

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**CALIFORNIA INSTITUTE OF TECHNOLOGY
JET PROPULSION LABORATORY**

CASE NOS. 31-CA-030208
31-CA-030249
31-CA-030293
31-CA-030326
31-CA-088775

and

DENNIS BYRNES, an Individual

and

SCOTT MAXWELL, an Individual

and

LARRY D'ADDARIO, an Individual

and

ROBERT NELSON, an Individual

and

WILLIAM BRUCE BANERDT, an Individual

JET PROPULSION LABORATORY'S ANSWERING BRIEF IN RESPONSE TO
EXCEPTIONS FILED BY THE ACTING GENERAL COUNSEL TO THE DECISION
OF ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. JUDGE KOCOL CORRECTLY DISMISSED THE ALLEGATION THAT
JPL’S ETHICS AND BUSINESS CODE SECTION 2.3 VIOLATES SECTION
8(a)(1) 2

 A. “Discredit the Laboratory” Cannot Reasonably Be Read To Chill
 Section 7 Rights 2

 B. Section 2.3 Was Never Applied..... 5

 1. The Charging Parties Were Not Disciplined For Violating Section
 2.3, Let Alone For Discrediting The Laboratory 5

 2. The ALJ Did Not Abuse His Discretion In Permitting JPL To
 Amend Its Answer To Deny That The Charging Parties Were Cited
 For Violating Section 2.3 7

III. THE DOUBLE EAGLE RULE DOES NOT APPLY 8

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

| | Page(s) |
|--|----------------|
| CASES | |
| <i>Ark Las Vegas Restaurant,</i> 335 NLRB 1284 (2001) | 4 |
| <i>Continental Group, Inc.,</i> 357 NLRB No. 39 (2011) | 9 |
| <i>Costco Wholesale Corp.,</i> 358 NLRB No. 106 (2012) | 3, 4 |
| <i>Double Eagle Hotel & Casino,</i> 341 NLRB 112 (2004) | 8, 9 |
| <i>Flex Frac Logistics, LLC,</i> 358 NLRB No.127, 193 L.R.R.M. 1253 (2012)..... | 8, 9 |
| <i>Karl Knauz Motors,</i> 358 NLRB No. 164 (2012) | 3, 4 |
| <i>Lutheran Heritage Village-Livonia,</i> 343 NLRB 646 (2004) | 2, 3 |
| <i>Pleasant Travel Services, Inc.,</i> 2010 NLRB LEXIS 374 (ALJD September 28, 2010)..... | 4, 5 |
| <i>Standard Dry Wall Products,</i> 91 NLRB 544 (1950) | 8 |
| STATUTES | |
| 29 U.S.C. § 157..... | 1, 2, 3, 5 |
| 29 U.S.C §158(a)(1)..... | 2, 4 |
| REGULATIONS | |
| 29 C.F.R. § 102.46(b)(2)..... | 7 |
| OTHER AUTHORITIES | |
| NLRB RULES AND REGULATIONS § 102.23 | 7 |

I. INTRODUCTION

The Jet Propulsion Laboratory's ethics policy prohibits *unethical* conduct that would "discredit the Laboratory." Counsel for the Acting General Counsel (hereafter "the GC") claims that this rule is unlawful because it could be construed to prohibit Section 7 activity, and because it was supposedly applied to restrict Section 7 activity in this case. Neither is true. The rule, which resides in JPL's Ethics and Business Conduct Policy Section 2.3, is steeped in context (and surrounded by examples) making clear that *unethical* behavior --- such as creating the appearance of "bias" or a "conflict of interest" --- is what is banned. Moreover, the Charging Parties' discipline had nothing to do with Section 2.3, let alone the portion referring to "discredit[ing] the Laboratory."

