

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8**

**AMERICAN RED CROSS BLOOD SERVICES,  
WESTERN LAKE ERIE REGION**

**and**

**CASE 08-CA-090132**

**THE UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 75**

**COUNSEL FOR THE ACTING GENERAL COUNSEL’S ANSWER TO  
RESPONDENT’S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARK  
CARISSIMI’S DECISION**

**A. Response to Exception 1: *Noel Canning***

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), *NLRB v. New Vista Nursing & Rehabilitation*, \_\_ F.3d \_\_, 2013 WL 2099742 (3d Cir. May 16, 2013), *petition for reh’g filed*, Nos. 11-3440, 12-1027, 12-1936 (July 1, 2013), and *NLRB v. Enterprise Leasing Co. Southeast, LLC*, \_\_ F.3d \_\_, 2013 WL 3722388 (4th Cir. July 17, 2013), Respondent challenges the authority of the Board to issue a decision, the Acting General Counsel and Regional Director to investigate and prosecute, and the Administrative Law Judge (“ALJ”) to issue a decision in this case. As discussed below, Respondent is incorrect on all fronts.<sup>1</sup>

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<sup>1</sup> Administrative Law Judge Carissimi will be referred to as “ALJ”. ALJD p. \_\_: \_\_ will indicate the page and line numbers in the ALJ’s Decision, JD-38-13. Respondent’s August 2, 2013, Brief in Support of Exceptions of Respondent will be referred to as “R. Excp. Br.”.

As an initial matter, the Board now has five fully confirmed members. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). Accordingly, Respondent's argument that the Board lacks authority to act in this case is simply incorrect.

Moreover, regardless of the issue of the Board's composition, the Acting General Counsel has independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, both the Acting General Counsel's authority to issue and prosecute the complaint, and, in turn, the Regional Director's authority to do so, are unaffected by any issue concerning the composition of the Board.<sup>2</sup>

Similarly, any issue regarding the composition of the Board does not affect the Board's longstanding delegation of authority to ALJs. ALJs have possessed the authority to hold hearings on the Board's behalf since 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (designating trial examiners (now called ALJs) as agents responsible for hearings); Secs. 102.34-35, Board's Rules and Regulations (designating ALJs as agents

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<sup>2</sup> The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*, 366 F.3d 776 (2d Cir. 1966).

responsible for hearings). Any assertion that delegees may not exercise delegated authority fails to account for the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit's *Laurel Baye*<sup>3</sup> decision, stated that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, three Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011).

**B. Response to Exceptions 2 through 8: Complaint Allegations and Due Process**

Prior to going on the record in the hearing before the Administrative Law Judge, and in response to the Acting General Counsel's subpoena *duces tecum*, Respondent produced newer versions of policies with work rules prohibiting the same conduct as rules already plead in the Complaint. (Tr. 14-15) The Acting General Counsel made a motion to amend the Complaint to include the newer work rules as violating Section 8(a)(1). The ALJ instructed Acting General Counsel to pinpoint the alleged unlawful rules instead of a policy in its entirety. (Tr. 23) Thus, for each oral amendment, Acting General Counsel stated the new exhibit number, the title of the document, and quoted the portions of the policies or directed attention to the paragraphs of policies that contained unlawful work rules. (Tr. 18-25) Each oral amendment alleged that the

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<sup>3</sup> *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

rules violate Section 8(a)(1) under the same theory as the other rules alleged in the Complaint<sup>4,5</sup>. It is disingenuous for Respondent to assert its due process rights were denied. The ALJ informed Respondent's counsel that if additional time was required to prepare a defense to the oral amendments, he would grant Respondent as much time as needed. (Tr. 22)

The ALJ properly relied on the Board's Rules and Regulations and *Payless Drug Stores*, 313 NLRB 1220 (1994) in granting oral amendments to the Complaint. (ALJD, p. 3:29-36) Section 102.17 of the Board's Rules and Regulations permits complaint amendments upon terms that may be just. The Board has held that "in determining whether there is a sufficient nexus between the allegations in the charge and the complaint allegations, the Board examines, among other things, whether the two arise from the same factual circumstances and are based on the same legal theory." *Id.* at 1221, citing *Southwest Distributing Co.*, 301 NLRB 954, 955-956 (1991); *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991).

