Handbook had been released and were told that a copy of the new edition was available for them to look at in the TSC area or somewhere else they had access to. See, e.g., Tr. 195, 299, 424, 866, 962.

As the ALJ noted, Dawn Major denied that some policies are not enforced. ALJD 33:23-25; Tr. 590-95, 597-600, 610, Several managers testified that the Handbook was a guide. Tr. 610, 748, 1007. Pena and other managers admitted that they were never instructed by Respondent not to follow the policies. Tr. 698, 770. Casolino and Jones both testified to enforcing the no solicitation/no distribution policy. Tr. 632-33, 684-85, 693, 695. In addition, as the ALJ found, during the pre-election period, no manager ever told an employee that any edition of the Handbook had been rescinded or that the policies in the Handbook were not being enforced. Tr. 606, 696-97, 749. In fact, Target instructs managers and supervisors to discipline

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<sup>7</sup> Respondent’s “poor management” argument is contrary to the record. Pena, who had worked at Valley Stream for several years, was the store manager throughout the campaign period. Respondent witnesses testified that Pena inherited an “operationally broken” store, but that she turned it around. Tr. 709, 831-32, 962. To the extent Respondent claims that the Handbook was loosely enforced due to a poor performing store, by Respondent’s own admission, this was repaired by Pena.

employees for violation of the unlawful Handbook provisions. Target’s Human Relations (“HR”) guidelines instruct managers that “unacceptable conduct” includes: employee solicitation and distribution of literature; failing to report that co-workers have engaged in “unacceptable conduct;” and general “policy and procedure violations.”<sup>8</sup> CP Ex. 7 at 3-4, 12, 13; CP Ex. 9. “Unacceptable conduct” is grounds for employee discipline, up to and including discharge. *Id.*

Finally, as the ALJ correctly found, Respondent unlawfully enforced its no solicitation/no distribution policy on at least two occasions; ALJD 28:30-31, 29:1-2; showed a video threatening to enforce that policy; ALJD 29:39-42; and threatened discipline to employees talking about the Union. ALJD 13:10-11, 25-26.

Respondent does not claim, nor is there evidence, that the rules were rescinded. Rather, there is clear evidence that the rules were maintained and in effect. Therefore, there is no basis upon which a repudiation of the conduct can be found. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978) (repudiation of unlawful conduct must be timely, unambiguous, and announced to employees); Compare *Baldor Electric Co.*, 245 NLRB 614, 615 (1979) (holding that, to assure free election, employer must show that it informed all employees that it had repudiated invalid rules and would not enforce them).

3. Evidence of non-enforcement or contravention of the rules is not relevant and is insufficient to find that the ALJ erred.

Even if evidence of non-enforcement and contravention of the rules was relevant to a finding that the rules tended to interfere with Section 7 activities, the record is insufficient to establish these elements. As will be shown below in discussing each rule, Respondent wildly distorts the record as to alleged employee contravention of the rules. Respondent cites to only a few employees who testified to engaging in conduct that arguably ran afoul of the rules and on

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<sup>8</sup> HR policies and guidelines are posted on Target’s intranet, the “Workbench,” and are accessible only to managers and supervisors. Tr. 614-16, 698, 770-71, 825-28, 963.

only a few occasions. And, as summarized in subsection 2 above, Respondent ignores the ALJ's findings and the record evidence that Respondent did enforce its policies.

Equally without merit is Respondent's argument that the record evidence of employees engaging in union activities supports a claim that employees did not understand the rules to prohibit Section 7 activities. First, with one exception, Tr. 914-17 [Antonia Smaine], Respondent exclusively cites testimony regarding the activities of Green, Williams, and Bracey or non-employee Union representatives, as corroboration for its claim that many Target Valley Stream employees actively solicited and distributed in support of the Union during the election period. See, e.g., Tr. 786-87 [Eva Reaves], 798-800 [Betsy Ann Wilson], 870-71 [Wesly Symby]. Unlike their co-workers, Green, Williams, and Bracey were active, visible Union supporters with knowledge of their Section 7 rights. Tr. 74, 106-110, 267, 295, 323, 332, 364, 415, 456-61, 476-77, 485, 733, 808-09, 819. Their activities cannot be used to impute the same knowledge on 265 additional employees.

Second, as the ALJ found, Green, Williams and Bracey testified that managers and supervisors threatened to discipline, and did discipline, them for discussing the Union and distributing Union literature on store premises. ALJD 12:40-13:11, 13:15-26, 13:30-14:4.

Third, Target's argument makes no logical sense. It simply does not follow that because some Union supporters solicited and distributed literature for the Union, other - or even a majority of - employees understood that the No Solicitation/No Distribution did not apply to Union - related activity.

Fourth, and most importantly, no Board case holds that employees' subjective understanding is in any way relevant to the determination of what is a "reasonable construction"

under *Lutheran Heritage*. See *Lutheran Heritage*, 348 NLRB at 650 (citing *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003)).

For these reasons, the ALJ correctly found that the mere maintenance of the rules alleged to be unlawful in fact violates Section 8(a)(1).

4. Respondent's calls to overrule precedent should be rejected.

Respondent argues that, to the extent Board precedent precludes an evaluation of the [shop floor] context in determining how a reasonable employee would construe the rules, it should be overruled. R Br. 11-12. This must be rejected. Respondent cites no Board authority for the proposition that a determination of violations of 8(a)(1) should be subject to such an evaluation. In fact, it flies in the face of Board precedent which requires an objective review of the rule. While Respondent argues that the standard it espouses, evaluating conditions on the shop floor and evaluating what employees think about them, is an objective one, it is in fact a subjective standard and an entirely impractical one. Employees are held responsible for rules that companies promulgate and maintain. Nothing here suggests employees should have thought otherwise. If Respondent was not serious about its rules, it should have rescinded them.

Finally, the Supreme Court cases to which Respondent cites have no bearing here as they do not arise under the NLRA, and concern individual rights, not collective rights.

C. The ALJ Correctly Found Target's Ban on Solicitation and Distribution for "Commercial Purposes" Can Reasonably Be Construed to Encompass Union Activity.

The Handbook provides:

**Don't distribute flyers, pamphlets or other information to team members.**

While you or the team members you're talking to are on work time or in work areas, you must not pass out or distribute any pamphlets or other literature. *Also you must never pass out any literature and/or products, sell merchandise or exchange money 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.

GC 8 at 27-28 (emphasis supplied).

\* \* \* \* \*

**No Solicitation / No Distribution Policy**

Certain activities are prohibited *at all times on Target premises*. Soliciting, distributing literature, selling merchandise or conducting monetary transactions, whether through face-to-face encounters, telephone, company mail or e-mail, *are always off limits (even during meal and break periods)* if they are:

- For personal profit
- *For commercial purposes*
- For a charitable organization that isn't part of the Target Community Relations program and isn't designed to enhance the company's goodwill and business.

GC 8 at 44-45 (emphasis supplied).