In excepting to Judge Kocol's dismissal of the overbroad-rule allegation, the GC has submitted a supporting brief that, unfortunately, is misleading in several important respects. First, the GC's contention that the rule in question requires employees to avoid "*even the appearance*" of discrediting JPL depends upon a tortured (and ungrammatical) reading of the rule. Second, the GC ignores *all* of the ethics-based context within and surrounding JPL's rule, and would have the Board believe it prohibits *any* behavior that might damage the Laboratory's interests. That is just false. Third, the GC argues that the Charging Parties' discipline was based on Section 2.3, even though there is no evidence that is true. Finally, the GC seeks to rely upon a version of JPL's Answer that erroneously stated JPL found the Charging Parties to have violated Section 2.3 of the Ethics and Business Conduct Policy, when it was actually Section 2.3 of a different policy (the *Use of JPL and Sponsor Resources Policy*) that JPL concluded the Charging Parties violated. Following briefing and a telephonic hearing, Judge Kocol granted JPL's motion to amend the Answer --- a ruling that can be overturned only for abuse of discretion. The GC has not excepted to that ruling, but nonetheless suggests the erroneous answer should stand.

In dismissing the GC's allegation regarding the phrase "discredit the Laboratory," Judge Kocol got it right. The GC's exception should be denied.

II. JUDGE KOCOL CORRECTLY DISMISSED THE ALLEGATION THAT JPL'S ETHICS AND BUSINESS CODE SECTION 2.3 VIOLATES SECTION 8(a)(1)

A policy violates Section 8(a)(1) if employees would reasonably construe the language of the rule to prohibit Section 7 activity, or if it has been applied to restrict Section 7 activity.

Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). Judge Kocol rightly found that neither was true in this case.

A. "Discredit the Laboratory" Cannot Reasonably Be Read To Chill Section 7 Rights.

The GC begins by parsing the rule in an attempt to argue that, under Section 2.3, "employees must avoid creating *even the appearance* of discrediting their employer" GC's Brief at 3 (emphasis added). In support of his "even the appearance" contention, here is how the GC quoted the rule, with the GC's own emphases in italics:

As representatives of JPL, employees *shall avoid any actions which could reasonably be expected to adversely affect, or give the appearance of adversely affecting*, the independence and objectivity of their judgment, interfere with the timely and effective performance of their duties and responsibilities, or *discredit* the Laboratory.

GC's Brief at 3.

The emphases that the General Counsel supplies in quoting the rule constitute a strained -
-- indeed, ungrammatical --- attempt to modify the phrase "discredit the Laboratory."

"[A]dversely affect" and "adversely affecting" obviously modify the very next phrase, "the independence and objectivity of their judgment." The normal, natural reading of this portion of the rule instructs employees to avoid actions that "could reasonably be expected to adversely affect, or give the appearance of adversely affecting, the independence and objectivity of their

judgment.” It makes no sense to read “adversely affect” and “adversely affecting” as modifying “discredit the Laboratory.” Nobody but the GC would do so.

Under *Lutheran Heritage*, provisions that are challenged as prohibiting Section 7 activity must be given a reasonable reading. They also must be read in context.

In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.

343 NLRB at 646.

Here, the *context* of the phrase “discredit the Laboratory” clearly limits its application to unethical behavior. It appears in JPL’s *Ethics* and Business Conduct policy, under the heading “2.0 *Ethical Conduct*.” That entire section is plainly a call to the highest ethical behavior:

- Section 2.1 begins, “JPL shall conduct business lawfully and in accordance with *high ethical standards*.” GC Ex. 18, p. 10 (emphasis added).
- Section 2.1 goes on to observe that “the integrity of the Laboratory, from both business and technical perspectives, is based on the *collective integrity* of its individual employees.” *Id.* (emphasis added).
- Section 2.2 prohibits using one’s JPL position for “personal gain and otherwise engaging in *conflicts of interest*.” *Id.* (emphasis added).
- As noted, Section 2.3 itself speaks of preserving the “*independence and objectivity*” of one’s judgment. *Id.* (emphasis added).
- The phrase “discredit the Laboratory” appears within Section 2.3 at the *end of a list of ethical wrongdoing* that would compromise the Laboratory’s reputation as a scientific institution operated in the public interest, such as *displaying bias*. *Id.*
- Section 2.4 requires employees to comply with JPL’s *Honor Code*. *Id.* (emphasis added).

The GC’s brief ignores this context altogether, and argues that *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), and *Karl Knauz Motors*, 358 NLRB No. 164 (2012) --- cases

involving sweeping prohibitions that were *totally unlimited* by their context --- should apply here. The GC is mistaken.

