UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

FRESH & EASY NEIGHBORHOOD MARKET,

Respondent,

and Case Nos. 31-CA-077074
31-CA-080734

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION,

Charging Party.

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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CASES

I. INTRODUCTION

Based on charges filed by the United Food and Commercial Workers International Union (Union) against Fresh & Easy Neighborhood Market (Respondent), a Consolidated Complaint and Notice of Hearing (Consolidated Complaint) issued on October 22, 2012, alleging that the Respondent violated Section 8(a)(1) of the Act by maintaining the following rule (Rule) in the Confidentiality and Data Protection section (Section) of its Code of Business Conduct (Code):

> Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.

On January 16, 2013, the parties submitted their Joint Motion to Transfer Proceedings to the Division of Judges, and Joint Stipulation of Facts (Joint Motion), which was granted by Administrative Law Judge Gerald A. Wacknov (ALJ or ALJ Wacknov) on January 18, 2013.

On March 22, 2013, ALJ Wacknov issued his decision and order. ALJ Wacknov concluded that Respondent did not violate the Act as alleged in the Consolidated Complaint because, based on the overall purview of the Code and the essence of the Section, employees would not reasonably interpret the alleged unlawful Rule to preclude them from revealing and discussing with coworkers specific information regarding wages and other terms and conditions of employment.[1] (ALJD 4:33-40.) Therefore, the ALJ dismissed the Consolidated Complaint. (ALJD 5:17.)

Counsel for the Acting General Counsel's excepts to the ALJ's findings and conclusions that a reasonable employee would not understand the Rule to restrict employees from disclosing information relating to their wages and other terms and conditions of employment to other employees and to non-employees. Based on the entire record in this matter and the arguments

[1] References to the Administrative Law Judge's Decision will be cited as "ALJD X:Y," where X is the page number and Y is the line number. References to the Joint Motion will be cited as "Joint Motion ¶ X," where X is the paragraph number. References to exhibits to the Joint Motion will be cited as "J. Ex. X," where X is the exhibit number.

presented below, Counsel for the Acting General counsel respectfully submits that the ALJ erred in dismissing the Consolidated Complaint and that Respondent violated Section 8(a)(1) of the Act by maintaining the Rule.

II. ARGUMENT

The facts in this case are not in dispute, and the ALJ's recitation of the stipulated facts is accurate. (ALJD 2:24-3:13.) What is in dispute, however, are the ALJ's findings and conclusions in this matter. Thus, Counsel for the General Counsel submits the following:

A. The ALJ erroneously failed to find that when viewed in the context of the Code and the Section in which it appears, a reasonable employee would understand the Rule to restrict employees from disclosing information relating to employees' wages and other terms and conditions of employment to other employees or to non-employees (Exceptions 1-7, 9-11, 13)

As correctly stated by the ALJ, the Section, including the alleged unlawful Rule, appears on page 16 of the Code, as follows:

> CONFIDENTIALITY AND DATA PROTECTION
>
> We have an important duty to our customers and our employees to respect the information we hold about them and ensure it is protected and handled responsibly. The trust of our staff and customers is very important, so we take our obligations under relevant data protection and privacy laws very seriously. We should also regard all information concerning our business as an asset, which, like other important assets, has a value and needs to be suitably protected.
>
> **What does it mean for me?**
> **DO**
> - Make sure any customer or staff information you collect, is relevant, accurate and, where necessary, kept up to date. Keep it for no longer than necessary.
> - Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.
> - Ensure that data is appropriately and securely stored and disposed of. Be aware of the risk of discussing confidential information in public places.
>
> **DON'T**

- Release information, without making sure that the person you are providing it to is rightfully allowed to receive it and, where necessary that it has been encrypted in accordance with [Respondent] policy.

CONTACT

If you are ever unsure about how to handle [Respondent] data, be cautious and seek advice from:

- Your Line Manager
- Information Security
- Our Legal Department

(ALJD 2:33-3:31.)

An employer violates Section 8(a)(1) when it maintains a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). The framework for analyzing whether the maintenance of a work rule by an employer reasonably tends to chill employees in the exercise of their Section 7 rights was laid out by the Board in *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *Lutheran Heritage*, the Board explained that a rule that explicitly restricts Section 7 activity is unlawful, and that even if the rule does not explicitly restrict Section 7 activity, it will be found unlawful if: "(1) employees would reasonably construe the language [of the rule] 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*, *supra* at 647; *see also*, *Longs Drug Stores California, Inc.*, 347 NLRB 500, 500-501 (2006).