The rules prohibit distribution or solicitation related to “commercial purposes” “at all times on Target premises.” Target premises are defined in the handbook to be “all the buildings, grounds, vehicles and parking areas Target uses to conduct its business.” GC Ex. 8 at 64; GC Ex. 9 at 57. The ALJ was correct in concluding such language was overbroad and “explicitly restricts” Section 7 activity by both impermissibly prohibiting the distribution of union literature on the premises and solicitation of union membership. ALJD 29:26-32. Contrary to Respondent’s argument, the term “commercial” can reasonably be understood to refer to Union activities because Target repeatedly characterized unions in general, and Local 1500 in particular, as a “business.”

1. Respondent portrays unions as a business.

Throughout the campaign period, a key component of the Employer’s anti-union campaign was that the Union is a business that only wants employees’ money. The Employer

distributed a leaflet that refers to the Union as a “failing *business* ... [that] needs to increase revenue to stay in business.” (emphasis supplied). CP Ex. 10 (c).

Pena admitted she gave speeches emphasizing that the Union was a business. ALJD 6:2-3; Tr. 746-47. Most significant, Target required employees to view the video “Think Hard Protect your Signature.” ALJD 6:1-6; Tr. 530-45, 548-51, 553-62, 493-97, 716, 747, 815, 898, 956, 1012-14, 1037-38, 1042-43. The video emphasizes that a union is a business “and like any other business, it has to bring in money to survive. But it doesn’t have any product to sell. Instead, it sells MEMBERSHIPS.”<sup>9</sup> ALJD 6:4-6, GC 6b at 4. Actors alternate stating:

A union is a BUSINESS.

And that’s important to know. A union is not a charity. It’s not a club. And it’s not part of the government. It’s a business.:

See GC 6b at 4.

The video then states that Target policies prohibit union solicitation and distribution:

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?

GC Ex. 6(b), at 16-17 (emphasis added).

Because Target repeatedly told Valley Stream employees that unions are businesses, an employee could reasonably conclude that solicitation or distribution on behalf of the Union was for commercial purposes and thus prohibited. Accordingly, the mere maintenance of Target’s

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<sup>9</sup> As argued in our Exceptions filed today, the ALJ failed to make a finding regarding the record evidence that a second video, “Think Hard Before You Sign” was also shown at new employee orientations and meetings during the critical period. This video has the same content as that the ALJ found to be shown. See CP Ex. 4.

No Solicitation/No Distribution rule violates Section 8(a)(1). Compare *Children’s Center for Behavioral Development*, 347 NLRB 35, 37 (2006) (finding a no solicitation policy lawful that stated, “staff should not be permitted to solicit, obtain, accept or retain services, merchandise, commodities, etc. for personal gain/ profit during working hours.”).

2. Target enforced its no solicitation and no distribution rules.

Contrary to Respondent’s assertions, record evidence reflects that Respondent, consistent with the message in its video, enforced its no solicitation/no distribution policies. Throughout the critical period, Target unlawfully and repeatedly ordered employees not to speak to co-workers about, or to solicit for, the Union anywhere on Target’s premises, including non-work areas. Tr. 75-76; 81-85; 145-46; 178-79; 183-89; 226; 231-35; 285-86; 296-97; 301-10; 427-30; 461-63; 479-85. Senior managers admitted that a substantial part of their job duties in providing security for the store was to enforce the No Solicitation/No Distribution policy, particularly in Target’s parking lot, and that they did so during the months immediately preceding the election. Tr. 599-600, 632-33, 670, 684-85, 726-27, 755-56, 973.

Store supervisors and managers told employees on various occasions to stop soliciting for the Union or handing out Union literature and either expressly or impliedly told them that doing so was prohibited. Tr. 75-76, 81-85, 112-14, 145-46 [Green]; 181, 184 [King]; 301-06, 314-15, 390 [Williams]; 395 [Brown]; 427-30, 461-63, 479-85 [Bracey].

As the ALJ found, Respondent unlawfully enforced its policy in violation of the Act on at least two occasions during the critical period:

- on June 9, while Green was speaking with a co-worker about the Union outside the employee entrance, HR ETL Stone came out with security guard Kyle and told Green she was soliciting and that solicitation was not allowed on Target property. ALJD 28:30-31 Tr. 81-85, 145-46; and

- On April 28, 2011, Pena told Williams that she had learned that Williams was soliciting employees for the Union and that such activity was forbidden on Target’s premises, including its parking lots. ALJD 8:30-39; Tr. 295-97, 314-17.

Additional findings of the ALJ underscore that Respondent, consistent with enforcing its no solicitation policy, was vigilant about preventing Union activity. Thus, the ALJ correctly found

- When, in early March 2011, Green spoke with co-employee Matthew King in the store about needing a union, supervisor Joseph ordered them to stop talking, warning that they could be disciplined for such talk; ALJD 3:38-52; Tr. 75-76, 78-79, 178-79.
- On June 9, as Union representative Waddy was speaking with workers in the parking lot, an ETL and an asset protection employee approached and told Waddy and the employees that they could not talk on Target property and that if they were discussing Union matters, they would not be welcome anywhere in “the whole mall.” ALJD 9:9-47; Tr. 223-26.

The Record contains additional evidence that Respondent sought to enforce its policies. When Williams tried to distribute Union literature, Target prevented her from doing so. Tr. 301-10, 427-30, 461-63, 479-85. Also, Green, Williams, and Union representative Aly Waddy all testified that multiple other Target employees who did not testify at the hearing attended a meeting organized by *New York Times* reporter Stephen Greenhouse in early May 2011, where they expressed fears that they would face personal retribution and the store would close if management observed them engaging in protected Section 7 solicitation and distribution activity. Tr. 88-95 [Green]; 231-36; 277-79 [Waddy]; 307-10 [Williams].

The ALJ properly rejected Respondent's reliance on *Register Guard*, 351 NLRB 1110 (2007), because that case has no relevance. See R Br. 20-22; ALJD 29:4-20. *Register Guard's* import is limited to its facts: an employer's discriminatory enforcement of a policy that limited use of an employer's email system to employer business only and prohibited its use for "non-job related solicitations," 351 NLRB 1110 (2007). *Register Guard* has nothing to do with the issue here: validity of Respondent's rules prohibiting distribution and solicitation for "commercial purposes" at any time anywhere on its premises. The ALJ correctly reasoned that *Register Guard* did not disturb employees' right to engage in Section 7 activity as provided by Republic Aviation. ALJD 29:15-15. See *Register Guard*, 351 NLRB at 1115-16. Also, here, the ALJ correctly found maintenance of the rule to be unlawful because Respondent itself had defined Union purposes to be "commercial" purposes. *Supra* at Point I.

D. The ALJ Correctly Found that the Handbook's Information Security Policies Unlawfully Prohibit Employees from Discussing Their Terms and Conditions of Employment.

