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TT&W Farm Products, Inc., d/b/a Heartland Catfish Company, Inc. and Heartland Alabama, LLC and Toney Williams. Case 26–CA–023722

September 11, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES
AND GRIFFIN

On December 21, 2010, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge’s rulings, findings,¹ and conclusions in part, to reverse them in part, and to adopt the recommended Order as modified below.²

The judge found that the Respondent violated Section 8(a)(1) by maintaining overbroad handbook rules prohibiting employees from “distributing handbills or similar literature on Company property at any time” and “bearing false witness” against the Respondent. We agree with the judge that both of these rules were unlawfully overbroad.³

¹ In the absence of exceptions, we adopt the judge’s dismissal of the 8(a)(1) allegations based on the handbook rules prohibiting employees from making disparaging remarks about the Respondent and prohibiting the disclosure of confidential or proprietary information.

² We shall modify the judge’s recommended Order and substitute a new notice to conform to the Board’s standard remedial language for the violations found.

³ In adopting the judge’s analysis with respect to the rule prohibiting distribution, we agree that any ambiguity in the rule must be “resolved against . . . the promulgator of the rule.” *TeleTech Holdings Inc.*, 333 NLRB 402, 403 (2001). We do not, however, rely on the judge’s citation to *Naples Community Hospital*, 355 NLRB 964, 1013 (2010); because no party excepted to the relevant findings in that case, the issue was not addressed by the Board.

With respect to the rule prohibiting employees from “bearing false witness,” we agree with the judge that employees would not reasonably read the Respondent’s rule as making a distinction between maliciously false statements, which lose the protection of the Act, and statements that are merely false, which do not. See generally *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006), revd. sub nom. *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008).

Member Hayes disagrees with the judge and his colleagues that employees would reasonably read the rule against “bearing false witness” for or against the Respondent as involving anything other than intentional falsehoods, if not the even more limited meaning of lying under oath.

The judge also found that the Respondent violated Section 8(a)(1) by maintaining handbook rules prohibiting employees from leaving their workstations during worktime. Specifically, the judge found the following handbook provisions unlawful: (1) “You are expected to be at your work station during working hours and you should obtain permission from your supervisor or the plant manager before leaving the work station or plant”; (2) “Leaving the plant without your supervisor/group leader’s permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit”; (3) “Leaving your work station without permission or approval will be considered cause for disciplinary action”; (4) “Walking off the job or leaving the plant without permission or notifying the supervisor will be considered cause for immediate discharge”; and (5) “Willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate discharge.” For the reasons stated below, we agree with the judge that the last two of these five rules are unlawful, but we reverse the judge and dismiss the allegations regarding the first three rules.

In determining whether the maintenance of a challenged rule is unlawful, the Board’s first inquiry is “whether the rule explicitly restricts activities protected by Section 7.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If so, the rule is unlawful. If not, “the violation is dependent upon a showing of 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.” *Id.* at 647.

Applying *Lutheran Heritage*, we find first that the disputed rules do not explicitly restrict Section 7 activities. We next note that the Acting General Counsel does not contend that the Respondent promulgated the rules in response to protected activity or applied them to restrict the exercise of Section 7 rights. Therefore, in determining whether the maintenance of the rules was unlawful, the only question to be answered is whether an employee would reasonably construe the rules to prohibit Section 7 activity.

In *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2–3 (2011), the Board found that employees would reasonably construe a rule prohibiting employees from “walking off” the job to prohibit Section 7 activity such as a strike, given the common use of the term “walkout” as a synonym for a strike. *Accord: Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2 (2000) (finding a rule pro-

hibiting “walk[ing] off” the job unlawfully overbroad). Consistent with that precedent, we find that the Respondent’s rule prohibiting employees from “walking off the job” is unlawful. Similarly, we find that employees would reasonably interpret the Respondent’s rule prohibiting “engaging or participating in any interruption of work” to prohibit participation in a protected strike. Thus, we find that this rule also violates Section 8(a)(1).⁴

Turning to the remaining three rules prohibiting employees from leaving the plant or their workstations without permission, we find that a reasonable employee would read these rules to prohibit only unauthorized leaves or breaks, not to prohibit conduct protected by Section 7. In *2 Sisters*, supra, the Board distinguished rules that prohibit “walking off” the job from rules that merely prohibit leaving a department or plant during a shift without permission, stopping work before a shift ends, or taking unauthorized breaks. The Board found that rules in the latter category do not violate Section 8(a)(1). *2 Sisters*, supra, slip op. at 2–3. We find no meaningful distinction between the Respondent’s rules, which prohibit employees from leaving their workstations or the plant without permission or approval, and the rules found lawful in *2 Sisters*.⁵ Accordingly, we find these three rules to be lawful, and we dismiss the 8(a)(1) allegations based on the Respondent’s maintenance of these rules.⁶

⁴ The Respondent argues that its rules are lawful under *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated in part 345 NLRB 1050 (2005), revd. on other grounds *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007). In *Wilshire*, the employer operated a nursing home for sick or infirm elderly patients; its “mission” was “to ensure adequate care for its patients.” *Id.* The handbook prohibited employees from “abandoning [their] job by walking off the shift without permission of [their] supervisor or administrator.” *Id.* at 144. The Board held that “considering the rule in this context,” employees “would necessarily read the rule as intended to ensure that nursing home patients are not left without adequate care during an ordinary workday.” *Id.* The Board has never extended *Wilshire* beyond the context of employees who are directly responsible for patient care, and we decline to do so here. Member Hayes agrees with his colleagues’ rejection of the Respondent’s reliance on *Wilshire*, but he disavows any implication that the rule at issue can only be justified in the direct patient care context.