Here, the Rule restricts disclosure of "employee information." As the term "employee information" is vague as to what employee information may not be disclosed, the Rule does not explicitly restrict Section 7 activity. Further, there is no evidence that the Rule was promulgated in response to union activity or was applied to restrict employees' Section 7 activities. Therefore, as correctly found by the ALJ, the relevant inquiry here is whether or not employees

would reasonably construe the Rule to prohibit Section 7 activity. (ALJD 2:20-23.) If so, the Rule violates Section 8(a)(1) of the Act. *Lutheran Heritage, supra.*

The ALJ erroneously found that employees would not reasonably interpret the alleged unlawful Rule to preclude them from revealing and discussing with coworkers specific information regarding wages and other terms and conditions of employment. In making his finding, the ALJ concluded that: (i) the Code is not a typical employee handbook that "provides information and establishes policies, rules and requirements governing employees' day-to-day activities; and it does not deal with or even mention wages and working conditions"; (ii) the paragraph preceding the alleged unlawful rule's reference to "....customer or staff information you collect is..." means staff information collected by the Respondent, and is applicable to all other rules contained in the Section, including the alleged unlawful rule, such that the alleged unlawful rule's reference to "employee information" means information about employees that is collected by the Respondent; and (iii) information "collected" by the Respondent does not include employee wages, hours and working conditions, as wages, hours and working conditions of employees are "generated" by the Respondent. (ALJD 4:20-5:2.)

Contrary to the ALJ's conclusion, the record evidence shows that a reasonable employee would view the Code as a typical handbook-type document containing mandatory work rules for the employee to follow. Despite finding that the Code provides employees with the "'do's and don'ts'" relating to ethical business conduct that all employees are required to follow, the ALJ, without providing other facts or support for his conclusion, erroneously concluded that the Code was "not a typical employee handbook," and, therefore, that an employee would not view the rule as referring to wages and other terms and conditions of employment. (ALJD 2:25-27). Contrary to the ALJ's unsupported conclusion, the introductory section to the Code on page 2,

entitled "Using the Code of Business Conduct," explains to employees that the Code contains "some of [Respondent's] most important individual responsibilities and obligations as [the employees] go about [their] work." The introductory section further informs employees that each of them must comply with the Code, and that breaches of the rules in the Code "may result in disciplinary action." (J. Ex. 2, p. 2.) Therefore, Counsel for the Acting General Counsel submits that although the Code does not address wages specifically, a reasonable employee would view the Code as a typical handbook-type document containing mandatory work rules that employees' must follow in carrying out their day-to-day work duties or face disciplinary action. It is in this light that an employee would read the Rule contained therein.

Further, ALJ Wacknov's conclusion that employees would not reasonably interpret the Rule to restrict disclosure of wages and other terms and conditions of employment because the Rule's reference to "employee information," includes only employee information that is "collected" by the Respondent, is not supported by the record evidence. (ALJD 4:24-25.) After concluding that "employee information" as used in the Rule meant information "collected" by the Respondent, the ALJ deduced that a reasonable employee would not understand the Rule to restrict disclosure of wages and other terms and conditions of employment because wages and other terms and conditions are not "collected" by the Respondent, but, rather, are "generated" by the Respondent. (ALJD 4:26-34.) By way of example, the ALJ concluded that a reasonable employee would conclude that information "collected" by the Respondent could include employees' social security numbers, medical information, and other information collected in a personnel file. (ALJD 4:26-29.) The ALJ provided no citation to the record or to any facts upon which he relied in concluding that the Rule's reference to "employee information" includes only information "collected" by the Respondent. The Rule itself makes no reference to information

"collected" by the Respondent. In fact, the only place within the Section where the word "collect" or "collected" appears is in the "do" paragraph immediately preceding the unlawful Rule. (ALJD 3:11-13; J. Ex. 2, p. 16.) In the "do" paragraph immediately preceding the Rule, the Respondent instructs employees to make sure any "customer or staff information you collect" is relevant, accurate, and kept up-to-date. (ALJD 3:11-13; J. Ex. 2, p. 16.) The ALJ erred in concluding that the "you" in the "do" paragraph immediately preceding the Rule is meant to refer to the Respondent and not to the employee. The "do" paragraphs are clearly directed to employees, as they appear under the heading "what does [this Section] mean for me?" (ALJD 3:7-19.) Further, in other places within the Section where the Respondent refers to itself, as opposed to the employee, it does so by using its name, "Fresh & Easy." (ALJD 3:24, 27; J. Ex. 2, p. 16.) Therefore, contrary to the ALJ's conclusion, the plain language of the paragraph immediately preceding the Rule applies to information collected by the employee, not by the Respondent. Further, the ALJ's conclusion that the paragraph immediately preceding the Rule provides any context to decipher what the Respondent meant by "employee information" in the Rule was in error. The ALJ provided no facts, law, or other argument in support of his conclusion. Contrary to the ALJ's finding, a reasonable reading of the Section itself leads to the conclusion that the two paragraphs are each separate and self-contained, and by all reasonable interpretations neither bears any relation to the meaning of the other. (ALJD 3:10-17; J. Ex. 1, p. 16.) The ALJ's conclusion that "employee information" as used in the Rule does not include wages and terms and conditions of employment, because they are not information "collected" by the Respondent, is not supported by the record evidence; and, therefore, the ALJ erred in so concluding.