Mere maintenance of a confidentiality rule such as Target's, even if the rule is not enforced, constitutes an unlawful interference with employees' Section 7 rights. *Cintas Corp.*, 344 NLRB 943, 946 (2005). The ALJ correctly found that the Respondent's Information Security Policies, which prohibit the release of confidential team member information, can reasonably be construed as prohibiting disclosure and communication by employees of terms and conditions of employment. ALJD 27:16-20.<sup>10</sup> The ALJ also found that the rule directs employees to report unauthorized access to confidential information or misuse of confidential information to Respondent and threatens employees with termination for failing to do so. ALJD 27:22-25. The Rules read as follows:

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<sup>10</sup> The ALJ inadvertently referred to the unlawful confidentiality rule as the "after hours" rule. We filed exceptions requesting the Board correct the error. See ALJD 27:19.

## Information Security

...

### Confidential information

All Target information that is not public must be treated as confidential. Here are some examples of confidential information:

- Non-public company information, including: ...
- Team member personnel records...

If you have access to confidential information, it is your job to prevent its unauthorized disclosure, both outside of Target and to team members at Target who do not need the information to perform their job

GC Ex. 8 at 51-52.

\* \* \* \* \*

### **Communicating confidential information**

You also need to protect confidential information when you communicate it. Here are some examples of rules you need to follow:

- **Make sure someone needs to know.** You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is a proper authorization to do so. If you are unsure, talk to your supervisor.
- **Develop a healthy suspicion.** Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.
- **Watch what you say.** Don't have conversations regarding confidential information in the Break room or in any other open area. Never discuss confidential information at home or in public areas.

GC Ex. 8 at 53.

\* \* \* \* \*

### **Unauthorized access to confidential information**

If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, *it is your responsibility to report that information by*

*contacting your supervisor* (who should send an e-mail to [Integrity@Target.com](mailto:Integrity@Target.com)), sending an e-mail to [Integrity@Target.com](mailto:Integrity@Target.com) directly, or calling the Employee Relations and Integrity Hotline at 800-541-6838.

We're serious about the appropriate use, storage and communication of confidential information. A violation of Target policies regarding confidential information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

GC Ex. 8 at 53. (emphasis supplied)

Confidentiality rules that may reasonably be interpreted as restricting discussion of terms and conditions of employment are unlawful, even if they do not specifically prohibit such discussions on their face. *Double Eagle Hotel & Casino*, 341 NLRB 112, 113-115 (2004), *enf'd in rel. part* 414 F. 3d. 1249 (10<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1331 (2006). Target's rules prohibit disclosure of confidential information, require employees to report breaches to management and threaten discipline for any violation. Confidential information is broadly defined as "All Target information that is not public...." As the ALJ found, such overly broad language reasonably can be read to include employee wages, disciplinary information, and the like, particularly since the rules specifically define confidential information as including "Team member personnel records." ALJD 26:44-49. Target employees know that such records typically include wage and disciplinary information. Target employee personnel records contain information about wages and benefits (Tr. 606).<sup>11</sup>

Moreover, as a further chill on Section 7 rights, the policy requires that employees talk to their supervisors if they are unsure whether certain information can be shared. It also requires that employees report possible misuse of confidential information and threatens that employees

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<sup>11</sup> Respondent correctly notes that the ALJ erroneously cited to language ("personnel information and documents") that does not appear in the handbook. R Br. 14-15; ALJD 26:25. However, omitting this portion of the ALJ's reasoning does not alter the analysis of the additional language the ALJ found violative of the Act, as the prohibition on disclosure of nonpublic information and "team member personnel records" standing alone are unlawful.

who violate the confidentiality policies face discipline up to and including termination and criminal prosecution. See e.g., *Double Eagle*, 341 NLRB at 114 (threat of discharge on its face for breach of rule). Further, these rules are unlawful as they prohibit employees from sharing information regarding fellow employees. See e.g., *Double Eagle*, 341 NLRB at 113-15 (finding rule that prohibits disclosure of salary and other employee information unlawful); *Flamingo Hilton -Laughlin*, 330 NLRB 287, 288 n.3 (1999) (finding rule that prohibits revealing of confidential information regarding “fellow employees” unlawful). For these reasons, maintenance of the confidentiality rules violates Section 8(a)(1).

Respondent argues that the ALJ erred by ignoring evidence that purportedly demonstrates that employees ignored the rules or were unaware of them. Respondent claims that “[a]lmost every employee witness at the hearing testified that he or she *freely* speaks with other employees about pay, benefits and other issues while they are working.” R Br. 4 (emphasis supplied). However, Respondent cites to a total of six employees who testified that they discussed wages with coworkers out of a total of 12 who testified and nearly 300 employees overall (Tr. 709); three of whom limited the discussions to following annual reviews. Tr. 804-05, 883-84, 921-23. One of those witnesses called by Respondent, Eva Reaves, testified that Target employees discuss wages and benefits at work “all the time,” but the only example she was able to provide involved a conversation that was accomplished without disclosing confidential information. (Tr. 784-785).

Respondent also makes the incredible statement that, “[E]mployees are *permitted to, encouraged to* and openly speak about their wages, benefits and other terms and conditions while at work.” R. Br. 15 (emphasis supplied). However, none of Respondent’s transcript cites remotely support this proposition. (Tr. 361-63, 784-85, 804-05, 921-22, 938). Respondent has

cited to witnesses who, in fact, expressly testified that no manager or supervisor had ever told them they could discuss wages or benefits. (See Tr. 897, 928, 942, 958). In addition, Williams testified that, in the spring of 2010, she asked a coworker how much her raise was; the coworker replied that her Team Lead had asked her not to disclose that information. (Tr. 312-13).

E. The ALJ Correctly Found Respondent’s “After Hours” Policy for Off-Duty Employees Unlawful.

A rule which does not allow employees access to a company’s premises during non-working hours is invalid unless it is justified by legitimate business reasons. *Lafayette Park Hotel*, 326 NLRB at 828-29. The Handbook policy unlawfully restricts access of off-duty employees to the Target premises:

**After hours**

Team members must leave the premises after hours. You should only be on company property during your scheduled work hours or for other authorized company business.

**Visitors**

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

...

- 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 at 20; GC Ex. 9 at 25.

To be valid, a rule restricting employee access to company property during non-working hours must “(1) [limit] access solely with respect to the interior of the plant [here, the store] and other working areas; (2) [be] clearly disseminated to all employees; and (3) [apply] to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.” *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976). An employer cannot prohibit its employees from engaging in union solicitation on its property during

nonworking time or from distributing union literature on its property during nonworking time in nonworking areas, absent special circumstances. *Republic Aviation Corp. v. NLRB*, 324 US 793, 803 (1945).