The amendments to the Complaint made on the record are not only closely related to the policies alleged in the Second Order Consolidating Cases and Amended Consolidated Complaint (GC 1(l)), they are more recent versions of the same policies which were plead to be unlawful in the Second Amended Consolidated Complaint paragraphs 6(A) and 7(A). In its Answer to the Second Amended Consolidated Complaint (GC 1(n)), the Respondent admitted that it maintained the policies and denied that they violated Section 8(a)(1) of the Act. Clearly, there is a factual nexus between the amendments made on the record and those already contained in the

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<sup>4</sup> The Second Order Consolidating Cases and Amended Consolidated Complaint and Notice of Hearing, General Counsel Exhibit 1(l), hereinafter referred to as "Complaint".

<sup>5</sup> Contrary to Respondent's assertion, Acting General Counsel did not allege any rules contained in General Counsels Exhibit 17 to be unlawful. Indeed, she withdrew a proposed oral amendment relating to GC Exhibit 17 after further review of the document. (See R. Excp. Br. at 12; Tr. 22-23 relating to GC 17)

Complaint. Furthermore and more significantly, Respondent failed to make this argument in its Post-Hearing brief to the ALJ. There was no denial of Respondent's due process rights in this regard.

Respondent also asserts that the ALJ denied it due process because it was not on "notice as to what was claimed to be unlawful".<sup>6</sup> Notably, Respondent failed in any of its Answers to raise this argument as an affirmative defense. In this connection, the Second Order Consolidating Cases and Amended Consolidated Complaint and Notice of Hearing was issued on November 30, 2012.(GC 1(l)) Respondent should have raised due process as an affirmative defense in either its first Answer on December 14, 2012, or its Amended Answer, filed February 4, 2013, the day of the hearing. (GC 1(n); GC 1(s)). It failed to do so.

The ALJ correctly determined that the "[c]omplaint allegations in the instant matter were clear..." (ALJD, p. 4:35-38). The ALJ followed Board precedent that "the only requisite of a complaint is that it contains a plain statement of the acts constituting an unfair labor practice sufficient to allow a respondent an opportunity to present a defense." (ALJD, p. 4:7-12) The ALJ relied on the Board's decision in *Artesia Ready Concrete, Inc.* 339 NLRB 1224 (2003), where the Board specifically noted that the complaint did not need to include a legal theory or plead matters of evidence. *Id.* at 1226 fn. 3. In *Whirlpool Corp.*, 337 NLRB 726, 727 (fn. 4 2002), the Board held an employer's due process rights were not denied because the complaint allegations were sufficient and squarely raised the lawfulness of the conduct. Here, each allegation in the complaint contains a clear, concise statement of each rule alleged to be unlawful and asserts that each rule "has discouraged its employees from forming, joining, and assisting the

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<sup>6</sup> (R. Excp. Br. at 8)

Union or engaging in other concerted activities.” (GC 1(l)).<sup>7</sup> Respondent’s due process rights were not denied.

The ALJ also properly rejected Respondent’s reliance on *Lamar Advertising of Hartford*, 343 NLRB 261 (2004) in reaching his decision.<sup>8</sup> The facts in *Lamar Advertising* are inapposite to those in this proceeding. In *Lamar Advertising*, the complaint alleged that the employer violated Section 8(a)(4) by discharging an employee who cooperated with the Board’s subpoena. The complaint failed to allege that retention of legal counsel was also a motivating factor in the employee’s discharge. The Board found that to permit the General Counsel to expand its 8(a)(4) theory to include the retention of legal counsel as a motivating factor would deny the employer due process. *Id.* at 261. In the instant case, the Acting General Counsel sufficiently plead that the Respondent has maintained unlawful rules. The theory has not changed, nor has it been expanded. There is no viable due process argument here.

**C. Response to Exceptions 28, 36, 37, and 39: Confidentiality Policies Maintained within the 10(b) Period**

While Respondent claims that the 1993 Confidentiality Policy was not maintained within the 10(b) period, the record shows otherwise. The ALJ reached the correct conclusion in determining that the 1993 policy was maintained and enforced within the Section 10(b) period.

