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NO. 287, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
7

8 UNITED STATES OF AMERICA

9 NATIONAL LABOR RELATIONS BOARD

10 DURHAM SCHOOL SERVICES, L.P.) Case Nos. 32-CA-077078;
11) 32-RC-066466
Employer,)
12)
and)
13) **BRIEF IN SUPPORT OF**
FREIGHT, CONSTRUCTION, GENERAL) **PETITIONER/CHARGING PARTY'S**
14 DRIVERS, WAREHOUSEMEN AND) **EXCEPTIONS TO THE DECISION OF**
HELPERS, TEAMSTERS LOCAL NO. 287,) **THE ADMINISTRATIVE LAW JUDGE**
15 a/w INTERNATIONAL BROTHERHOOD OF)
TEAMSTERS,)
16)
Petitioner/Charging Party.)
17)

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19 Although we join generally in the findings of the Administrative Law Judge, we bring
20 specific issues to the Board for resolution:

21 **I. TRI- COUNTY RULE SHOULD BE EXPANDED TO ALLOW NON-EMPLOYEES**
ACCESS TO PUBLIC AREAS

22 To the extent that employees who are off duty and not working are allowed access to public
23 areas, non-employees for the purposes of organizing should be allowed the same access. We
24 recognize that the Board is supposed to balance Section 7 rights against employer property rights.
25 *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) and *New York, New York*, 356 NLRB
26 No. 119 (2011), *enforced*, 676 F.3d 193 (D.C. Cir. 2012), *cert denied* (2013). To the extent,
27 however, that off-duty employees have been allowed into non-working areas, there is no

1 interference with property rights to allow non-employees access to the same non-working areas.

2 **II. THE LUTHERAN HERITAGE VILLAGE-LIVONIA RULE SHOULD BE OVERRULED**

3 The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an
4 unworkable and unreasonable doctrine of determining when employer maintained rules are
5 unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB
6 824 (1998). *See also Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in
7 a rule which restricts concerted activity can be construed against the employer).

8 The Board’s application of the *Lutheran Heritage Village-Livonia* rule ignores the basic
9 concept that if some employees can read the language as interfering with Section 7 rights, then
10 there is a violation because some employees have had their rights unlawfully interfered with or
11 restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity
12 allows Durham to the Section 7 rights of those who can reasonably read the rule as reaching
13 Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest
14 in such activity. They may assert their right to “refrain from such activity.” But those who choose
15 to engage in such activity have their conduct chilled if not prohibited. The Board’s rule is a form
16 of tyranny of some or a few over the rights of those who want to engage in Section 7 activity.

17 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

18 Where, as here, the rule does not refer to Section 7 activity, we will not
19 conclude that a reasonable employee would read the rule to apply to such
20 activity simply because the rule *could* be interpreted that way. To take a
21 different analytical approach would require the Board to find a violation
22 whenever the rule could be conceivably be read to cover Section 7 activity,
23 even though that reading is unreasonable. We decline to take that approach.

24 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

25 This doctrine has created confusion and uncertainty in the application of rules. Moreover,
26 it is an illogical statement. If the “rule could be interpreted that way [to prohibit section 7
27 activity],” the rule should be unlawful. We are not suggesting that if that “reading is unreasonable”
28 it should violate the Act. Only if the rule can be reasonably read to interfere with Section 7 activity
should it be found unlawful. This is the rule of ambiguity. If the rule is ambiguous and could
reasonably be read by some to interfere with or prohibit Section 7 activity, it should be unlawful.

1 The Board’s prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity
2 against the employer. This has been the consistent application in many areas of law including the
3 Board’s application of employer-created rules. After all, the employer has control over what it
4 says, and it can implement language which is not vague or ambiguous. Only the employer benefits
5 from chilling and restricting Section 7 activity.

6 A worker is not at fault if the employer makes a statement which is ambiguous and could
7 affect or chill Section 7 rights. The employer statement should be construed against the employer.
8 Where there is any reasonable interpretation of the rule which could interfere with Section 7
9 activity, the rule should be deemed unlawful.

10 This rule has become one of which the Board ignores the illegal yet reasonable
11 interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has
12 turned the law on its head; where there is a reasonable interpretation which a few employees may
13 apply, it makes no difference that most or many of the employees would apply a reasonable
14 interpretation that the rule prohibits Section 7 activity.

15 The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of
16 employer rules to be created from the employer perspective rather than from the view of a worker.
17 Where the worker could read any reasonable interpretation into the rule that would prohibit Section
18 7 activity, it is overbroad as to that worker or a group of workers. The fact that some workers
19 might reasonably construe it not to prohibit such Section 7 activity does not invalidate the fact that
20 at least some employees could reasonably read the rule to prohibit Section 7 activity, and thus the
21 rule would chill those activities.