As the ALJ found, in contravention of the law, Target's after-hours rule prohibits employee access to its premises, including public and non-work areas, on non-working time. ALJD 30:44-52. Both Respondent's "After hours" and "Visitors" policies restrict access broadly to "the premises," "company property" and "non-public areas." These areas are not narrowly defined and employees could reasonably interpret the rules as prohibiting off-duty employees from being present and communicating with employees in nonworking areas, such as the parking lot or sidewalks outside employee entrances. See *Lutheran Heritage Village-Livonia*, 343 NLRB at 655 (2004). Thus, mere maintenance of the rule renders it unlawful because the rule "reasonably tend[s] to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB at 825.<sup>12</sup>

The ALJ correctly found that the rule has been maintained and rejected Respondent's argument that, because there was some evidence that employees return to the premises off duty, no violation should be found. ALJD 30:32-35. As the ALJD correctly found, even if such evidence was relevant, the evidence demonstrates that employees return to the premises off duty for authorized company business or activities. ALJD 30:19-25. Respondent asserts that large numbers of Target employees not only visited non-public areas of the Valley Stream store while off-duty but routinely *socialized* with one another in the break room, parking lot, and other areas for extended periods of time. R Br. 4, 24-25 (emphasis supplied). There is no support whatsoever anywhere in the record for this claim. Many witnesses did testify that employees

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<sup>12</sup> Here, too, Target solicited testimony that employees regularly come into the store when they are not scheduled to work. As discussed above in subsection 2, employees' subjective understanding of a rule is not relevant. The test is an objective one, to be determined by the context of the language *Lutheran Heritage*, *supra*.

would visit the store premises when they were not scheduled to be working in order to engage in very brief and typically transactional activities such as collecting a paycheck, correcting a punch card, picking up a friend, receiving a shopping discount, submitting a time off request, or in order to attend company events at which managers and supervisors would be present the entire time. See Tr. 735, 950-51; ALJD 18:42-47, 30:21-25. A few employees testified that they occasionally spent some time in the break room prior to their shifts; but none of these employees testified that either they or other employees present were socializing with one another. See Tr. 358, 463-64, 869-70. Other employees testified that they rarely, if ever, spend any time in the break room or other non-public areas of the store while off-duty. Tr. 148-49, 193. Finally, employee Green testified that it was her understanding that she was forbidden from visiting the break room to bring food to her friends when she was not working her shift. Tr. 148.

F. The ALJ Correctly Held Respondent’s Dress Code Policy Interferes with Employees’ Section 7 Rights.

The Employer’s Dress Code policy unlawfully prohibits employees from wearing union buttons or logos:

Dress code:

...

Don’t wear:

...

Any buttons or logos on your clothing (unless approved by our team leader).

GC Ex. 8 at 21.

Section 7 entitles employees to wear union logos and insignia. See *P.S.K. Supermarkets, Inc.*, 349 NLRB 34, 34-35 (2007) and cases cited therein. The burden is on the employer to prove the existence of special circumstances that would justify a restriction. *W San Diego*, 348 NLRB 372 (2006). The Board has long held that customer exposure to union insignia, standing

alone, or the requirement to wear a uniform, do not constitute “special circumstances,” *P.S.K. Supermarkets, Inc* , 349 NLRB at 34-35.

On its face, the no button/logo rule can be reasonably construed to prohibit Union insignia, therefore, the maintenance of rule is unlawful.

As the ALJ found, and Respondent does not contest in its brief, “there has been no showing that the wearing of any insignia would interfere with Respondent’s ‘red and khaki brand.’” ALJD 32:14-15; R Br. 29-31.

Respondent rather excepts to the ALJ’s determination largely on the ground that employees purportedly did not know of the rules. In support of this claim, Respondent misleadingly suggests that large numbers of Target Valley Stream employees wore union paraphernalia on store property throughout the entire election period without being subject to discipline. R Br. 5, 29-31. Yet, the record provides no evidence of this claim. With two anecdotal exceptions (Tr. 734-35, 966-69), the record pertaining to employees wearing union paraphernalia at any time in the store *exclusively* involves Green, Williams, Brown, or Bracey, the Charging Party’s four main witnesses and the Union’s most outspoken supporters during the election period. While there is ample testimony from multiple employees that they or others wore some kind of logo or button while at work, none of these logos and buttons were union-related but were rather designer clothing labels, Christmas decorations, or breast cancer awareness buttons. ALJD 23:7-13; Tr. 782-84, 866-68, 909-10, 952-53. Respondent employee witness Jennifer Pebrow testified that, as an employee, she was “not supposed to” wear logos or buttons, although she saw coworkers wearing them at times. Tr. 933. Moreover, most of the evidence regarding the key union supporters wearing Union paraphernalia on store property concerns a pro-Union march held on June 16, 2011, the eve of the election. The record contains

no evidence that any Target employee participated other than Green, Williams, and Bracey, all of whom were not working at the time. See Tr. 731, 808, 922.

Finally, contrary to Respondent's claim, the record does contain evidence that, after the petition was filed, supervisors and management, including Pena, told employees that they could not wear Union paraphernalia with their uniforms. Tr. 310-11. Green was told to wear only red and khaki during work hours, which she understood to mean no Union paraphernalia. Tr. 95. Prior to the critical period, she was never given such an instruction. Tr. 95. Waddy testified that employees were afraid that wearing Union paraphernalia while working would result in management retaliating against them. Tr. 235-36.

Thus, there is ample basis to conclude that Respondent's rule was maintained, enforced, and interfered with employees' Section 7 rights.

G. The ALJ Correctly Held Respondent's Parking Lot Policy Restricts Section 7 Rights.

The ALJ correctly found that Target's Parking Lot rule unlawfully restricts employees in their Section 7 rights because it reasonably can be interpreted to prohibit employees from lingering on Respondent's premises and because it requires employees to report anyone they do not know to management. ALJD 31:15-32. The Rule provides in relevant part:

Parking: ...

if you see people you don't know loitering around the team member parking area, notify Assets Protection or your leader on duty immediately.

GC Ex. 8 at 19; GC Ex. 9 at 24.

This rule on its face is unclear and ambiguous as to whether or not it applies to co-workers and, therefore, in balancing Respondent's interests in the rule and employees Section 7 rights, it must be construed against Respondent. *Roomstores of Phoenix*, 357 NLRB slip

op. at 26. Also, the rule must be read in the context of other Handbook policies. *See Arkema, Inc.*, 357 NLRB No. 103 at 4 (2011). Target’s After-Hours rules restrict employees’ access to Target’s premises, including the parking lot. As the Board recognized, the term “loitering” has negative, broad and ambiguous connotations. *Lutheran Heritage*, 343 NLRB at 649 n. 16. The rule especially chills Section 7 rights both because it can be reasonably interpreted as preventing a worker from remaining in the parking lot and because an employee would reasonably read this rule to require him to inform his supervisor of an unfamiliar co-worker in the parking lot. As the ALJ correctly reasoned, the Valley Stream store has almost 300 employees who work varying schedules, who cannot all know one another. ALJD 31:23-25. Contrary to Respondent’s argument, employees would not necessarily recognize one another especially when they are in street dress, wearing jackets, or coming in at night. And, as the ALJ found, off duty employees are not permitted to be in the parking lot. ALJD 30:26-30. Therefore, the rule’s effect is to require co-workers to report to management the presence of unknown co-workers – either on or off duty – who are in the parking lot, including those engaged in Section 7 activity such as discussions with Union organizers.