Contrary to the ALJ's conclusions, Counsel for the Acting General Counsel submits that a review of the introductory portion of the Section, and the plain language of the Rule, leads to the conclusion that a reasonable employee would interpret the phrase "employee information" as used in the Rule to include wages and other terms and conditions of employment. As described above, the introductory paragraph to the Section explains that the policies therein, including the Rule, exist because the Respondent has an "important duty" to its customers and its employees to respect the information that Respondent "hold[s] about them and ensure it is protected." (ALJD 2:35-40; J. Ex. 2, p. 16.) Therefore, in reading the Rule, a reasonable employee would interpret Respondent's reference to "employee information" to include all information that the Respondent "hold[s] about [employees]." All information that Respondent holds about employees would reasonably include wages, benefits, hours, and other terms and conditions of employment. Therefore, an employee would reasonably conclude that disclosure of this information - employee wages and other terms and conditions of employment - would violate the Rule. The ALJ failed to explain how information "held" by the Respondent about its employees does not include wages and other terms and conditions of employment.

Interpreting the Rule's reference to "employee information" to include wages and other terms and conditions of employment is also consistent with existing Board law. *See, DIRECTTV US DIRECTV Holdings, LLC,* 359 NLRB No. 54, *slip op.* at *3 (Jan. 25, 2013)(confidentiality rule instructing employees to "never give out information about customers or DIRECTV employees" was found to be unlawful); *IRIS USA, Inc.*, 336 NLRB 1013, 1013 (2001)(confidentiality rule restricting disclosure of "all of the information, whether about IRIS, its customers, suppliers, or employees..." was found to be unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291-92 (1999)(rule prohibiting employees from revealing "confidential

information regarding our customers, fellow employees, or Hotel business," was found to be unlawful); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995)(confidentiality rule prohibiting disclosure of "office business" was found to be unlawful).

The Rule in the case at bar is distinguishable from those cases in which the Board has found confidentiality rules relating to the business of the employer lawful because in those cases, the employees would not reasonably conclude that the rule restricted their right to engage in Section 7 activity. In those cases, the rules were narrowly written to include only information relating to the business of the employer, such that employees would reasonably understand the rule to be designed to protect the employer's "legitimate interest in maintaining the confidentiality of its private business information, [and] not to prohibit discussion of wages or working conditions." *K-Mart d/b/a Super K-Mart*, 330 NLRB 263, 263 (1999)(confidentiality rule prohibiting dissemination of "company business and documents" was lawful); *Lafayette Park Hotel*, *supra* at 825 (confidentiality rule prohibiting dissemination of "hotel private information" found lawful). Notably none of the rules in these cases included the word "employee." That is not the case here. To the contrary, the Rule restricts disclosure of customer *and* employee information for the stated purpose of protecting customer and employee information, and not for the purpose of protecting Respondent's business information.

Notably, the ALJ failed to cite any cases in support of his analysis of the facts and his conclusions herein, and failed to distinguish the case at bar from the Board cases cited herein, and by Counsel for the Acting General Counsel in her Post-Hearing brief.

For the reasons stated above, when viewed in the context of the Code and the Section in which it appears, a reasonable employee would understand the Rule to restrict employees from disclosing information relating to employees' wages and other terms and conditions to other

employees or to non-employees. Therefore, Respondent's Rule violates Section 8(a)(1) of the Act.

B. Respondent's revision of the Rule on October 12, 2012, was insufficient to cure its unfair labor practice under the standards enunciated in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978). (Exceptions 8, 12)

On October 12, 2012, the Respondent replaced the entire Code, including the Rule, with a revised version of the Code (Revised Code). (Joint Motion ¶ 19; J. Ex. 3.) In the Revised Code, the Rule was qualified to explain that it did not restrict employees' rights to engage in protected activities under the Act, "including the right to share information related to terms and conditions of employment." (J. Ex. 3, p. 16.) Beginning on October 12, 2012, the Revised Code was made available on Respondent's website, in the same place as the former Code. (Joint Motion ¶ 16.) Respondent did not take any other action to inform employees that it had revised the Rule, revised the Code, or otherwise replaced the former Code with the Revised Code. (*Id.*)

An employer may repudiate its unfair labor practices, but must do so in a certain manner. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978). Under *Passavant*, an employer may relieve itself of liability from unlawful conduct by: "(1) repudiating that conduct—as long as such repudiation is timely, unambiguous, and specific to the coercive conduct; (2) adequately publishing the repudiation to the employees; (3) not engaging in any further proscribed conduct; and (4) giving employees assurances that in the future, the employer will not interfere with the exercise of their Section 7 rights." *Id.*

Although the Rule in Respondent's Revised Code gives employees assurances that the Respondent will not interfere with the exercise of employees' Section 7 rights in the future, at least as it relates to communications regarding wages and terms and conditions of employment,

Respondent's repudiation was not legally sufficient because it was not publicized to employees and it was not made in a timely manner.