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<sup>7</sup> Respondent’s assertion that it was not on notice that the rules in question were facially invalid is plainly untrue. (R. Excp. Br. fn 6 at p. 8) The Second Order Consolidating Cases and Amended Complaint (GC1(l)) at Paragraph 10(B) asserts that Coutchure and Laursen were terminated by enforcement of the “overbroad and unlawful rules set forth above in paragraphs 6 through 9.” While the Parties resolved the termination allegations and the cases were severed, Respondent cannot now say that it had no notice of that the rules were alleged to be overbroad and unlawful.

<sup>8</sup> The ALJD acknowledged that *New York Post*, 353 NLRB 343 (2008) was issued by a two-Member panel and lacks precedential value. (ALJD 4:fn. 3). Moreover, *Comau, Inc.*, 358 NLRB No. 73 (2012), cited by Respondent, is non-precedential, as it is not a Board decision. (R. Excp. Br. at 8)

Employees hired in 2001 signed Respondent's 1993 "Confidentiality Policy" (GC 3), and the 1993 Confidentiality Policy was never rescinded (Tr. 38; ALJD, p. 11:26-30). On May 24, 2012, employee Amanda Laursen was terminated for violating the 1993 Confidentiality Policy. (Tr. 40-42; GC 21) Respondent's assertion that Laursen's termination letter clearly communicates that the Employer discharged Laursen for violating the Employee Handbook's confidentiality rules is unsupported. The letter makes no reference to the Employee Handbook. (GC 21) Given the substantial record evidence, Respondent's argument lacks merit.

Respondent further argues that its 2002 "Confidential Information and Intellectual Property Agreement" ("2002 CIIPA") was not maintained within the 10(b) period. (GC 5) The record evidence clearly supports the ALJ's correct conclusion that on May 24, 2012, the Employer terminated employee Heidi Coutchure for violating the 2002 CIIPA. In September 2002, employee Coutchure signed the 2002 CIIPA. (GC 5) Employees hired after 2005 were required to sign the 2005 "Confidential Information and Intellectual Property Agreement" ("2005 CIIPA") at new-hire intake meetings. (Tr. 115; GC 19) Respondent admits that Coutchure never signed the 2005 CIIPA. (R. Excp. Br. at 36) Employee Coutchure was terminated for violating the 2002 CIIPA. (GC 20) Respondent argues that the Acting General Counsel bears the burden to demonstrate that the 2002 CIIPA was not superseded by the 2005 CIIPA. Board precedent is clear that Respondent bears the burden to prove that the policy *was not* maintained during the 10(b) period. Respondent failed to meet its burden. The record shows and the ALJ correctly found that Respondent maintained and enforced the 2002 CIIPA in the Section 10(b) period when it terminated Coutchure in May 2012. (ALJD, p. 12:34-40)

**D. Response to Exceptions: Confidentiality Policies<sup>9</sup>**

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<sup>9</sup> Exceptions 9 -13, 15-18, 21-27, 29-30, 38, 40-41

The Board will find a Section 8(a)(1) violation if it is shown that an employer maintains a rule or policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 RNLB 824, 825 (1998). If a rule “explicitly restricts activity protected by Section 7, the Board will find the rule unlawful. *Lutheran Heritage Village*, 343 NLRB 646 (2004). If the rule does not explicitly restrict such activities, the Board proceeds to ask whether: “(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.” *Id.* at 647. An affirmative answer to any of these questions will warrant a finding of a Section 8(a)(1) violation. *Id.*

Respondent takes exception to each of the ALJD’s findings regarding the confidentiality policies and the Board precedent the ALJ relied on. Instead, Respondent insists that the Board should rely solely on decisions by the United States Court of Appeals for the District of Columbia.

Established precedent easily dispenses with Respondent’s erroneous claim that the ALJ was required to make a finding that the rules were actually enforced or had a demonstrable chilling effect on employees. (R. Excp. Br. at 14-18) As the Board has explained in rejecting this argument, it is “merely required to determine whether employees would reasonably construe the [challenged] language to prohibit Section 7 activity...and not whether employees have thus construed the rule.” *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) Nor is there any merit to Respondent’s related argument that the Board was required to find that the rules were actually enforced. The Board has explicitly held to the contrary; stating that the mere maintenance of a rule is likely to chill Section 7 activity even absent evidence of enforcement. *Brunswick Corp.*, 282 NLRB 794, 795 (1987) To the extent that the Court of Appeals has

applied a different test in cases including *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), *Adtranz Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001) and *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the ALJ correctly applied Board precedent. Accordingly, the ALJ appropriately rejected such arguments by Respondent and correctly recognized that a rule does not have to be enforced to be found unlawful.