Contrary to Respondent’s argument, the ALJ did not neglect Respondent’s safety concerns. See R. Br. 28. He noted witness testimony concerning safety incidents and concluded that the rule is intended to ensure the safety of employees in the store’s parking lot. See ALJD 24:26-32; 31:8-9. However, consistent with Board law, he found that the rule was overbroad and could reasonably be interpreted to prohibit Section 7 activities. ALJD 31:16-20. The record evidence concerning safety issues does not justify the rule here. Respondent’s witnesses testified in generalities as to issues in the parking lot and seemingly exaggerated concerns by making general comments about the “neighborhood.” Tr. 636-42, 686-87. As the ALJ noted, there is no

evidence that employees were involved in any of the few specific incidents noted, all of which were attenuated in time. Therefore, the rule was overbroad as it could reasonably be construed as applying to reporting coworkers and Section 7 activity. See *Fairfax Hospital*, 310 NLRB 299, 309 (1993) (rejecting employer’s business justification safety defense for a broad no-access rule when no evidence that employees engaged in illegal conduct).

**II. The ALJ Correctly Found Respondent’s Store Closing Leaflet Unlawfully Threatened Employees and Constituted Objectionable Conduct.**

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. ALJD 34:50 – 35:5; See GC Ex. 4. As the ALJ found, and Respondent does not deny, Respondent distributed the leaflet to employees before the election. ALJD 4:25, 10:50. Respondent argues that the leaflet is protected by Section 8(c) because it contained only objective facts and suggests that the leaflet must be interpreted in the context of a response to the Union’s election kit flyer. R. Br. 34-37.<sup>13</sup> Respondent’s arguments have no merit. As the ALJ correctly found, the overwhelming emphasis in the leaflet is on “unions being an important factor in the closing of a large number of stores.” ALJD 11:46-47. Absent from the leaflet is any explanation as to the basis for that assertion. ALJD 11:23-26.

An employer unlawfully threatens employees with plant closure and job loss if it makes statements during a campaign that suggest the facility will close if employees select the union. *N. L. R. B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Citing *Homer Bronson Co.*, 349 NLRB 512, 514 (2007), enfd, 273 Fed. Appx. 32 (2d. Cir. 2008), the ALJ correctly noted, “[a]bsent the necessary objective facts, employer predictions of adverse consequences arising

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<sup>13</sup> There is no evidence that Respondent issued the store closing leaflet in response to Union literature. See *Infra* at 28.

from unionization are not protected by Section 8(c), rather they constitute threats that violate Section 8(a)(1).” ALJD 11:15-17. Respondent “crossed the line between a permissible prediction of the economic consequences of unionization and an unlawful threat of plant closure and job loss.” *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1096 (2004).

Respondent goes to great lengths to analyze the “truth” of each one of its assertions. However, Board law requires that the leaflet be viewed, and its inferences analyzed, as a whole. *Eldorado Tool, Division of Quamco, Inc., (Eldorado Tool)*, 325 NLRB 222 (1997). In *Eldorado Tool*, the Board found that the employer’s “UAW Wall of Shame” (tombstones with names of closed UAW-represented plants) constituted an 8(a) (1) violation, even though it was factually accurate. *Eldorado Tool*, 325 NLRB at 223. The “logical inference...drawn from the expanding cemetery of UAW-represented plants [was] that the same fate of plant closure and job loss awaited [the employer’s plant].” *Id.* Similarly, the Board affirmed an 8(a)(1) violation where a letter from an employer specifically named Teamsters’ companies that had gone out of business and indicated that “more than 150 unionized carriers” had gone out of business with more to come, finding that “[t]he necessary implication of [the employer’s] statement that 150 unionized truck companies had gone out of business [was] that the Teamsters [were] to blame for those closings.” *Overnite Transp. Co.*, 329 NLRB 990, 1024 (1999).

Here, as in *Eldorado Tool* and *Overnite Transp.* Respondent crossed the line from a prediction supported by objective facts to an unlawful implied threat of plant closure. The Employer’s leaflet opens by asking in large bold print “**WILL THE STORE CLOSE IF THE UNION GETS IN?**” and proceeds to answer in the affirmative by referencing other Union-represented stores that have closed, the Union’s “**terrible record of store closings,**” and membership losses (emphasis in the original). There are no facts presented as to the reasons for

the described A & P stores closing or for that of Caldor. Rather, the reference to the Union-represented stores that closed --- without explanation – strongly suggests that the stores closed because of the Union. This is not an objective fact. And, there is no record evidence to suggest it is true. Although the leaflet does not expressly state that the store will close if “unionized,” and contains a disclaimer that there are “no guarantees,” the “logical inference” is that that “the same fate of plant closure and job loss await[s] [Target]” if the Union is elected. *Eldorado Tool*, 325 NLRB at 223.

Similar to the language in the *Overnite* letter discussing “more than 150 unionized carriers” that had gone out of business, Respondent’s leaflet describes “**32 store closings**,” that “local was happy with only 4 NY stores...closing,” and cautions “***We all owe our jobs to the closing of the Caldor store that was in our building. It had the union. It closed.***” See *Overnite Transp.*, 329 NLRB at 1024. The “necessary implication” is that the closings were the fault of the Union. *Id.*

The leaflet also suggests that the Union will be bad for Respondent’s economic health. This statement is based on a prediction - not a fact - that the Union will be bad for the store’s economic health. The leaflet states “Our store will stay open only so long as it meets Target’s economic needs” and that the future depends on “Our store’s economic health”. It then drives home the message that unionization is bad for “our store’s economic health”:

Would a union help? Rigid union work rules and seniority systems could hurt . . . . WHEN WAS THE LAST TIME YOU HEARD OF A UNION . . . . BENEFITING A COMPANY’S ECONOMIC HEALTH? (capitalization in original).

GC Ex. 4.

The connection the Employer made is clear. Together, the “logical inference” supported by these statements is that the Union would cause the store to fail and employees will lose their

jobs. Of course, what can happen in negotiations with a Union are in the control of the parties, and are not objective fact. Therefore, these statements are not based on objective facts but rather are couched in opinion designed to raise the specter that the store will need to close should the Union come in. *See generally, Homer D. Bronson Co.*, 349 NLRB 512 (2007), *Eldorado Tool*, 325 NLRB 222 (1997).

