

**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 REPLY BRIEF TO
THE RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO
COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

On May 3, 2013, Fresh & Easy Neighborhood Market (Respondent) filed its Answering Brief in Opposition to Counsel for the Acting General Counsel's Exceptions to the Decision of the Administrative Law Judge. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the Acting General Counsel ("AGC") respectfully submits this reply brief in response to Respondent's Answering Brief.

Respondent's Answering Brief and the cases cited therein, fail to support the Administrative Law Judge's ("ALJ's") conclusion that the Respondent's alleged unlawful confidentiality policy did not violate Section 8(a)(1) of the Act, because the cases cited by the Respondent are inconsistent with well-established Board precedent and are factually distinguishable from the case at bar. (R AB 4-6.)¹ Accordingly, AGC maintains that Respondent's arguments are unavailing and that the ALJ erred in dismissing the complaint.

II. ARGUMENT

- A. Based on Board law, the ALJ erroneously failed to find that when viewed in context, a reasonable employee would understand the alleged unlawful 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**

Contrary to Respondent's assertions and arguments in its Answering Brief, Board law does not support the ALJ's conclusion of law in this case, that Respondent's confidentiality rule did not violate Section 8(a)(1) of the Act, as alleged.

The alleged unlawful rule ("Rule") reads:

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

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 Counsel for the Acting General Counsel's Brief in Support of Exceptions to the Decision of the ALJ will be cited as "GC EB X," where X is the page number. References to Respondent's Answering Brief will be cited as "R AB X," where X is the page number.

(ALJD 3:34-36.)

The Rule appears on page 16 of Respondent's Code of Business Conduct ("Code"), in its Confidentiality and Data Protection section ("Section") 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.)

As described more fully in AGC's Brief in Support of Exceptions to the Decision of the ALJ ("AGC's Brief in Support of Exceptions"), the Rule is similar to those cases in which the

Board has found an employer's confidentiality rule to be overly broad. (GC EB 7-9.) To this end, the Board has found that the following confidentiality rules were unlawful because employees would reasonably understand them to prohibit discussion of wages and other terms and conditions of employment: "information about customers or [employer's] employees," "all of the information whether about [the employer] its customers, suppliers, or employees," "confidential information regarding our customers, fellow employees, or Hotel business," "office business," and "personnel information and documents." *DIRECTTV US DIRECTV Holdings, LLC*, 359 NLRB No. 54, *slip op.* at *3 (Jan. 25, 2013)("never give out information about customers or DIRECTV employees"); *IRIS USA, Inc.*, 336 NLRB 1013, 1013 (2001)("all of the information, whether about IRIS, its customers, suppliers, or employees..."); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291-92 (1999)("confidential information regarding our customers, fellow employees, or Hotel business"); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995)("office business"); *Flex-Frac Logistics LLC*, 358 NLRB No. 127, *slip op.* at 2 (Sept. 11, 2012)("personnel information and documents"). Similar to the aforementioned rules, the Rule instructs employees to keep all "employee information" held by Respondent confidential, which would reasonably be understood to include wages and other terms and conditions of employment, and therefore, the Rule is unlawfully overbroad. (GC EB 7-8.)

The Rule should also be found to be unlawfully overbroad because the Rule is vague as to what information is included in "employee information." *See, e.g., Flex-Frac Logistics LLC, supra.* In *Flex-Frac*, the Board found that an employer confidentiality rule prohibiting disclosure of "personnel information and documents" was unlawfully overbroad because the term was ambiguous, and, therefore should be construed against the employer. *Id.* The Board in *Flex-Frac* explained that employees should not have to decide at their own peril what

information is not lawfully subject to the rule's prohibition. *Id.* Similarly, here, the Rule is ambiguous as to what information is included in "employee information," and, therefore, the Rule is unlawfully overly broad.

In its Answering Brief, Respondent argues that its Rule is lawful because it "constitutes a lawful restriction on the disclosure of proprietary business information." (R AB 6.) In support of its argument, Respondent points to three cases, including one Board decision, *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2001), and two Circuit Court decisions, namely, *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003) and *NLRB v. Arkema, Inc.* 710 F.3d 308 (5th Cir. 2013). (R AB 4-6.) It is important to note that both of the Circuit Court decisions cited by Respondent, *Community Hospitals* and *Arkema*, are decisions in which the D.C. and the Fifth Circuits, respectively, overruled the Board's decisions on the relevant legal issue.