Respondent failed to inform its employees that the Code had been replaced with the Revised Code that assured employees of their right to engage in Section 7 activities. Although the Revised Code was put in place of the Code, such that any employee who went looking for the Respondent's "confidentiality and data protection" policy would find the revised Rule, the Respondent did not inform employees that the Code or the Rule had been revised, and employees had no other reason to know or suspect that it had been revised.[2]

Respondent's attempted repudiation also fails because it did not occur until, at the earliest, 26 months after the unlawful Rule was put into effect. Twenty-six months between the unlawful conduct and the repudiation of the unlawful conduct is significantly more time than the Board deems sufficient to cure the unfair labor practice under *Passavant*. *See*, *DIRECTV US*, *supra* at *4 (untimely repudiation where repudiation occurred one year after unlawful rule was promulgated), *Fresh & Easy Neighborhood Market v. NLRB*, 468 Fed. Appx. 1 (DC Cir. 2012)(upholding Board decision that repudiation was untimely where the unlawful rule was in effect for at least 10 months), *enfg.* 356 NLRB No. 85, *slip op.* at *16 (Jan. 31, 2011).

Respondent relies on *River's Bend Health & Rehabilitation Services*, 350 NLRB 184 (2007), in support of its argument that by putting its October 12, 2012, Revised Code on its website in place of the former Code, Respondent sufficiently cured its unfair labor practice, and argues that as a result, this case is now moot. Respondent's reliance on *River's Bend* is

[2] Further, even if an employee had occasion to look at the Revised Code on Respondent's website, there is nothing about the Revised Code that would bring to the employee viewer's attention that the document was a revised version of the Code. To this end, the cover pages of the Code and the Revised Code are the same, as are the Table of Contents and the Introduction from the Chief Executive, Tim Mason. Although the copyright date in the Revised Code was updated from August 2010 to October 2012, the copyright date is only noted on the second page of the document and would hardly tip off an employee as to the fact that the Code or the Rule had been revised.

misplaced. In, *River's Bend*, an employer unilaterally increased the price of employee meals by $.75. *River's Bend, supra* at 193. About three months later, after the Regional Director informed the employer that a complaint had been authorized on that allegation, the employer posted a notice to its employees informing them that the Regional Director decided that the employer "improperly" increased meal prices, and that the employer would reinstate the former meal price and reimburse employees the price difference in their meals from the time the price had been changed. *Id.* The administrative law judge decided, and the Board affirmed, that although the employer's posting four months later may not have met the requirements of *Passavant*, the employer's posting was nonetheless legally sufficient to repudiate its unfair labor practice. The administrative law judge reasoned that in light of the fact that the alleged violation was minor in nature, the employer's repudiation – i.e., its rescission of its unilateral change, reimbursement of employees for their losses resulting therefrom, and admission to employees of its wrongdoing in making the change - was legally sufficient to cure the alleged unfair labor practice. *Id.* at 184, 193. Here, however, the rationale of *River's Bend* is not applicable. First, the maintenance of a confidentiality rule restricting employees from communicating about wages and other terms and conditions of employment is not and has never been characterized by the Board as a relatively minor violation. Second, the Respondent's repudiation occurred significantly later that the employer's repudiation in *River's Bend*, in fact two years later. Finally, the Respondent failed to inform its employees that the Rule had been changed or to accept its wrongdoing. Because, unlike the employer in *River's Bend,* Respondent's unfair labor practice was not relatively minor, and because Respondent significantly failed to meet the requirements of *Passavant* to legally repudiate its unfair labor practice, this case is distinguishable from the facts of *River's Bend.*

In light of the foregoing, and because Respondent did not inform employees that the Rule was revised on October 12, 2012, and because Respondent's revision of the Rule came 26 months after the Rule was initially issued, the Respondent failed to meet the standards enunciated in *Passavant* to repudiate its unfair labor practice.

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that its Exceptions to the ALJ's Decision be granted. Counsel for the Acting General Counsel submits that the record and the applicable case law support the Acting General Counsel's allegation that by maintaining the Rule, the Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

Dated at Los Angeles, California this 19th day of April, 2013

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Re: FRESH & EASY NEIGHBORHOOD MARKET
Cases: 31-CA-077074 and 31-CA-080734

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE** on the parties listed below on the 19th day of April, 2013:

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