In *Costco Wholesale*, the Board found that a work rule prohibiting employees from electronically posting any statements that “damage the Company . . . or damage any person’s reputation” violated Section 8(a)(1). The Board based its conclusion on the fact that this was a “broad prohibition” with no limitation that would “even arguably [suggest] that protected communications are excluded from the broad parameters of the rule.” *Costco Wholesale* at *6.

So too in *Karl Knauz*. There, the Board found unlawful a work rule that “[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.” Neither the language nor the context limited the scope of the rule in any way, and so the Board concluded that employees would reasonably assume the employer would view *any* statement of protest or criticism as “disrespectful” or “injur[ious] [to] the image or reputation of the Dealership.” *Karl Knauz* at *3.

JPL’s limited prohibition on ethical misconduct that discredits the Laboratory is nothing like those examples. Rather, it is analogous to the work rules found lawful in *Ark Las Vegas Restaurant*, 335 NLRB 1284 (2001), and *Pleasant Travel Services, Inc.*, 2010 NLRB LEXIS 374 (ALJD September 28, 2010). *Ark Las Vegas* involved a work rule that prohibited “[c]onducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company.” The Board adopted the ALJ’s conclusion that the rule was lawful because the wording limited its application. The ALJ noted that the rule did not appear aimed at protected activity, but rather at misconduct, such as leaking proprietary information to competitors. *Id.* at 1291. The GC claims that the *Ark Las Vegas* rule is distinguishable because it “was aimed only at ‘unprofessional’ and ‘unethical’ conduct that could discredit the

employer,” whereas “[JPL’s] rule contains no such limitation.”¹ But in fact JPL’s rule is limited in precisely the same way.

Pleasant Travel involved a work rule barring “[i]mmoral or indecent behavior, or behavior that publicly embarrasses or discredits the Company.” 2010 NLRB LEXIS 374 at *5. The GC argues that the *Pleasant Travel* policy’s reference to “immoral or indecent behavior” shapes the context of that rule in a way that JPL’s rule does not.² Wrong again. In *Pleasant Travel*, the disjunctive word “or” separated the limiting phrase “immoral or indecent behavior” from the phrase that was challenged. The General Counsel in *Pleasant Travel* argued that this prevented the reference to “immoral or indecent behavior” from modifying the rest of the rule. The ALJ disagreed, finding that the reference to “immoral or indecent behavior unmistakably defined the core nature of this rule” and made clear that it does not apply to Section 7 activity. The lawfulness of JPL’s rule is even clearer. The phrase “discredit the Laboratory” is unquestionably defined by its ethics-based context.

B. Section 2.3 Was Never Applied.

1. The Charging Parties Were Not Disciplined For Violating Section 2.3, Let Alone For Discrediting The Laboratory.

The GC’s brief contends that JPL “issued the warnings ... pursuant to ... Section 2.3.”³ That simply is not true. It is undisputed that Section 2.3 was not mentioned in *any* aspect of the disciplinary process. The Charging Parties’ own testimony established that no part of Section 2.3 was referenced in any of the investigatory interviews conducted by Human Resources and JPL’s Ethics Department. So, too, in the meetings at which each Charging Party received his

¹ GC’s Brief at 9.

² GC’s Brief at 10.

³ GC’s Brief at 14.

written warning. Tr. 76:4-77:23 (1/22), 237:15-238:16 (1/23), 284:1-285:11 (1/23). When three of the Charging Parties “appealed” their written warnings by submitting lengthy internal grievances challenging every perceived basis for the discipline, none of them mentioned Section 2.3. General Counsel Exhibit Nos. 19, 66, 100. Nor did JPL in any of its grievance responses. General Counsel Exhibit Nos. 20, 67, 101. The written warnings themselves say nothing of Section 2.3. General Counsel Exhibits 18, 65, 75, 81, 97. And decisionmaker Leslie Livesay testified without contradiction that Section 2.2 was the *only* portion of the Ethics and Business policy she concluded they had violated:

Q Would you please advise me as to which, if any, of [the] parts of the [Ethics and Business Conduct] policy you concluded were violated?

A ... [Section] 2.2.

...

Q Was there any other part of ethics and business conduct that you thought was violated or was that it?

A That’s it.

Tr. 640:2-641:1 (1/25).