In the Board's decision in *Mediaone*, the alleged unlawful confidentiality rule prohibited the disclosure of "customer and employee information, including organizational charts and databases." *Mediaone, supra* at 278. The alleged unlawful rule appeared within a larger section that prohibited the disclosure of "proprietary information, including information assets and intellectual property," and appeared as one type of information that would be an example of "intellectual property." *Id.* at 278-79. The rule's other examples of "intellectual property" included other business information, such as "business plans," "marketing plans," "trade secrets," and "financial information." *Id.* The Board reasoned that an employee reading the alleged unlawful rule in the section in which it appears, along with the other listed examples of "intellectual property," would reasonably understand that the rule prohibited disclosure of

“employee information” only “to protect the confidentiality of the Respondent’s proprietary business information rather than to prohibit discussion of employee wages.” *Id.* at 279.

In arguing that the Rule is analogous to the rule in *Mediaone*, Respondent points to erroneous factual conclusions made by the ALJ about the Code, including that the Code is not seen by employees as a typical handbook that establishes rules that employees must follow, and that the Rule applies to prohibit disclosure only of employee information “collected” by the Respondent, which could not reasonably include wages because wage information is “generated,” not “collected” by Respondent. (ALJD 4:20-34; R AB 3-4.) For the reasons stated in AGC’s Brief in Support of Exceptions, the ALJ’s conclusions of fact, cited by Respondent in its Answering Brief, were not supported by the record evidence, and, therefore, the ALJ erred in so concluding. (GC EB 4-7.)

Respondent further argues that employees would reasonably understand the Rule to prohibit disclosure only of Respondent’s proprietary business information because the Rule “appears in the context of a broader policy governing protection of confidential business information,” “specifically reference[s] ‘relevant data protection and privacy laws,’” and makes “clear that the purpose of the policy was to ensure that ‘information concerning [Respondent’s] business’ is treated like an ‘asset, which like other important assets, has a value and needs to be suitably protected.’” (R AB 3-4.) Respondent does not point to any facts in support of its assertion that the Rule appears in the context of a broader policy governing protection of business information. The Section’s title of “Confidentiality and Data Protection,” and reference to “relevant data protection and privacy law” provides no limitation on or guidance as to the types of data or information that will be subject to the rules contained in the section, and certainly does not explicitly state or implicitly suggest that the only type of information subject

to the Rule is Respondent's proprietary business information. *K-Mart d/b/a Super K-Mart*, 330 NLRB 263, 263 (1999)(confidentiality policy prohibiting disclosure of "company business and documents" lawful because employee would understand it to include only employer business information); *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998)(confidentiality policy prohibiting disclosure of "hotel private information" lawful because employee would understand it to include only employer business information).

Contrary to Respondent's assertions, the plain language of the Rule would not give a reasonable employee the understanding that the Rule's purpose was to protect Respondent's proprietary business information. Unlike the rules in *Mediaone*, *K-Mart*, and *Lafayette Park*, the Rule at issue herein specifically and explicitly makes clear to its employees that the purpose of the Rule is to protect employee information, for the purpose of maintaining the "respect" and "trust" of the employees. To this end, the introduction to the Rule explicitly states that the purpose of the Section is to maintain the "trust of [Respondent's] staff" and to "respect the information [Respondent] hold[s] about [the staff] and ensure it is protected and handled responsibly." (ALJD 2:35-40.) Only after mentioning the importance of the respect and trust of Respondent's employees does the introduction then inform employees that they should "also regard all information concerning [Respondent's] business as an asset" that "needs to be suitably protected." (ALJD 2:40-3:6.) At best, a reasonable employee reading the Rule would understand the Section and the Rule to prohibit the disclosure of employee information for the sake of protecting employee information and for the sake of protecting the Respondent's business information. Because the Rule specifically instructs employees that the purpose of the Rule is to protect employee information, employees would reasonably perceive the Rule's prohibition on disclosing "employee information" to include discussions regarding all employee

information held by Respondent, including information concerning wages and other terms and conditions of employment and not just information relating to Respondent's proprietary business information.