Therefore, the statements of the leaflet, taken together and in context, are more than a “mere reference” to “possible negative outcomes” or a statement of what “could happen,” both of which would be permissible under *Gissel*. Also, any ambiguity in the language of the leaflet should be construed against the Employer; borderline statements are objectionable. *Georgetown Dress Corporation*, 201 NLRB 102, 116 (1973); *W.D. Manor Mech. Contractors*, 357 NLRB No. 128, slip op. at 14-15 (2011). Therefore, the ALJ correctly found the leaflet to be unprotected by Section 8(c).

While the ALJ cited to unfair labor practice cases, Board law is clear that the leaflet constitutes objectionable conduct. Anti-union campaigns and materials prior to elections are found to constitute objectionable conduct when they include “constant references to strikes, plant closure, and loss of jobs,” even if they do not expressly state that voting for a union as a bargaining agent would cause an employee to lose their job. *See Turner Shoe Co., Inc.*, 249 NLRB 144, 147 (1980) (leaflet in form of obituary notice describing plant closings where employees had been represented by the Union found objectionable).

The leaflet's message is analogous to the letter found objectionable by the Board in *Gold Coast Rest. Corp., d/b/a Bryant & Cooper Steakhouse*, 304 NLRB 750, 753, 762 (1991):

"I can tell you about hundreds of restaurants in New York which were unionized that have gone out of business. The union was unable to do anything to save the jobs of the employees in these restaurants. In our opinion, the union may have even contributed to

some of these closings. Service tends to get lazy and tired at these places. When people come to these places, they don't have a good time they don't come back. When that happens, a closing is inevitable."

*Bryant & Cooper*, 304 NLRB at 762.

Without citing to any Board authority, Respondent defends on the basis that by issuing the leaflet it was responding to the Union's materials and this context renders the leaflet lawful. R. Br. 5, n.3, 36-37. Even if such a context had legal significance --- which under Board law it does not -- Respondent's defense is pure fiction. There is no record evidence that Respondent's leaflet was a reply to the Union's material. The language Respondent points to is contained in a 13-page new "union Election Preparation Kit" that was distributed to employees after the Union received their signed union authorization card. R. Ex. 5, cover letter and p. 11. While Respondent refers to this Kit as the Union's "first written handout in its campaign (mailed before April 8, 2011)," the record does not support this statement. R. Br. 5. Rather, the only evidence is that Betsy Wilson received her kit and delivered it to Respondent on April 8, 2011. R. Ex. 40. The Union gave out kits as it received cards from employees. Tr. 240-42, 984-86; R. Ex. 5; R. Ex. 40. Moreover, Respondent's leaflet was issued in May, one month later. And, there is no indication in the leaflet that it is responding to something the Union previously stated on the topic. Respondent's defense is a post hoc creation that has no bearing here.

Respondent's leaflet "conveyed unlawful threats of adverse consequences from unionization, rather than lawful, fact-based predictions of economic consequences beyond the Respondent's control." *Bronson*, 349 NLRB at 513. The ALJ correctly found that the leaflet established both a Section 8(a)(1) violation and objectionable conduct.

**III. The ALJ Correctly Directed a Second Election because Respondent Committed Unfair Labor Practices that Affected the Entire Bargaining Unit and Interfered with the Election.**

A. The ALJ Correctly Found that the “Virtually Impossible” Standard Was Not Met.

The ALJ correctly set aside the election held on June 17. ALJD 36:26-28. Respondent argues that the ALJ erred in concluding that the “virtually impossible” standard was not met. R Br. 45. As shown below, the ALJ set aside the election in accordance with applicable Board law because the record evidence established that Respondent’s objectionable conduct interfered with the election.

“Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election.” *Enola Super Thrift*, 233 NLRB 409, 409 (1977), citing *Dal Tex Optical Co.*, 137 NLRB 1782, 1786-87 (1962). This election must be set aside unless it is “virtually impossible” to conclude that the Employer’s conduct affected the election. *Id.* In making this determination, the Board considers, among other things, “the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.” *Id.*

The ALJ found that Respondent committed numerous unfair labor practices during the critical period. Applying *Dal Tex Optical Co.*, he correctly concluded that the unfair labor practices constituted objectionable conduct that warranted setting aside the election. ALJD 36:24-26. Contrary to Respondent’s claim, the ALJ did not rely solely upon the mere maintenance of unlawful Handbook provisions. In fact, the ALJ specifically pointed to:

- Respondent's reinforcement of the unlawful no solicitation/no distribution rule by showing the video to employees;<sup>14</sup>
- the fact that those rules were enforced against employees;
- the fact that the rules were maintained;
- the fact that they not rescinded;
- employees receipt of the Handbooks and certification that they read it;
- the fact that Respondent did not tell employees they were not bound by the rules;
- dissemination of the objectionable conduct to the entire bargaining unit.

ALJD 36: 12-22.

Presumably because the above conduct was more than sufficient to support his conclusion that the Respondent's conduct affected the election, the ALJ did not cite additional objectionable conduct that further supported his conclusion, including: distribution of 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 Respondent's threat that employees would be disciplined for supporting the Union. ALJD 13:25-26.<sup>15</sup> Given the number and severity of these unfair labor practices, as well as the wide dissemination of the severest misconduct, it cannot be disputed that Respondent's conduct affected the election results by intimidating and inhibiting employees from exercising their Section 7 right to support the Union.

The violations were numerous. The number of unfair practices alone militates in favor of setting aside the election. See e.g., *Vestal Nursing Ctr.*, 328 NLRB 87, 103-04 (1999) (setting

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<sup>14</sup> In assessing Respondent's conduct during the critical period under the "virtually impossible" standard, the ALJ stressed that "the objectionable conduct was disseminated to the entire bargaining unit by [among other conduct] . . . the video . . . which warned employees 'you can rely on us to enforce all solicitation, distribution, and harassment policies.'" ALJD 36:17-21. The ALJ found that the video was shown during the campaign period. We filed exceptions to his failure to find that it was shown specifically during the critical period.

<sup>15</sup> See Charging Party's Exceptions to the ALJ's failure to specifically rely upon these additional violations found, including, the wide dissemination of the store closing leaflet.

aside an election based on multiple unfair labor practices that, taken cumulatively, affected the entire bargaining unit); *The Jewish Home for the Elderly of Fairfield*, 343 NLRB 1069, 1121-23 (2004) enf'd, 174 Fed. Appx. 631 (2d Cir. 2006) (same).

The conduct was severe. Respondent's violations are among the most egregious under Board law. Respondent threatened plant closure, which has long been viewed as destroying laboratory conditions and is a "hallmark" violation that warrants 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 it. As discussed, *supra* Point II, the Board routinely overturns elections when the employer made threats of plant closing during the critical period.

In addition, Respondent maintained an unlawful no solicitation/no distribution rule that it reinforced and enforced throughout the critical period, which instilled fear in employees. The intensity with which Respondent acted to stop Union activity was particularly intimidating. In plain view in the parking lot, Stone interfered with Green's communications with her co-workers (ALJD 28:30-31) and Casolino interrogated and stopped employees from speaking with Waddy. ALJD 14:46-47. Each of these violations alone, and certainly in combination, warrant setting aside the election. See *Evergreen America Corp.*, 348 NLRB 178 (2006) (setting aside election where employer misconduct included: threatening employees with plant closure and unspecified reprisals because of their union activities; interrogating employees about their union activities; and creating the impression that employees' union activities were under surveillance).