The GC argues that JPL must have relied on Section 2.3 because Human Resources Manager Cozette Hart testified about Federal Acquisition Rule (“FAR”) 35.07, which requires JPL to operate in the public interest “with objectivity and independence.” FAR 35.07 is thus echoed in the part of Section 2.3 that admonishes employees to “avoid any actions which could reasonably be expected to adversely affect . . . the *independence and objectivity* of their judgment.”⁴ But the GC has never contended, and even now does not appear to contend, that the “independence and objectivity” portion of Section 2.3 is overbroad. Moreover, the GC’s focus on this other clause within Section 2.3 reinforces the most important point: *The Charging*

⁴ GC’s Brief at 13 (emphasis added).

Parties were not disciplined for violating the clause prohibiting conduct that “discredit[s] the Laboratory.”

2. The ALJ Did Not Abuse His Discretion In Permitting JPL To Amend Its Answer To Deny That The Charging Parties Were Cited For Violating Section 2.3.

Without any evidence that the written warnings were in fact based on Section 2.3, the GC urges the Board, in effect, to overturn Judge Kocol’s ruling allowing JPL to correct its erroneous admission that the Charging Parties were cited for violating Section 2.3 of the Ethics and Business Conduct Policy. (It was actually Section 2.3 of the *Use of JPL and Sponsor Resources Policy* that JPL concluded the Charging Parties violated, among other uncontested rules.)

The threshold hurdle for the GC is that he did not except to the ALJ’s ruling on JPL’s motion to amend. JPL made a motion to amend, the GC opposed the motion, and Judge Kocol held a telephonic hearing in which he heard the arguments of both counsel. The ALJ then ruled on the motion, allowing the amendment. In denying the GC’s special appeal from the ruling, the Board did so without prejudice to the GC’s raising the issue in its exceptions. But the GC has *not* excepted to the ruling on the motion to amend, and therefore the issue is waived.⁵

If the Board were nonetheless inclined to consider the ALJ’s ruling on the merits, the standard of review is “abuse of discretion.” Section 102.23 of the Board’s Rules and Regulations provides that amendment during and after the hearing rests “in the discretion of the administrative law judge.” The GC does not even acknowledge the abuse of discretion standard, let alone make a showing of abuse. Moreover, the GC’s assertion that JPL’s counsel is too experienced to have made such a mistake is, in effect, a challenge to the judge’s finding that it

⁵ Section 102.46(b)(2) of the Board’s Rules & Regulations states that “[a]ny exception to a ruling, finding, conclusion, or recommendation which is not *specifically urged* shall be deemed to have been waived.” (Emphasis added.)

was a mistake.⁶ There is no basis for overturning this finding. *Cf. Standard Dry Wall Products*, 91 NLRB 544, 545 (1950). Finally, the GC's claim of prejudice due to the timing of the amendment is baseless, given that Judge Kocol was downright solicitous of the GC's right to present additional evidence. In the telephonic hearing, Judge Kocol invited a motion to reopen the record, and said he would be inclined to grant it. Yet the GC chose not to accept the judge's invitation.

III. THE DOUBLE EAGLE RULE DOES NOT APPLY

Having claimed "discredit the Laboratory" is overbroad, the GC argues this provides an *additional* basis for finding the *disciplines* unlawful under *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004). Wrong again --- for two reasons.

First, while the GC contends Section 2.3 as a whole was a basis for the disciplines, one thing is certain: the portion the GC insists is overbroad --- "discredit the Laboratory" --- played no role. That part was not cited in any of the warnings (even in paraphrase), nor was it mentioned by JPL in any meeting with the Charging Parties, nor was it cited as a basis for Ms. Livesay's decisions. Therefore, even if that phrase were overbroad, it had nothing to do with the disciplines at issue.

The Board has drawn this very distinction, holding that "discipline pursuant to an unlawful rule is *not* per se unlawful." *Flex Frac Logistics, LLC*, 358 NLRB No.127, 193 L.R.R.M. 1253 (2012) (emphasis added). In *Flex Frac Logistics* case, an employee was discharged under a rule that unlawfully prohibited discussing wages or other personnel information, but also addressed legitimately confidential information. Remanding to the ALJ for

⁶ In addition to his ruling granting JPL's motion to amend, Judge Kocol specifically concluded that "the earlier admission by JPL was simply a mistake." D.28, L.33-34. The GC did not except to that specific conclusion, either.

a determination whether the employee was discharged for disclosing confidential profit margins only, the Board said “the judge erred by finding [the employee’s] discharge unlawful simply because the *rule* was unlawful.” 193 L.R.R.M. at *9 (citing *Continental Group, Inc.*, 357 NLRB No. 39 (2011)) (emphasis added).