Respondent's comparison of its Rule to the rule in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003) is equally untenable. The alleged unlawful rule in *Community Hospitals* prohibited the "release or disclosure of confidential information concerning patients or employees." *Community Hospitals, supra* at 1088. In *Community Hospitals*, the Board found that the employer's confidentiality rule was unlawful because an employee may reasonably perceive wages and terms and conditions of employment to be within the scope of "confidential information." The D.C. Circuit reversed the Board's decision, holding that the rule was not unlawful because an employee has no right to disclose employee information acquired in confidence, and the rule only prohibited the disclosure of "confidential" employee information. *Id.* The rationale of *Community Hospitals* is not applicable to the Rule in the case at bar because the Rule does not limit disclosure of employee information only to "confidential" employee information. (ALJD 3:15-16.) In fact, unlike the rule in *Community Hospitals*, the Rule restricts disclosure of any "customer and employee information" that is *held by the Respondent*, without any other limitations on the type of information whose disclosure is limited by the Rule. (ALJD 2:35-3:16; GC EB 7.) Again, Respondent's comparison of its Rule to the rule in *Community Hospitals* is flawed and cannot be sustained.

Finally, Respondent cites to *Arkema* in support of its argument that its Rule is lawful. In *Arkema*, the Fifth Circuit overruled the Board's finding that a rule prohibiting employees from being "harassed, intimidated or threatened in any way...by anyone, including the union, for refusing to support a strike or certification" and instructing to employees to report to

management if they felt they had been harassed, violated Section 8(a)(1) of the Act, because, the Fifth Circuit argued, “harassment” did not include protected Section 7 activities. *Arkema, supra* at 313, 318. It is difficult for AGC to comprehend on what grounds Respondent relies on *Arkema* in support of its argument, and in its Answering Brief Respondent fails to explain why *Arkema* was factually similar to the case at bar, or on what legal grounds it should be relied. (R AB 5-6.) Because *Arkema* is factually dissimilar to this case, Respondent’s citation to *Arkema* is not instructive or persuasive.

For the reasons stated above, and in AGC’s Brief in Support of Exceptions, 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. Further, Respondent’s Rule is ambiguous as to what information is subject to the Rule’s prohibition. 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)

As described fully in AGC’s Brief in Support of Exceptions, Respondent’s replacement of the Code, including the Rule (“Revised Code), on October 12, 2012, by posting the Revised Code in the same place as the former Code on Respondent’s website, did not meet the legal requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-39 (1978). (GC EB 9-12.) In its Answering Brief, Respondent argues that its repudiation by issuing the Revised Code, occurring **26 months** after the alleged violation, was sufficiently timely to remedy the unfair labor practice of maintaining its Rule. (R AB 7-9.) In support of its argument, Respondent cites to *Atlas Logistics Group Retail Services (Phoenix) LLC*, 357 NLRB No. 37, *slip op.* at *8 (Aug. 5, 2011) and *Kawasaki Motors Corp., USA*, 231 NLRB 1151, 1152 (1977). (R AB 8.). Despite

Respondent's bald assertion that *Atlas Logistics and Kawasaki* support its legal argument, without any comparison of the facts of either case to the facts of the case at bar, in fact, neither case cited by the Respondent supports Respondent's conclusion. In *Atlas Logistics*, the employer's timely repudiation for two instances of unlawful conduct, occurred eight months in one instance and 5 weeks in the second instance, after the employer's unlawful conduct, and in *Kawasaki Motors*, the employer's timely repudiation occurred one month after its unlawful conduct. *Atlas Logistics, supra* at *8; *Kawasaki Motors, supra* at 1152. Respondent's repudiation occurred, at best, 26 months after its unlawful conduct. (R AB 8.) For the reasons cited in Acting General Counsel's Brief in Support of Exceptions, repudiation 26 months after the unfair labor practice is insufficient to meet the requirements of *Passavant*, and neither case cited by Respondent compels a result different result. (GC EB 9-12.)

III. CONCLUSION

Based on the entire record in this matter and on the foregoing arguments, Counsel for the Acting General Counsel respectfully urges the Board to find 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, and to issue a proper remedy.

Dated at Los Angeles, California this 17th day of May, 2013.

Respectfully submitted,



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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 REPLY BRIEF TO THE RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINSTRATIVE LAW JUDGE** on the parties listed below on the 17th day of May, 2013:

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