22 We quote at length the dissent and ask this Board to return to the view of the dissent:

23
24 In *Lafayette Park Hotel*, supra at 825, the Board recognized that determining
25 the lawfulness of an employer's work rules requires balancing competing
26 interests. The Board thus relied upon the Supreme Court's view, as stated in
27 *Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945), that the inquiry
28 involves “working out an adjustment between the undisputed right of self-
organization assured to employees under the Wagner Act and the equally
undisputed right of employers to maintain discipline in their
establishments.” 326 NLRB at 825. While purporting to apply the Board's
test in *Lafayette Park Hotel*, the majority loses sight of this fundamental

1 precept. Ignoring the employees' side of the balance, the majority concludes
2 that the rules challenged here are lawful solely because it finds that they are
3 clearly intended to maintain order in the workplace and avoid employer
4 liability. The majority's incomplete analysis belies the objective nature of
the appropriate inquiry: “whether the rules would reasonably tend to chill
employees in the exercise of their Section 7 rights.”

5 Our colleagues properly acknowledge that even if a “rule does not explicitly
6 restrict activity protected by Section 7,” it will still violate Section 8(a)(1)
7 if—among other, alternative possibilities—“employees would reasonably
8 construe the language to prohibit Section 7 activity.” On this point, of
9 course, the established test does not require that the *only* reasonable
10 interpretation of the rule is that it prohibits Section 7 activity. To the extent
11 that the majority implies otherwise, it errs. Such an approach would permit
12 Section 7 rights to be chilled, as long as an employer's rule could reasonably
be read as lawful. This is not how the Board applies Section 8(a)(1). See,
e.g., *Double D Construction Group, Inc.*, 339 NLRB 303, 304 (2003) (“The
test of whether a statement is unlawful is whether the words could
reasonably be construed as coercive, whether or not that is the only
reasonable construction”).⁴

13 The majority asserts that it has considered the employees' side of the
14 balance, in that it has found that the purpose behind the Respondent's
15 rules—to maintain order and protect itself from liability—is so clear that it
16 will be apparent to employees and thus could not reasonably be
17 misunderstood as interfering with Section 7 activity. Although the
18 Respondent's assertedly pure motive in creating such rules may be crystal
19 clear to our colleagues, it may not be as obvious to the Respondent's
employees, especially in light of the other unlawful rules maintained by the
Respondent. Rather, for reasons explained below, we find that the
challenged rules are facially ambiguous. The Board construes such
ambiguity against the promulgator. *Norris/O'Bannon*, 307 NLRB 1236,
1245 (1992), quoting *Paceco*, 237 NLRB 299 fn. 8 (1978)

20 *Id.* at 650.

21 This problem and the need to overrule this case is illustrated here.

22 The ALJ failed to find the following language in the handbook unlawful: “inappropriate
23 solicitation of student, parent, or school official contact information would result in corrective
24 action up to and including immediate dismissal.” See Union Exhibit 2, 2010 Addendum. The
25 word “inappropriate” could have many meanings. One meaning is that seeking contact
26 information of parents or students would be inappropriate if that purpose was to harass the parent
27 or student. On the other hand, some employees might view that language as prohibiting
28 solicitation of parents or students to support organizing or support workers with respect to a

1 workplace issue. Another interpretation of the language is that it prohibits contacting parents about
2 a workplace issue. For example, there is nothing unlawful about employees asking parents to
3 support their request for better wages or improved working conditions. In the context of school
4 services, the Employer’s intent is to prohibit any contact by employees of students or parents.
5 Many employees might read that language to prohibit any such contact.

6 However, seeking contact information of public officials would always be legitimate. Any
7 contact of public officials would be in in the nature of whistleblowing or similar lawful conduct. If
8 the employee sought to contact the public official to complain about working conditions or anti-
9 union activity, the conduct would be protected. There is virtually no reasonable way to read this
10 prohibition as lawful.

11 In addition, the following language appears in the same rule: “All work related issue
12 should be addressed through normal CSE procedures....” The language with respect to requiring
13 “work related issues [to] be addressed to normal CSE procedure” prohibits employees from
14 contacting union representatives, administrative agencies, or other outsiders.

15 Although we recognize, as noted above, that one could interpret this rule not to be
16 mandatory because they use the word “should,” at least some employees would interpret that as a
17 mandate that they address issues to “normal CSE procedures” rather than go outside. It is a normal
18 reaction of employees to believe that the chain of command would apply and that “should” is
19 mandatory. Because some employees would interpret this language as reasonably requiring that
20 employees go through the “normal CSE procedures,” such language interferes with their rights to
21 go outside. We note that courts are often required to determine whether “should” is mandatory or
22 not in the context of contracts and statutes. If courts can find that such language is mandatory,
23 employees who are subject to the control of employers would far more likely read the language as
24 mandatory and not optional.