The dissemination was extensive. Unfair labor practices that involve widespread dissemination of an unlawful message to an entire bargaining unit are far more serious objectionable conduct than isolated instances of employer misconduct. 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).

The ALJ found that Respondent maintained and distributed five unlawful Handbook policies to the entire unit. See *supra* Point I. He found that Respondent disseminated to the entire bargaining unit the unlawful no solicitation/no distribution policy by showing them the "Think Hard" videos. And he found that Respondent distributed to the entire unit the unlawful store closing leaflet. See *supra* Point II. It is more than just possible it is likely -- that Respondent's unlawful conduct affected the election results.

B. The Handbook Rules Constitute Grounds for Overturning the Election.

The Board has long held that the mere maintenance of an overbroad rule can affect the results of an election. *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 1-4 (2011). Each of the five unlawful rules alleged as objectionable conduct, individually and together, had a reasonable tendency to chill or otherwise interfere with employees' pro-union campaign conduct during the critical period. Even under the more relaxed "could reasonably have affected the results of the election" standard, maintenance of the Handbook rules constituted objectionable conduct supporting setting aside the election. The result can be no different here under the vigorous "virtually impossible" test. See *Jurys Boston Hotel*, slip op at 2, n.8.

In *Jurys Boston*, a representation case, the Board directed a second election based solely on a single objection over three rules in an employee handbook pertaining to solicitation, loitering, and wearing emblems and buttons. 366 NLRB slip op. at 1. The Board reasoned that,

*notwithstanding the absence of evidence that the rules were enforced against protected activity, the rules, individually and together, “could reasonably be construed by employees as precluding them from communicating with each other about the Union and their wages, hours, and other terms and conditions of employment at their workplace...”* Id. slip op. at 3. See also, *Pacific Beach Hotel*, 342 NLRB 372, 373-374 (2004) (setting aside election based on employer’s maintenance of overbroad no solicitation policy); *Freund Baking Co.*, 336 NLRB 847 (2001) (setting aside an election based on maintenance of overbroad confidentiality rule); *IRIS USA, Inc.* 336 NLRB 1013 (2001) (same).

The ALJ correctly relied upon *Jurys Boston* in setting aside the election. Of the five rules the ALJ found to be unlawful, three are identical to the rules in *Jurys Boston*: an overbroad no solicitation rule; a prohibition on loitering; and a prohibition on wearing buttons and insignia. As in *Jurys Boston*, Respondent distributed the handbook to employees upon hire and employees signed an acknowledgment of receipt. *Jurys Boston*, 366 NLRB slip op. at 2-3. Also, here there is record evidence that employees had additional means to procure the handbook and that the rules were reinforced at orientations and in huddles. See Tr. 194-98, 299-301, 424, 584, 866, 899. 962. See also ALJD 5:27-32.

Here there is even a greater likelihood that the Handbook rules affected the results of the election. In addition to the same three rules involved in *Jurys Boston*, Respondent maintained other rules that tended to chill Section 7 rights and interfere with the election: the policies restricting use of confidential information; the requirement to report coworker violations of said policies; and the “after hours” rule prohibiting employees from returning to the premises -- including the parking lot--- when not scheduled to work.

In *Jurys Boston*, there was no evidence of enforcement or that any employees were hired or given the handbook during the critical period. Here, in contrast, the ALJ found that Respondent unlawfully enforced its no solicitation/no distribution policy (ALJD 28:30-31, 29:1-2); showed a video advising that Respondent would enforce that policy (ALJD 29:39-42); and threatened to discipline employees talking about the Union. ALJD 13: 25-26. Respondent's enforcement of the unlawful rules is underscored by the ALJ's findings that Respondent unlawfully interrogated Jones and Stewart in the parking lot (ALJD 14:46-47) ("After Hours" and "Parking Lot" policies) and Respondent's unlawful creation of the impression that Williams' Union activity was under surveillance, (ALJD 14: 3-4), assured that Respondent was monitoring compliance with its no solicitation policy. Moreover, during the critical period, at least fifteen employees were hired and given the Handbook (R Ex. 41), and a "Think Hard" video was shown at orientation sessions. Tr. 1011-1012, 1037-38, 1042-43.

C. Respondent's Exceptions to the Direction of a Second Election Lack Merit.

In excepting to the ALJ setting aside of the election, Respondent repeats the same arguments it made regarding the Handbook violations. See R Br. 47. Respondent asserts that employees were unaware of the rule and that management did not make employees aware of the rules during the campaign. This is contrary to the record evidence. As described supra at Point I, Handbooks were distributed at orientation and readily available to all employees, both old and new. While there is no way to know precisely how many employees received or obtained handbooks, the record shows that the vast majority did. Moreover, management held new hire orientations during the critical period at which the Handbook was distributed and rules discussed. Tr. 1013-14, 1036, CP Exs. 12, 13. And, the video was shown that reinforced the unlawful no solicitation/no distribution policy. ALJD 29:39-42.

Respondent also misrepresents the record when it claims that employees regularly acted in contravention of the policies. R Br. 47. For example, Respondent suggests that Target employees in large numbers actively solicited on the Union's behalf and distributed Union literature throughout the entirety of the election period on store property. R Br. 22, 26. Virtually all of the testimony pertaining to solicitation and distribution by employees on store property during that period involves the activities of Green, Williams, or Bracey. The record shows that each instance of such activity was met with a supervisor's admonishment, discipline or threats of future discipline. See *supra* at Point I; Tr. 77, 109, 112-14, 145-46, 183-84, 295-97, 301-04, 314-15, 427-30, 461-63, 478-85. Multiple witnesses testified that they attended a meeting for Union supporters in early May 2011 and that many attendees reported feeling reluctant to solicit or distribute on behalf of the Union at the store out of fear of retaliation from management and fear that the store might close if the Union came in. Tr. 88-95, 231-36, 277-79, 307-10.

Finally, Respondent asserts that "the Union had the interest, know-how, and informed employees of their rights to solicit/distribute via campaign literature." R Br. 47. This point has no bearing here. The Board has considered the ability of a union to communicate employee rights only in situations in decertification elections where the Union was the incumbent bargaining representative. see e.g., *Safeway, Inc.* 338 NLRB 525, 526 (2002) (upholding election results where the union had been in place at least three years before the election, had successfully negotiated at least one collective bargaining agreement, and had not challenged the rule previously). In addition, there is no record evidence to support the assertion that the Union

communicated employee rights to a significant number of employees.<sup>16</sup> And, the Union has no authority to repudiate Respondent's rules.