Contrary to his colleagues, Member Hayes would find that employees would not reasonably understand the rule against “engaging or participating in any interruption of work” to prohibit participation in a protected strike. Viewed in the context of the other specifically described actions prohibited by this rule, employees would reasonably understand the prohibition as limited to unprotected in-plant actions.

⁵ We disagree with our dissenting colleague’s contention that the rule prohibiting employees from “leaving the plant without [a] supervisor/group leader’s permission” is materially distinguishable from the rules found lawful in *2 Sisters*. In our view, *2 Sisters* compels a finding that employees would not reasonably construe the rule to encompass protected activity.

⁶ In deciding this issue, we do not rely on *Crowne Plaza Hotel*, 352 NLRB 382 (2009), cited by the judge.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TT&W Farm Products, Inc., d/b/a Heartland Catfish Company, Inc. and Heartland Alabama, LLC, Itta Bena, Mississippi, and Greensboro, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

“(a) Maintaining in employee handbooks, or anywhere else, rules that: (i) prohibit employees from ‘distributing handbills or similar literature on Company property at any time’; (ii) consider ‘walking off the job or leaving the plant without permission or notifying the supervisor’ as cause for immediate discharge; (iii) consider ‘willfully restricting production’ or ‘engaging or participating in any interruption of work’ as cause for immediate discharge; and (iv) consider ‘bearing false witness for or against the Company under any and all conditions’ as cause for immediate discharge.”

2. Substitute the following for paragraph 2(a).

“(a) Rescind the handbook rules that: (i) prohibit employees from ‘distributing handbills or similar literature on Company property at any time’; (ii) consider ‘walking off the job or leaving the plant without permission or notifying the supervisor’ as cause for immediate discharge; (iii) consider ‘willfully restricting production’ or ‘engaging or participating in any interruption of work’ as cause for immediate discharge; and (iv) consider ‘bearing false witness for or against the Company under any and all conditions’ as cause for immediate discharge.”

Contrary to his colleagues, Chairman Pearce would adopt the judge’s finding that the Respondent’s rule, stating that “[l]eaving the plant without your supervisor/group leader’s permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit,” violates Sec. 8(a)(1). He finds that, when read in context, employees would reasonably construe the rule as prohibiting employees from engaging in lawful strikes and work stoppages. In the Chairman’s view, this rule is distinguishable from the rule found lawful in *2 Sisters*, supra. In that case, the prohibition against leaving the plant was presented together with terms not typically used when referencing strike activity, specifically, leaving the department and taking unauthorized breaks. By considering these prohibitions together, employees would not reasonably construe them as encompassing strike activity. Conversely, the instant rule references leaving the premises without any language of limitation, and instead broadly proclaims that leaving the premises without permission will be treated as a voluntary quit. In these circumstances, employees would reasonably read the rule as one that covers strikes and walkouts protected by Sec. 7 of the Act.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 11, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain in our employee handbooks rules that: (i) prohibit you from distributing handbills or similar literature on company property at any time; (ii) consider walking off the job or leaving the plant without permission or notifying the supervisor as cause for immediate discharge; (iii) consider willfully restricting production or engaging or participating in any interruption of work as cause for immediate discharge; and (iv) consider bearing false witness for or against the Company under any and all conditions as cause for immediate discharge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL rescind the handbook rules that: (i) prohibit you from distributing handbills or similar literature on

company property at any time; (ii) consider walking off the job or leaving the plant without permission or notifying the supervisor as cause for immediate discharge; (iii) consider willfully restricting production or engaging or participating in any interruption of work as cause for immediate discharge; and (iv) consider bearing false witness for or against the Company under any and all conditions as cause for immediate discharge.

WE WILL furnish our current employees with inserts for the current edition of our handbooks that (1) advise that the unlawful provisions set forth have been rescinded, or (2) provide the language of lawful provisions, or WE WILL publish and distribute to all correct employees a revised handbook that: (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

TT&W FARM PRODUCTS, INC., D/B/A
HEARTLAND CATFISH COMPANY, INC. AND
HEARTLAND ALABAMA, LLC

William T. Hearne, Esq., for the Acting General Counsel.

John S. Burgin, Esq., for the Respondent.

Spring Miller, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to the Judges Division pursuant to a joint motion for issuance of a decision based upon the waiver of an evidentiary hearing and approval of detailed stipulation of facts under Section 102.35 (a)(9) of the Board's Rules and Regulations.

On November 9, 2010, the motion was granted and the case was assigned to me. The parties agree that the charge, first amended charge, complaint, amended complaint, answers to complaint and amended complaint, order indefinitely postponing hearing, the stipulation of issues and facts and each party's statement of position constitute the entire record in this case.¹

The amended complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining several handbook rules at its Mississippi and Alabama facilities that are overbroad and unreasonably infringe upon the Section 7 rights of employees. Respondent's answer denies the essential elements of the complaint. On December 9, 2010, the Acting General Counsel and the Respondent filed briefs in support of their positions, which I have carefully read and considered.