25 Here, given the employer’s anti-union conduct, employees would certainly read that
26 language as prohibiting contact with parents or students to seek support for organizing.

27 The *Lutheran Heritage Village-Livonia* doctrine simply creates an opportunity to read rules

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1 which reasonably can be read by at least some employees as prohibiting or limiting Section 7
2 activity or interfering with Section 7 activity as valid.

3 The Board should return to the previous rule of the *Lafayette Park Hotel*. The rule should
4 be that if there is “any reasonable construction of a rule which encompasses Section 7 protected
5 concerted activity” the rule should be invalid. That is a simple rule and simple application.

6 The current rule allows rules to encompass what is otherwise easily construed as Section 7
7 activity by employees as prohibited. The rule should be modified.

8 **III. REMEDY IS INADEQUATE**

9 The remedy in this case is inadequate.

10 First, any notice posted should be posted for the same length of time between when the
11 unfair labor practice has occurred and when violations are remedied. To require only a sixty-day
12 notice after years following the incidents is a basically irrelevant remedy. The only employees
13 who will see the posted notice will probably have no memories of the incident or will not be
14 concerned.

15 To require only a sixty-day notice posting is to encourage delay. The longer the Employer
16 waits to post the notice, the less impact it will have.

17 The notice must also be mailed to all of the employees who worked for the company at any
18 time from when the complaint issues to when the notice is posted. Otherwise, employees who may
19 have been affected by these unlawful rules and who are no longer with the company will not have
20 received adequate notifications the rules were invalid.

21 The notice should be furthermore modified to reflect the fact that full decision is available
22 on the Board’s website. Otherwise, employees will not have any idea why this notice was posted.
23 The Board notice should be modified to clearly reflect the availability of the Board’s Decision
24 either on the Board’s website or require the Employer to make it available to any employee who
25 wants the decision.

26 The Board’s Decision should be furthermore mailed, along with any notice, to employees.
27 Employees who receive the notice in the mail will have no understanding why the notice has been

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1 mailed to them, and they should receive the Board’s decision as part of the notice.

2 To the extent that there is mailing, the Employer should not be allowed to use FedEx or a
3 non-union carrier. The Employer should be directed to use UPS or the Postal Service.

4 The notice, furthermore, should be modified to delete the language “choose not to engage
5 in any of these protected activities.” There is no evidence in this case of limitation of the rival
6 employees not to engage in protected activities, and that language is irrelevant.

7 The notice should be furthermore modified, and the remedy modified, to delete the limiting
8 language “in any like related manner....” The Employer should be prohibited from interfering with
9 Section 7 rights in any manner.

10 For the above cited reasons, the remedy should be modified.

11 **IV. THE LUFKIN NOTICE IS INADEQUATE**

12 The *Lufkin* notice should be modified to be stronger. We propose the following language.

13 The election held on March 9, 2012, was set aside because the National
14 Labor Relations Board found that Durham Transportation interfered with the
15 employees’ free choice to be represented by Teamsters Local 287. Those
16 violations were found to be serious enough to interfere with the rights that
17 you are entitled to select a labor organization. If you have questions about
the violations which were found, the Board’s decision is available on the
Board’s website at: _____. You can also obtain copies of the
decision from the employer who will make them available to you or from
the Board’s regional office.

18 A new election will be held in accordance with the terms of this notice of
19 election. The Employer has already posted a notice and agreed not to
20 commit any further violations of the National Labor Relations Act. All
21 eligible voters should understand that the National Labor Relations Act
gives them the right to cast ballots without employer interference and
protects them in the exercise of this right from interference by employer or
any party in the election.

22 It is time that the *Lufkin* notice have some punch and means. The prior *Lufkin* notice was
23 ineffectual.

24 **V. CONCLUSION**

25 For the reasons stated above, these exceptions should be granted.

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Dated: April 17, 2013

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/David A. Rosenfeld
DAVID A. ROSENFELD
Attorneys for Petitioner/Charging Party

129337/709150

PROOF OF SERVICE
(CCP 1013)

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501-1091. On April 17, 2013, I served upon the following parties in this action:

Executive Secretary
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copies of the document(s) described as:

BRIEF IN SUPPORT OF PETITIONER/CHARGING PARTY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

FACSIMILE

BY ELECTRONIC MAIL I caused to be transmitted each document listed herein via the email address(es) listed above or on the attached service list.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 17, 2013.

/s/Katrina Shaw
Katrina Shaw