

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

TARGET CORPORATION,

Respondent,

and

UNITED FOOD & COMMERCIAL
WORKERS LOCAL 1500

Charging Party.

Case No: 29-CA-30804
29-CA-30820
29-CA-30880
29-RC-12058

JD(NY) 16-12

**REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO
TARGET CORPORATION'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

On the Brief:

Alan I. Model, Esq.

August 10, 2012

I. THE ALJ'S FINDING THAT TARGET'S HANDBOOK CONTAINED OVERBROAD POLICIES WAS ERROR

A. The ALJ Did Not Apply The Appropriate Standard

The General Counsel contends that the ALJ applied the proper standard and restates the black letter law. The General Counsel then asserts that “it is clear that the ALJ did consider the context in which the rules and policies were maintained.” (GC. Br. 6).¹ This is an admission by the General Counsel (which supports Respondent’s Exceptions) that Board precedent required the ALJ to assess the context of the Valley Stream store under the *Lutheran-Heritage* standard. The General Counsel’s subsequent statement that “[t]he context made it even more likely that the rules and policies violated the Act” is hollow, as the ALJ failed to address the context in his flawed analysis. (GC. Br. 6). The General Counsel then exaggerates that “Respondent announced that it would, and did enforce some of its unlawful policies.” (GC. Br. 7). The only record evidence (although lacking credibility) about an announcement and enforcement of a policy is limited to a single policy – the No Solicitation/No Distribution policy. There is no record evidence that Respondent announced or enforced any of the other four policies under attack.

Furthermore, the General Counsel’s claim that the “ALJ correctly applied Board law when he found that Respondent’s handbook rules are unlawful even in the absence of enforcement” is unsupported. The cases cited by the General Counsel do not address the instant situation where the record evidence establishes that (1) almost half of the employees never saw the rules at issue (R. Ex. 41); (2) employees openly acted in direct contravention of the rules; and (3) no employees were disciplined for acting in direct contravention of the rules. The General

¹ Respondent’s Brief in Support of Exceptions is referred to as “R. Br. ___”; the Union’s Answering Brief thereto is referred to as “U. Br. ___”; and, the General Counsel’s Answering Brief thereto is referred to as “GC. Br. ___.”

Counsel urges the NLRB to adopt a standard that an employer violates the Act by “maintaining” rules employees do not know about, do not adhere to, and are not held accountable to. This perversion of Section 7 must be rejected.

B. The Information Security Policy Is Lawful

For the reasons set forth in the Company’s Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 14-18).

The General Counsel takes aim at Respondent’s arguments that the ALJ made erroneous factual findings. (GC. Br. 9). First, the General Counsel claims that “no reasonable employee would conclude that such information [wages and benefits] is public.” Of course, the General Counsel does not cite to any Board precedent in support of this view – as no precedent exists. The record evidence remains that employees openly discussed their wages and benefits during the work day with each other, which demonstrates that such information is indeed public. The General Counsel’s unsupported personal view that wages and benefits are not public is meaningless.

Second, the General Counsel claims that the ALJ’s “reasonable employee” analysis “was not required” because he had previously concluded that the first prong of the *Lutheran-Heritage* test was met. (GC. Br. 10). Once again, there is no legal citation or record evidence provided in support of the ALJ’s findings. Truth be told, the ALJ erred in finding that the rule “explicitly restricts [Section 7 activities]” because the rule at issue does not reference wages, benefits or employees’ terms and conditions of employment. Moreover, the General Counsel further misses the mark in asserting that “the ALJ’s conclusion was based on the record evidence: the policies do not provide that employees are free to discuss wages or other terms and conditions of employment, and employees were never told they could do so.” (GC. Br. 10). As urged by the

General Counsel, Board precedent does not require all employer policies to expressly/affirmatively encourage employee discussion of wages, benefits or other terms and conditions of work. Rather, Board precedent requires that employer policies not restrict employees in the exercise of Section 7 rights, which is how Target's policy is written. What's more, although the General Counsel urges reliance on *Security Walls, LLC*, 356 NLRB No. 87 (2011), in another context (GC. Br. 8), he ignores the finding in that case that an objective reading of the phrase "payroll or personnel records" is directed towards the confidentiality of business records and not a prohibition of Section 7 rights.

C. The No Solicitation/No Distribution Policy Is Lawful

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 18-23). The General Counsel seeks to buttress the ALJ's findings by claiming that "Respondent's prohibition of solicitation and distribution in these rules is overbroad in that it is not limited to work time or to work areas" and is unlawful under *Stoddard-Quirk*, 138 NLRB 615 (1962). (GC. Br. 13). The fact is that Target's rules permit solicitation and distribution on Target premises so long as the conduct meets the lawful limitations of no solicitation during working time and no distribution during working time and in work areas. Thus, employees may solicit during their non-work time and may distribute during their non-work time in non-work areas. Tellingly, the record evidence is that Target's Valley Stream employees did in fact solicit and distribute without consequence, which the General Counsel conveniently forgets. The only other limitations regarding solicitation and distribution in Target's rules pertain to solicitation and distribution for personal profit, commercial or charitable purposes. The General Counsel's argument that a reasonable employee would interpret "commercial" to mean "union" is a far stretch. (GC. Br. 14).