Jurisdiction

Respondent, a Mississippi corporation with offices and places of business in Itta Bena, Mississippi, and in Greensboro, Alabama, is engaged in the business of catfish processing and sales. It is stipulated that Respondent is an employer engaged

¹ Only the Acting General Counsel's statement of position appears in the record. I was administratively advised that the Respondent did not submit a position statement.

in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Stipulated Facts

Respondent's Mississippi facility employs about 460 employees; its Alabama facility employs some 190 employees. The employees at those facilities work on an assembly line, which begins with live catfish being received and ends with the shipment or storage of catfish filets. The Mississippi facility processes approximately 300,000 pounds of catfish per day; the Alabama facility processes approximately 200,000 pounds of catfish per day. At both locations, the assembly line consists of employees unloading live-haul trucks and weighing fish, sizing each fish and sending it to the appropriate line for processing, de-heading and eviscerating, skinning and filleting, chilling and trimming, grading, and, finally, weighing, packaging, and labeling the fish for shipment to customers.

Since at least March 20, 2008, and at all material times since then, Respondent, at its Mississippi facility, has maintained an employee handbook, which contains, among other things, work rules, policies and procedures applicable to employees working at the facility. Respondent has disseminated the handbook to all employees at the Mississippi facility as part of its orientation for new employees. During the orientation, Respondent's human resources personnel review the handbook with employees. After the orientation, the handbook is returned to Respondent. Thereafter, a copy of the handbook is maintained in the human resources department at Respondent's Mississippi facility and made available to employees upon request for review and/or inspection.

Since at least March 20, 2008, and at all material times since, Respondent has required employees at its Mississippi facility, including the Charging Party, to sign an Employee Handbook Acknowledgement Form that reads as follows:

This is to certify that I have reviewed the employee handbook at the start of my Employment with Heartland Catfish. I also understand that I am responsible for abiding by all rules, policies and procedures outlined in the handbook.

Since about September 2008, and at all material times since then, Respondent, at its Alabama facility, has maintained a similar employee handbook applicable to employees employed at the Alabama facility. That handbook, like the Mississippi handbook, has been disseminated to employees as part of Respondent's orientation for new employees. The handbook is reviewed with employees by Respondent's human resources personnel and thereafter returned to Respondent. A copy of the handbook is thereafter maintained in the human resources department at Respondent's Alabama facility and made available to employees upon request for review and/or inspection. Since at least September 2008, and at all material times since, Respondent has required employees at its Alabama facility to sign an Employee Handbook Acknowledgement Form identical to that signed by employees at the Mississippi facility.

Both handbooks, which are 26 pages in length, contain the following provisions:

The policies that are set forth in this handbook may have to be changed from time to time out of necessity. . . . These poli-

cies and procedures reflect the way we will handle ordinary matters concerning your employment with the company.

Your supervisor/group leader will answer any specific questions you have about these policies and procedures and will be glad to help you in any way that he or she can.

Page 2 of both handbooks contains the following rule:

NON-INTERFERENCE WITH WORK

Working time is for work. There will be no solicitation of any kind and no distribution of literature of any kind by any employee during work time. You should accomplish your work and not interfere with other employees trying to accomplish their work. Work time does not include the time before your scheduled work day begins, the time after you have completed your scheduled work day, or your break and lunch periods. Employees are not permitted to engage in the distribution of advertising material, literature or other non-work materials at any time in work areas. Persons not in the employ of the company will not be permitted to make solicitations or distributions of any kind on plant property at any time.

Page 9 of both handbooks contains the following rules:

REGULAR ATTENDANCE

The job security of every employee depends on how much you help to make the plant operate efficiently. One of the most important contributions that each of us can make to an efficient operation is to report to work regularly and on time. Being on time means being at your workstation, ready for work at the starting time of your shift and remaining on the job until quitting time of your shift. Absence or tardiness for any reason must be reported to your supervisor or to the Human Resources Department by no later than 8:00 a.m. on the date of the occurrence. Failure to properly report absence or tardiness may result in appropriate disciplinary action.

COMMON SENSE

We are all expected to act like responsible adults and to treat each other and the company with fairness and respect. Therefore it should go without saying that things such as abusive, indecent or dishonest conduct; horseplay, gambling or other illegal conduct; fighting or provoking a fight; assaulting or threatening violence; using obscene or abusive language toward another person; and/or **making disparaging remarks about the company are strictly prohibited.** (Emphasis added.)

Page 10 of both handbooks contains the following rule:

WORK STATION

You are expected to be at your workstation during working hours and you should obtain permission from your supervisor or the Plant Manager before leaving the work station or plant.

Page 21 of both handbooks sets forth minor offenses which will be considered cause for disciplinary action. Included in item 2 is the following language:

Leaving your workstation without permission or approval.

Page 11 of both handbooks contains the following provision:

CONDUCT

Written rules or policies cannot cover all conduct which may be expected of employees. . . . In deciding the discipline to be imposed, consideration will be given to the facts of the particular case.