Moreover, the Board rejected such an argument in *Jurys Boston*, which was a decertification case in which the incumbent union was ideally positioned to advise employees of their Section 7 rights in relation to the employer handbook and the employer took a "neutral if not positive" position during the campaign, so instructed its supervisors, issued a letter to employees saying its relationship with the union had been "positive" and took corrective action against supervisors who did not comply with the "positive if not neutral" instruction. 356 NLRB slip op. at 1. Here, in contrast, the Union was without access to all eligible voters and Respondent ran an aggressive antiunion campaign, preventing what limited contact employees could have with the Union in public parking lots outside of the store. Finally, both *Jurys Boston* and *Safeway* were representation cases and not governed by the more rigorous "virtually impossible" standard applicable here. Thus, there was all the more reason for the ALJ to set aside the election.

The ALJ properly rejected Respondent's reliance on *Longs Drug Stores*, 347 NLRB 500 (2006), and *Delta Brands, Inc.*, 344 NLRB 252 (2005). ALJD 35:11-23. First, this case involves five unlawful Handbook rules,<sup>17</sup> while the cases cited by Respondent involve a single unlawful rule. See *Long Drug Stores* (confidentiality); *Delta Brands* (no solicitation - no distribution). Here, the ALJ found numerous additional 8(a)(1) conduct, including the video and the store closing leaflet, both of which were widely distributed. Thus, the collective impact of this additional conduct renders those cases inapposite.

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<sup>16</sup> Respondent's support for this assertion is Union campaign literature. Unlike the case with the store closing leaflet, which the ALJ found to have been given to all unit employees, there is no evidence of how many employees saw that literature; and it cannot be assumed to have reached all or even a majority of employees.

<sup>17</sup> In fact, there are eight rules. Supra at note 4.

In *Long Drug Stores*, the Board found that a single confidentiality rule, which violated Section 8(a)(1), did not warrant setting aside the election. However, as *Jurys Boston* observes:

the three rules on which this case turns have a much closer relationship to election – related activity by employees than did the single, relatively narrow confidentiality rule at issue in *Safeway*. It does not require “a chain of inference upon inferences” to conclude that restrictions on solicitation and distribution, “loitering,” and the wearing of buttons could reasonably have affected the outcome of the election in this case.

356 NLRB slip op. at 3.<sup>18</sup> While *Long Drug Stores* referred to evidence that employees openly discussed wages without being disciplined and the employer had posed a chart setting forth wage rates, there is no evidence that employees “openly discussed wages” let alone with Respondent’s approval. See *supra* at Point I.

Finally, in both *Long Drug Stores* and *Delta Brands*, there was no record evidence that the employer drew employees’ attention to the rules during the critical period or that the rules were enforced. Here, as the ALJ found, the rules were enforced and employees were shown the video telling them in no uncertain terms that Target will enforce its no solicitation/no distribution rules.

D. The Board has Overturned Elections where the Tally Results were Similar to Those Present Here

As the ALJ recognized, under Board law, the decision whether to invalidate an election does not turn on the margin of loss but on whether the objectionable conduct may have accounted for the Union’s defeat. ALJD 36:1-10. Where the union loses by a substantial margin, the Board will still set aside an election if “[t]he unfair labor practices . . . and other objectionable conduct committed by [the employer] were serious and created an atmosphere which made the exercise of free choice improbable.” *In re Newburg Eggs, Inc.*, 357 NLRB No.

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<sup>18</sup> *Jurys Boston* did not address *Longs Drug Stores* because the ALJ below had not relied on it. 356 NLRB at 2.

171 (2011) (setting aside an election which the union lost by a tally of 77 (64%) to 44 (36%) on the basis of 8(a)(1) threats alone); see also, *Jewish Home*, 343 NLRB 1069. The ALJ correctly relied upon *Freund Baking*, in which the Board set aside an election based on a single unlawful confidentiality rule where the Union had lost by a 10:1 margin. The Board relied upon the fact that the handbook containing the rule, as here, had been distributed to all employees and stated that violations of the rule will result in discipline.

Where the Board has relied on the tally as a basis for certifying the election results, the employer's conduct was isolated. See e.g., *Clark*, 278 NLRB at 505 (certifying the election results where the union lost by a margin of 489 (56%) to 391 (44%) because the employer's misconduct momentarily affected only eight employees out of a unit of over 800 employees); compare *IRIS U.S.A.*, 336 NLRB at 1015 (vote tally was 43 in favor of the union to 43 against the union; the Board set aside the election based on a single 8(a)(1) violation because the balance could have been tipped in the union's favor in the absence of that ULP).

In *Jewish Home*, the Board overturned the results of an election in which 146 eligible employees (40%) voted for the union and 213 eligible employees (60%) voted against. 343 NLRB at 1074. In explaining its decision to order a new election, the Board noted that the employer had "committed a number of serious and pervasive unfair labor practices," most notably "the threat of a closure of the facility and job loss contained in the poster displayed in the facility within weeks of the election and communicated to employees by the chairman of [the employer's] board of directors at meetings with the employees within a week of the election." *Id.* at 1121.

The Union's margin of loss in the June 17 election approximates that in *Jewish Home*: 85 (38%) for and 137 (62%) against.<sup>19</sup> And, as in *Jewish Home*, Respondent "committed a number of serious and pervasive unfair labor practices," including widely disseminated store closing threats and multiple group meetings where unlawful representations were made to employees. *Jewish Home*, supra at 1121. Here, the Union's showing was strong and there can be no doubt that the Employer's conduct affected the election. Moreover, the tally is consistent with cases in which the Board found the results should be set aside. See e.g., *Evergreen America Corp.*, 348 NLRB 178, 178 (2006) (setting aside an election which the union lost by a ballot count of 61 (54%) to 52 (46%) and imposing a *Gissel* bargaining order); *Chardan Inc., d/b/a, Perfect Art.*, 332 NLRB 859, 861-62 (2000) (setting aside an election with a tally of 17 votes (55%) for the intervening union, 9 votes (29%) for the petitioning union, 1 vote for no union (3 percent), and 4 challenged ballots (13%) based solely upon three 8(a)(1) violations); *Monroe Tube Co.*, 220 NLRB 302 (1975), enforcement denied on other grounds (setting aside an election with a tally of 22 (59%) against the union and 15 (41%) for the union based on two 8(a)(1) violations).

In sum, under established Board precedent, given the ALJ's findings and record evidence of Target's repeated violations of law – including "hallmark" store closing threats and the maintenance and dissemination to the entire bargaining unit - of eight unlawful Handbook provisions – the ALJ properly sustained all objections and ordered a second election.

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<sup>19</sup> An additional 6 ballots cast were challenged.

## CONCLUSION

For the foregoing reasons, the ALJ properly found that Respondent violated the Act as alleged in the Complaint and that Respondent's pervasive unlawful conduct warranted setting aside the June 17 election.

Dated: July 27, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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this 27<sup>th</sup> day of July, 2012.

/s/ Jessica D. Ochs

Jessica Drangel Ochs