D. The After Hours Policy Is Lawful

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 23-27). The General Counsel argues in support of the ALJ's findings that the After Hours paragraph is to be read in isolation from all other paragraphs in the same Handbook pertaining to employee access. Clearly, the General Counsel's view is at odds with the Union's view that the After Hours paragraph is to be read in conjunction with the Visitors paragraph. (U. Br. 18). Similarly, the General Counsel's position that the After Hours paragraph is to be read separately from all other employee access policies because "[n]o reasonable employee would meaningfully juxtapose the selectively quoted provisions where they are not laid out as part of the same rule" in the Handbook is disingenuous. (GC. Br. 19). Indeed, the General Counsel's claims that other Handbook rules violate the Act entail a reading of multiple sections, at times pages apart, of the Handbook. As did the Union in its Answering Brief, the General Counsel attempts to avoid the record evidence that employees returned to the store off-shift to watch TV in the break room, attend "Fast, Fun & Friendly" events, bring food to friends, sing Karaoke and relax in the break room. (Tr. 148-149, 193, 358, 463-464, 580, 781. 869-870, 950, 970, 996-997). To minimize the impact of this evidence, the General Counsel claims *without record support* that "many of these events were company authorized events" and "the overwhelming record evidence established that if an employee returned to the store after hours, it was for "company authorized business." (GC. Br. 20). Then, the General Counsel tries to further minimize the evidence about after-hours access by saying it was limited to a "small group of employees out of 300 at the store." (GC. Br. 20). There is no record evidence to support such a claim.

E. The Parking Lot Policy Is Lawful

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 27-29). Absent a legitimate basis to find support in the ALJ's interpretation that "people you don't know" would be interpreted by a reasonable employee to mean "employees," the General Counsel proffers factual arguments that the store is open "around the clock and a day-shift employee might never encounter a night-shift employee." (GC. Br. 21). The record evidence does not support that the store is open around the clock or that a day-shift employee might never encounter a night shift employee. To the contrary, the record evidence is that employees go to the store after hours to shop, visit with friends, etc., which supports the fact that day-shift employees likely encounter night-shift employees. Interestingly, in grasping to support the ALJ, the General Counsel and the Union take different approaches: The General Counsel tries to define "people you don't know" whereas the Union tries to define "loitering". (U. Br. 24). This shows that both the General Counsel and the Union are even struggling in their sycophantic support of the ALJ's erroneous findings.

F. The Dress Code Policy Is Lawful

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this policy violated the Act. (R. Br. 29-31). In addition, there is no case law support for the General Counsel's reliance on the absence of evidence that "Respondent never informed employees that they were permitted to wear Union, or any buttons or logos on their clothing at the store." (GC. Br. 24). Board precedent does not require an employer to affirmatively inform employees that they are permitted to wear union buttons or logos; rather, precedent prohibits a broad restriction on wearing union buttons or logos.

II. TARGET DID NOT THREATEN STORE CLOSURE

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that this leaflet violated the Act. (R. Br. 34-37). To support the ALJ's findings, the General Counsel makes unsubstantiated assertions. First, the General Counsel claims that the title of the leaflet, "Will the store close if the union gets in?", "clearly indicates that the leaflet intends to predict the answer, and it does so in the affirmative." (GC. Br. 27). Nowhere does the leaflet state or predict in the affirmative that the Valley Stream store will close due to the Union. Second, in footnote 10, the General Counsel sidesteps the fact that the leaflet was issued in response to the Union's initial piece of literature. (R. Ex. 40). Although the General Counsel claims that the Union's literature was not specific to any particular campaign and "there is no evidence it was distributed by the Union to the employees," Union organizer Waddy testified that the literature was handed out at first meetings with employees and also mailed to their homes. (GC. Br. 29, fn. 10; Tr. 240-242). Employee Betsy Wilson also testified that she received the literature in the mail. (Tr. 800).

III. TARGET DID NOT VIOLATE THE ACT BY MAKING ISOLATED STATEMENTS

For the reasons set forth in the Company's Brief in Support of Exceptions, the ALJ erred in finding that the Company threatened discharge through Team Leader Debbie Joseph (R. Br. 37-38); threatened unspecified reprisals through Team Leader Nicole Barrett (R. Br. 39); created the impression of surveillance through Store Team Leader Laura Pena (R. Br. 39-40); interrogated employees through Executive Team Leader Michael Casolino (R. Br. 40); and, unlawfully enforced or threatened to enforce its No-Solicitation policy. (R. Br. 42-44).

IV. CONCLUSION

The Board should set aside the ALJ's Decision and certify the June 17 election results.

Respectfully submitted,

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