Page 16 of both handbooks contains the following provision:

POLICIES

The company has established policies that will be used as a general guide for all employees.

Pages 18 and 19 of both handbooks contain Respondent's absenteeism, attendance and punctuality policy for employees at Respondent's Mississippi and Alabama facilities. That policy includes inter alia, the following provisions:

- (a) To maintain a productive and safe work environment, employees must be dependable and punctual in reporting for scheduled work. Absenteeism and tardiness places a tremendous burden on other employees and are disruptive to company operations.
- (b) . . . leaving the plant without your supervisor/group leader's permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit.

Page 20 of both handbooks contains the following provision:

OUR MUTUAL INTERESTS

For the same reason that a municipality makes laws and regulations to protect the rights of citizens, certain rules and regulations need to be observed in any organization where considerable numbers of people are working together. Here at Heartland Catfish, our rules and regulations are not made as restrictive measures, but as means of furthering cooperation among employees and safeguarding the rights, health, safety and security of all concerned.

Pages 22 and 23 of both handbooks list major offenses that may be considered cause for immediate discharge and intolerable offenses that will be considered cause for immediate discharge. Included in the list of major offenses is the "unauthorized selling or distributing of tickets, soliciting contributions, or **distributing handbills or similar literature on Company property at any time.**" (Emphasis added.)

Included in the list of intolerable offenses which will be considered cause for immediate discharge are the following:

- (a) Removing from the plant or revealing to an unauthorized person classified or proprietary information without approval.
- (b) Bearing false witness for or against the Company under any and all conditions.
- (c) Willfully restricting production, impairing or damaging product or Equipment, interfering with others in the performance of their jobs or **engaging or participating in any interruption of work.** (Emphasis added.)

(d) Walking off the job or leaving the plant without permission or notifying the supervisor.

Page 24 of both handbooks contains inter alia, the following provision:

COMMUNICATION PROCEDURE

It is the company's sincere belief that the prompt and effective use of the problem-resolving procedure can help maintain the harmonious relations which everyone so strongly desires. It is has been and always will be the policy of the company to listen and give full attention to every employee. There will be no retaliation against anyone for his or her part in the presentation of a complaint, suggestion or question will be handled as confidentiality as possible.

. . . .

We encourage you to seek solutions to any concerns you have at those levels of Supervision closest to you but in the event they are not or cannot be resolved by your supervisor/group leader, we want you to feel free to talk with any member of management that you feel comfortable with.

There are no allegations of violations of Section 8(a)(3) in this matter. Nor are there any allegations that Respondent unlawfully or discriminatorily enforced any of the work rules at issue in this proceeding. In addition, none of the handbook rules in question were first promulgated in response to union organizing activity.

Discussion and Analysis

An employer may not promulgate a rule that has a chilling effect on protected rights under the Act, including the right to organize or join a union. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). Even if a rule does not explicitly restrict protected activity, the Board has determined that the rule will constitute a violation [of Section 8(a)(1) of the Act] if: "(1) employees would reasonably construe the language to prohibit [protected] activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of [protected] rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). In giving the rule a reasonable reading, the Board refrains from reading particular phrases in isolation. *Ibid.* And ambiguities are construed against the promulgator of the rule. *Lafayette Park Hotel*, cited above, 326 NLRB at 828. See also *Auto Workers v. NLRB*, 520 F.3d 192, 197 (D.C. Cir. 2008); and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007).

The Acting General Counsel alleges that Respondent's rules run afoul of the above principles in several respects. First, it is alleged that the rule prohibiting distribution of handbills or similar literature on company property at any time is too broad because it prohibits distributions during nonwork time in non-work areas, without a legitimate business justification, activity that is clearly protected under the Act. Secondly, it is alleged that the rule prohibiting disparaging remarks about Respondent infringes on the protected right to criticize management during protected activity. Third, it is alleged that Respondent's rules against interruption of work and leaving one's work station

broadly interfere with the right of employees to strike or engage in a work stoppage. Fourth, it is alleged that the rule against revealing classified or proprietary information prohibits employees from discussing wages and benefits among themselves or with a union, clearly protected activity under the Act. Finally, it is alleged that the rule against bearing false witness broadly prohibits employees from making merely false, rather than maliciously false, statements during the course of protected activity.

As shown below, I agree with the Acting General Counsel that, on this stipulated record and in accordance with the applicable principles discussed above, three of the above rules are, on their face, unlawfully broad or ambiguous, and can be reasonably read by employees to infringe on their protected rights within the meaning of the Act. Thus, I agree with the Acting General Counsel that maintenance of those rules, even absent enforcement, constitutes a violation of Section 8(a)(1) of the Act. However, I find, in agreement with the Respondent, that two of the rules—those dealing with disparagement of the Respondent and the revelation of classified or proprietary information—cannot reasonably be read to interfere with protected rights and are thus lawful rules. I will therefore dismiss the complaint allegations regarding those two rules.