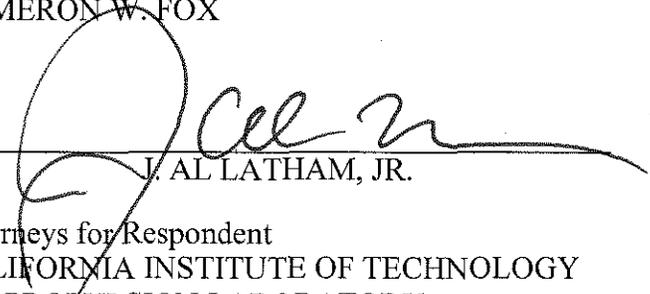
Second, it remains JPL’s position that the Charging Parties’ emails were not protected. As *Flex Frac Logistics* shows, mere application of an unlawful rule to otherwise unprotected conduct does not change the nature of the conduct. The conduct must be protected on its own before *Double Eagle* can apply. And while Judge Kocol found that the Charging Parties’ spam emails were protected conduct, that ruling is incorrect for all of the reasons set forth in JPL’s own exceptions.

IV. CONCLUSION

For all of the reasons described above, JPL respectfully requests that the Board affirm Judge Kocol’s dismissal of the Acting General Counsel’s allegations regarding Ethics and Business Conduct Policy Section 2.3.

Respectfully Submitted,

PAUL HASTINGS LLP
J. AL LATHAM, JR.
CAMERON W. FOX

By: 
J. AL LATHAM, JR.

Attorneys for Respondent
CALIFORNIA INSTITUTE OF TECHNOLOGY
JET PROPULSION LABORATORY

1 Re: CALIFORNIA INSTITUTE OF TECHNOLOGY
2 JET PROPULSION LABORATORY
3 Cases: 31-CA-030208, 31-CA-030249, 31-CA-030293,
4 31-CA-030326, 31-CA-088775

5 **CERTIFICATE OF SERVICE**

6 I hereby certify that I served the attached copy of the **JET PROPULSION**
7 **LABORATORY'S ANSWERING BRIEF IN RESPONSE TO EXCEPTIONS**
8 **FILED BY THE ACTING GENERAL COUNSEL TO THE DECISION OF**
9 **ADMINISTRATIVE LAW JUDGE WILLIAM G. KOCOL** on the parties listed below
10 on August 14, 2013.

11 **VIA E-FILE**

12 Gary W. Shinnors
13 Acting Executive Secretary
14 Office of the Executive Secretary
15 National Labor Relations Board
16 1099 14th Street, NW
17 Washington, DC 20570
18 Telephone: (202) 273-1067
19 Facsimile: (202) 273-4270
20 www.nlr.gov

21 **VIA E-MAIL**

22 Robert Nelson
23 775 N. Mentor Avenue
24 Pasadena, CA 91104-4624
25 RMNelson2@earthlink.net

26 **VIA E-MAIL**

27 William Bruce Banerdt
28 2207 E. Dudley Street
Pasadena, CA 91104-4126
Phone: (818) 710-7694
banerdt@earthlink.net

Larry D'Addario
3795 Cartwright Street
Pasadena, CA 91107-1906
larry9850@gmail.com

Scott Maxwell
1045 Sinaloa Ave.
Pasadena, CA 91104-3962
marsroverdriver@gmail.com

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VIA E-MAIL

Dennis Byrnes
42720 Nelder Heights Drive
Oakhurst, CA 93644
dbyrnes@sti.net

VIA E-MAIL

John A. Rubin, Esq.
Counsel for the Acting General
Counsel
National Labor Relations Board
Region 31
11150 W. Olympic Blvd.,
Suite 600
Los Angeles, CA 90064
John.Rubin@nlrb.gov



Arlene Figueroa, Secretary to J. Al Latham, Jr.,
Attorney for Respondent California Institute of
Technology Jet Propulsion Laboratory
515 So. Flower Street, 25th Floor
Los Angeles, CA 90071