The No-Distribution Rule. Paragraph 6(e) of the complaint alleges as unlawful Respondent’s rule providing for immediate discharge for the “unauthorized selling or distribution of tickets, soliciting contributions, or distributing handbills or similar literature on Company property at any time.” According to the Acting General Counsel, the last clause in the rule contains an unlawfully broad prohibition. As the Acting General Counsel points out in his brief (Br. 12), the distribution of literature involving union activity or terms and conditions of employment during nonwork time and in nonwork areas of an employer’s premises is protected activity. See *Hale Nani Rehabilitation*, 326 NLRB 335 (1998); and *Stoddard Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). Thus, a rule broadly prohibiting such distribution is unlawful. See *Turtle Bay Resorts*, 355 NLRB 706 (2010), incorporating by reference 353 NLRB 1242, 1271 (2009). In accordance with those cases, as well the general principles set forth in *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*, discussed above, I find that the Respondent’s no distribution rule is unlawfully broad.

Respondent alleges (Br. 6) that the language in the last clause of the rule—prohibiting the distribution of “handbills or similar literature” relates back to the selling or distribution of “tickets” or “soliciting contributions” in the first part of the rule and thus the entire rule is lawful. But Respondent’s attempt to parse the language of the rule is unavailing. Had its alleged interpretation been the operative one, the rule would have prohibited selling or distribution of tickets by handbilling or similar literature. It does not. Selling or distributing tickets, soliciting contributions and distributing handbills or similar literature are three distinct types of conduct, all of which are prohibited. Thus, the rule clearly prohibits the distributing handbills or similar literature on company property at any time. Any reasonable employee (or reasonable person) reading the rule would read it as such. That reading, of course, too broadly prohibits the distribution of handbills or similar literature deal-

ing with union or terms and conditions of employment, both as to time and place. The rule thus has the reasonable tendency to limit and proscribe protected activity.

Respondent’s reading is not only wrong grammatically, but, even if its reading were possible, Respondent’s reading simply illustrates that the rule as presently written is ambiguous. To avoid any such ambiguity, all the Respondent has to do is rewrite the rule to make it clear that it only bans the sale or distribution of tickets or the solicitation of contributions or that its present language does not prohibit lawful union or other protected activity by employees in nonwork areas on nonwork time. The fact that it has not done so establishes at the very least an ambiguity that must be held against the promulgator of the rule. See *Naples Community Hospital*, 355 NLRB 964, 1013–1014 (2010).

In its brief (Br. 7), Respondent also contends that there is no evidence that the employees have actual knowledge of the existence of the no-distribution rule since the only time the employees see the handbook is when they are first hired. The Respondent makes the same contention with respect to all the handbook rules alleged as unlawful (Br. 5). The contention, whether it applies only to the no-distribution rule or all of the rules alleged as unlawful, is without merit. Each employee is required to sign an acknowledgement that he or she is “responsible for abiding by all rules, policies and procedures outlined in the handbook.” Moreover, the specific penalty for violation of the no-distribution rule is immediate discharge. Other violations have similar penalties. Surely, Respondent is not contending that the rules in the handbook do not apply and that it cannot penalize employees for violating the rules simply because the employees did not know about the rules or did not see the handbook since they were first hired. Nor does the handbook state that the employees are excused from following the rules because they did not know about them or did not see the rules since they were first hired.

Nor is Respondent’s unlawful no-distribution rule on page 22 of its handbook rescued because, as it seems to argue (Br. 6), the handbook also has what Respondent contends is a lawful no-solicitation/distribution rule at page 2 of the handbook entitled, “Non-Interference with Work.” The thrust of the no-interference statement, which is in the introductory section of the handbook, along with other employment policies, such as its statement that it does not favor unions, is altogether different; it defines work and worktime and does not speak of what can or cannot be done on company property, unlike the unlawful no-distribution rule. In any event, the earlier statement does not negate the unlawful no-distribution rule, which comes immediately after a reference to major offenses that result in immediate discharge. At the least, the employees would be confused as to the conduct that subjected them to immediate discharge. See *Farr Co.*, 304 NLRB 203, 215 (1991).²

² Respondent cites two cases in support of its position. Both are distinguishable. In *Children’s Center for Behavioral Development*, 347 NLRB 35, 37 (2006), the Board found lawful an explicitly limited rule prohibiting employees from soliciting for personal gain or profit. In contrast, the rule in this case, as I have found, broadly prohibits “distributing handbills or similar literature.” In *NLRB v. Mock Road Super*

The No-Disparagement Rule. Paragraph 6(a) of the complaint alleges that the Respondent's no-disparagement rule is too broad and violates Section 8(a)(1) of the Act. That rule is entitled, "Common Sense", and provides that "[w]e are all expected to act as responsible adults and to treat each other and the company with fairness and respect. Therefore it should go without saying that things such as abusive, indecent or dishonest conduct; . . . and/or making disparaging remarks about the company are strictly prohibited." It is the last clause that the Acting General Counsel asserts is unlawful because, it is alleged (Br. 5), even negative comments about an employer are protected if they involve working conditions and are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection, citing *Endicott Interconnect Technologies*, 345 NLRB 409 [sic., should be 448, 450] (2005). See also *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), the lead case defining which comments are protected and which are not, in such circumstances.

It is true that employees who are engaged in a labor dispute and, in the course of that dispute, make disparaging comments about their employer, do not lose the protection of the Act if those comments are not so "misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech, to cause [the employee] to lose the protection of the Act." *Endicott Interconnect*, above, 345 NLRB at 451, quoting from *Titanium Metals Corp.*, 340 NLRB 766, 766 fn. 3 (2003), enf. denied on other grounds 392 F.3d 439 (D.C. Cir. 2004). In *Endicott*, an employee was fired for posting a statement on the internet, in connection with a union campaign and in response to a pro-union statement, which was critical of the employer for "job losses" that hurt employees. The statement went on to refer to the employer "being tanked" and "put into the dirt." In *Endicott* and most other cases involving the *Jefferson Standard* criteria, the Board considers whether the employee is disciplined for engaging in protected activity and whether improprieties during such protected activity are such as to make the conduct unprotected. The balancing of the competing interests in these cases is fact-specific.

By contrast, in assessing the impact of an unenforced rule, without a factual context, the Board is tasked with determining whether a reasonable employee could view the rule as infring-

Duper, Inc., 393 F.2d 432, 435 (6th Cir. 1968), the other case cited by Respondent, the Sixth Circuit refused to enforce a Board order finding the maintenance of a no-solicitation rule unlawfully broad because there was no evidence that the rule was unlawfully applied and, in the Court's view, the use of the word solicitation in the rule meant selling. This case is different. Not only is distributing literature different from solicitation or selling, but I have found that the broadly phrased prohibition against handbills and other literature in the instant case had nothing to do with distributing tickets or soliciting contributions. Moreover, *Mock Road Super Duper* was decided over 30 years before *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*, cited above, the Board's definitive rulings on this subject, which have received court approval and make clear that, in certain cases, like this one, even the simple maintenance of a broad rule, without enforcement, amounts to a violation. In any event, where a circuit court differs from Board law, I am bound to follow Board law. See *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

ing on his protected activity. See *Lutheran Heritage Village-Livonia*, cited above, 343 NLRB at 647, where the Board found that the maintenance of a rule banning abusive or profane language was not unlawful in part because such language is not an inherent part of protected activity and the alleged infringement of protected rights in such situations depends on the "specific facts of each case." In the context of the entire written rule in this case, I cannot find that a reasonable employee would construe the no-disparagement rule in this case to unlawfully limit his protected activity. First of all, the rule is not accompanied by a specific penalty, such as the no-distribution rule. The no-disparagement rule, which is entitled, "Common Sense", comes at page 9 of the handbook, after a no-smoking rule and a no-drug, no-drinking rule; it covers horseplay, threatening violence, and using obscene or abusive language. It does not refer to protected activity or labor disputes. Indeed, in its reference to disparaging comments, the rule may reasonably read as focusing on unprotected rather than protected conduct. Moreover, in the absence of a more precise factual context, I do not believe the rule could be read to limit protected activity. The Act comes into play only when the terms of a rule come into conflict with protected activity or a labor dispute. And the *Jefferson Standard* rule requires a close analysis of the facts in each case. The Respondent's no-disparagement rule thus has the same tenuous connection to protected activity as the rule considered in *Lutheran Heritage Village*, cited above, 343 NLRB at 647. In these circumstances, I cannot find that the existence of the rule itself could reasonably be read to infringe on protected rights. I therefore will dismiss the alleged violation set forth in paragraph 6(a) of the complaint.

In support of his position, the Acting General Counsel cites *Claremont Resort & Spa*, 344 NLRB 832 (2005). However, the case is distinguishable. In *Claremont*, the Board found unlawful a rule prohibiting "negative conversations" about employees and/or managers because it could reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect their working conditions. The rule in the instant case cannot be so read because, in context, it does not refer to conversations between employees. Moreover, the reference to disparagement in the instant rule is much more focused on unprotected conduct than is the reference to "negative conversations" in the rule found to be unlawful in *Claremont*.

Rules Against Interruption of Work and Leaving Work Station. This violation is alleged in several paragraphs of the complaint, which track language in different handbook rules, the violation of which call for discipline or discharge or treatment as a voluntary quit. The Acting General Counsel's brief on the point generally lumps all the allegations into one discussion (Br. 6-8). But, as the Respondent accurately points out (Br. 7-8, 18-19), the complaint alleges this violation in portions of paragraphs 6(b), (c), (d), and (f). Essentially, all the allegations may be viewed as contesting the language and the rules that prohibit the interruption of work and leaving one's work station without permission. To the extent that those rules and that language may reasonably be viewed as precluding employees from engaging in a protected strike or work stoppage, those rules and that language are violative of the Act. See *Labor*

Ready, Inc., 331 NLRB 1656, 1656 fn. 2 (2000); and *Crowne Plaza Hotel*, 352 NLRB 382, 387 (2008), citing *NLRB v. Washington Aluminum Co.*, 307 U.S. 9, 16–17 (1962), which makes it clear that employees may strike, notwithstanding a similar rule against leaving the work place in the absence of permission from the employer. Both *Labor Ready* and *Crown Plaza* involved, like this case, the legality of the maintenance of restrictive rules, in the absence of actual enforcement. In these circumstances, I find that a reasonable employee would interpret the Respondent's rules and language prohibiting leaving the work station and interrupting work without supervisory approval as prohibiting as well lawful strikes and work stoppages. The rules are thus unlawfully broad and violative of Section 8(a)(1) of the Act. See also *Turtle Bay Resorts*, cited above, 353 NLRB at 1271–1272.

Respondent's contention (Br.19), that one of the rules (paragraph 6(f) of the complaint) simply prohibits deliberate slow-downs or the interference of the work of other employees, which may be unprotected, is without merit. The language in the rule is not so restrictive and cannot reasonably be read that way. The last phrase of the rule, which is set forth in the disjunctive, prohibits “engaging or participating in **any** interruption of work (emphasis added).” In any event, the other rules and the other language dealing with this subject are clearly unlawful. To the extent that Respondent argues (Br. 9) that safety concerns justify all of the rules prohibiting leaving one's work station or interfering with work without permission from a supervisor, that argument is not sufficient to overcome the right of employees to leave their work stations without the permission of a supervisor to strike over safety concerns or any other legitimate dispute over working conditions. There is no reference to alleged safety concerns in the rules under consideration here, and, on their face, Respondent's alleged safety concerns do not justify the broad prohibitions set forth in its rules. Thus, Respondent has not established a legitimate business reason for the rules that would overcome the clear interference with the right to strike.

Respondent's citation of *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated on other grounds 345 NLRB 1050 (2005), reversed and remanded sub. nom. *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007) is inapposite because the case is distinguishable. In that case, the Board affirmed the judge, who found that a job abandonment rule could not reasonably be read to interfere with the right to strike, but rather was meant to ensure that nursing home patients not be left without adequate care during an ordinary workday. *Id.* at 144. The case was fact-specific, dealing with the care of nursing home patients. The Respondent's operation does not present similar concerns and thus *Wilshire* does not apply. See *Crown Plaza Hotel*, cited above, 352 NLRB at 387, similarly distinguishing the *Wilshire* case. *SMI Steel, Inc.*, 286 NLRB 274 (1987), also cited by Respondent (Br. 10), is likewise distinguishable. That case involved an allegation of discriminatory enforcement of a rule, not, as here, the maintenance of an unlawfully broad rule. Thus, the Board, which affirmed the violation, properly modified the judge's order to conform it to the violation found.

Non-Revelation of Classified or Proprietary Information. Paragraph 6(f) of the complaint alleges as unlawful the hand-

book rule that prohibits “revealing to an unauthorized person classified or proprietary information without approval,” which is labeled an intolerable offense punishable by immediate discharge. The Acting General Counsel asserts that the language in this rule interferes with the protected activity of employees because it precludes their discussion of wages and other terms and conditions of employment, citing cases that hold that rules precluding such discussions or sharing such information with others violates the Act. See *Bigg's Food*, 347 NLRB 425, 425 fn. 4 (2006); and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291–292 (1999). Respondent counters that its rule does not specifically refer to discussion of wage or benefit information and the main focus of the rule is removing from the plant or revealing classified or proprietary information, a legitimate business concern.

I find that the Acting General Counsel has failed to prove that the rule could reasonably be read to prohibit employees from discussing wage or other benefits among themselves or with others. The rule by its terms does not prohibit the discussion of wages and other terms and conditions of employment. Moreover, the Respondent's rule is very similar to other rules that the Board has found not to infringe on protected rights. For example, in the lead case of *Lafayette Park Hotel*, above, 326 NLRB at 826, the Board declined to find unlawful a rule that prohibited “divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.” The Board found that employees would not reasonably read the rule to prohibit discussion of wages and working conditions among themselves or with a union, even though the term “hotel-private” is not specifically defined in the rule. It also noted that employers have a substantial and legitimate interest in maintaining the confidentiality of private and proprietary information. *Ibid.* See also *Super K-Mart*, 330 NLRB 263, 263–264 (1999); and *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 278–279 (2003).

In support of his position, the Acting General Counsel cites *Cintas Corp.*, 344 NLRB 943 (2005), *enfd.* 482 F.3d 463 (D.C. Cir. 2007); and *Brockton Hospital*, 333 NLRB 1367 (2001). But those cases are distinguishable. In *Brockton Hospital*, the Board affirmed a judge's finding that a rule requiring employees to respect the confidentiality of information regarding patients, employees or hospital operations by not discussing such information was unlawful. 333 NLRB at 1367 fn. 3 and 1377. That rule specifically focused on employee information that might reasonably be read to include wage and benefit information. The rule in the instant case focuses on classified or proprietary information without specifying whether such information relates to employees. In *Cintas*, the Board found unlawful a confidentiality rule, whose terms amounted to an unqualified prohibition of the release of “any information” regarding its employees. The rule in *Cintas*, like that in *Brockton Hospital*, but unlike the rule in the instant case, specifically dealt with employee information; thus, the Board could properly read the rule as broadly prohibiting employees from discussing their wage and benefit information. Nor is the language in the Respondent's rule any more ambiguous in its reference to classified or proprietary information than the reference to hotel-private information in *Lafayette Park Hotel*, above, or similar

references in *Super K-Mart* or *Madiaone*, above, all cases in which the Board declined to find a violation.

Bearing False Witness. Paragraph 6(f) of the complaint alleges as unlawful the Respondent's rule prohibiting employees from "bearing false witness for or against the Company under any and all circumstances." A violation of that rule, which is labeled an intolerable offense, is penalized by immediate discharge. The Acting General Counsel alleges (Br. 9) that the rule, which essentially prohibits false statements, infringes on the right of employees to make false, but nonmalicious, statements in the course of engaging in protected concerted or union activities, citing *Lafayette Park Hotel*, above, 326 NLRB at 828. Respondent contends (Br. 13) that its rule simply prohibits intentionally false statements, which, in its view, are unprotected and thus the rule does not infringe on protected rights.

In *Lafayette Park Hotel*, the Board, citing numerous authorities, found unlawful a rule that prohibited "[m]aking false, vicious, profane or malicious statements toward or concerning Lafayette Park Hotel or any of its employees." 326 NLRB at 828. The Board noted that punishing employees for merely false statements, as opposed to maliciously false statements, was overbroad and had the tendency to chill protected activity. *Ibid.*

I find that the Respondent's rule can reasonably be read to prohibit merely false statements and thus is unlawfully broad under the Board's holding in *Lafayette Park Hotel*. An ordinary employee would read the term "bearing false witness . . . against the company" to mean that he could not tell a lie or a falsehood when talking about his employer. Not only does the rule prohibit lying, but it is specifically focused on lies about the company. This undoubtedly chills protected activity because employees have the right under the Act to criticize their employer when complaining about their terms and conditions of employment and deciding whether a union would help them in their dealings with their employer. And such criticism may include the occasional falsehood or hyperbolic comment. See *Jolliff v. NLRB*, 513 F.3d 600, 609–617 (6th Cir. 2008).

Respondent's contention (Br. 13) that its rule is lawful is based on its strained reading of the term "bearing false witness," which it defines, relying on the legal definition in *Black's Law Dictionary* (Revised 4th Ed. 1968), as a statement that is intentionally rather than mistakenly false. I doubt that an employee, who does not read *Black's Law Dictionary* and does not deal in the subtleties of legal technicalities, would make that distinction. An ordinary employee reading the term would reasonably understand it to mean simply lying or making a false statement. There is no clarifying language in the rule that prohibits only maliciously false statements or otherwise defines or limits the term "bearing false witness." At the very least, the term "bearing false witness" is so ambiguous as to confuse employees into believing that a merely false statement against their employer in the course of protected concerted activity would subject them to violation of the rule and possible discharge. I therefore find that the rule is violative of Section 8(a)(1) of the Act.³

³ Respondent's apparent assertion (Br. 14–15) that its rule is less offensive than the rule in *Lafayette Park Hotel* is without merit. The rule

CONCLUSIONS OF LAW

1. By maintaining handbook rules that prohibit distribution of handbills or similar literature on company property at any time, interruption of work and leaving one's workstation without permission of a supervisor, and bearing false witness against the Company, Respondent violated Section 8(a)(1) of the Act.

2. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. The Respondent has not otherwise violated the Act as alleged.

REMEDY

Having found that the Respondent violated the Act by maintaining unlawfully broad handbook rules, I will order that the Respondent cease and desist from maintaining those rules and rescind them. In accordance with the Board's *Cintas Corp.* decision, cited above, 344 NLRB at 943 and fn. 4, the Respondent may comply with the order by rescinding the unlawful rules and republishing its handbooks without them. Alternatively, it may supply the employees with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees. The Respondent will also be ordered to post an appropriate notice to employees, in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, TT&W Farm Products, Inc., d/b/a Heartland Catfish Company, Inc. and Heartland Alabama, LLC, Itta Bena, Mississippi, and Greensboro, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining in its employee handbooks, at both of its plants, rules that prohibit its employees from distributing handbills or similar literature on company property at any time, interruption of work and leaving one's work station without permission of a supervisor and bearing false witness against the Company.

in *Lafayette Park Hotel*, which referred to both "vicious" and "malicious" statements, which would be lawful because those statements would be unprotected, was nevertheless found unlawfully broad because it also banned "any false" statement. Respondent's rule similarly bans merely false statements.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the handbook rules that prohibit employees from distributing handbills or similar literature on company property at any time, interruption of work and leaving one's workstation without permission of a supervisor, and bearing false witness against the Company.

(b) Furnish all current employees with inserts for the current edition of its handbooks that (1) advise that the unlawful provisions set forth above have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised handbook that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

(c) Within 14 days after service by the Region, post at each of its facilities copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility or facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 22, 2010.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 21, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT maintain in our employee handbooks, at both of our plants, rules that prohibit our employees from distributing handbills or similar literature on company property at any time, interruption of work and leaving one's workstation without permission of a supervisor and bearing false witness against the Company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL rescind the handbook rules that prohibit employees from distributing handbills or similar literature on company property at any time, interruption of work and leaving one's workstation without permission of a supervisor, and bearing false witness against the Company.

WE WILL furnish our current employees with inserts for the current edition of our handbooks that (1) advise that the unlawful provisions set forth above have been rescinded, or (2) provide the language of lawful provisions; or publish and distribute to all current employees a revised handbook that (1) does not contain the unlawful provisions, or (2) provides the language of lawful provisions.

TT & W FARM PRODUCTS, INC. D/B/A HEARTLAND
CATFISH COMPANY, INC. AND HEARTLAND ALABAMA,
LLC