As noted, the ALJ relied on a plethora of Board law in support of the conclusion that all of the alleged confidentiality policies violate Section 8(a)(1). (ALJD, p. 9:38-47, 10:1-9) These cases are all on point and clearly support the ALJ's findings. Respondent's refusal to acknowledge the precedential value of six recent Board cases only demonstrates how far afield its arguments are.

Respondent further asserts that that a work rule restricts a "reasonable employee's" Section 7 rights only if said employee knows what Section 7 rights are. This argument is circular and goes against every principle of the National Labor Relations Act. The Board has never held that an employee must pass a litmus test on understanding labor law before such employee is protected under the Act. Not surprisingly, Respondent cites no authority for this proposition.

As to the merits of these allegations, the ALJ properly concluded that the rules here are no different than similar rules the Board found unlawful in *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001) and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). The rule in *IRIS* prohibited employees from revealing "information" about "employees." In *Flamingo Hilton*, the rule banned revealing "confidential information" about "fellow employees". The unlawful ban in *Flamingo Hilton* was even less restrictive than Respondent's rules. The rules at issue in this

matter apply to the disclosure of benefits, compensation, and employee information<sup>10</sup> and could reasonably be construed as restricting any discussion about not only other employees, but one's own wages and other terms and conditions of employment. Moreover, contrary to Respondent's assertion, *Cintas Corp.*, 344 NLRB 943 (2005) is applicable to the facts of this case. In *Cintas Corp.*, the Board found unlawful a confidentiality provision prohibiting "the release of 'any information' regarding [employees because it] could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment by their fellow employees and with the Union." *Id.* at 943.

Respondent also attempts to defend its confidentiality policies by asserting that the ALJ improperly read them in isolation and failed to properly consider the Respondent's legitimate business justification. Both arguments fail. As an initial matter, the ALJ did not ignore the context of the rule. To the contrary, the ALJ readily acknowledged Respondent's argument on this point. (ALJD, p. 7:26-33) Nonetheless, consistent with Board law, the ALJ reasonably found that the confidentiality policy language identified in the Complaint goes beyond what is permitted by the Act. The ALJ correctly concluded that the confidentiality work rules in the 1993 Confidentiality Policy, 2002 CIIPA and the 2005 CIIPA are facially invalid or overly broad. The ALJ also concluded that reading the 2005 CIIPA, code of conduct and employee handbook as a whole does not clarify or limit the term "confidential". Thus, even if an employee did review all of Respondent's work rules regarding confidentiality, the employee would still be left with three facially overbroad confidentiality policies. (ALJD, pp. 10: 44-47, 11:1-19)

Importantly, the Board has recognized that employees should not have to jump through such hoops to understand ambiguous work rules--any ambiguity in a rule must be construed

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<sup>10</sup> See 2002 CIIPA (GC 5), the Employee Handbook (GC 8) and the Code of Business Ethics and Conduct (GC 18).

against its promulgator. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) Indeed, as the ALJ noted, the Board has held that “employees should not have to decide at their own peril what information is not lawfully subject to such prohibition.” (ALJD, p. 11:8-12 citing *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip. op. at 3 (2013))

Indeed, given the breadth of the Employee Handbook’s<sup>11</sup> policy of “any confidential American Red Cross information that is available solely as a result of the employee’s affiliation with the American Red Cross,” and the 2005 CIIPA’s definition of “confidential information” to include financial, personnel, employee, contract, and business information and “all information not generally known outside of Red Cross regarding Red Cross and its business”<sup>12</sup>, it is difficult to interpret the rules as not prohibiting employees from discussing their wages, benefits and other terms and conditions of employment.

Respondent complains that the ALJ ignored the legitimate business purpose of its confidentiality policies. It claims these are for the protection of donors, patients and staff, as mandated by law. On their face, however, the rules do not make a distinction between personnel and employee information and that relating to donors and patients. Rather, Respondent’s policies combine facially invalid restrictions on the sharing of personnel and employee information with the disclosure of donor and patient information. (R. Excp. Br. at 20-24) If the company has valid confidentiality concerns regarding the latter, more carefully drafted policies would have been sufficient to meet its mission and business justifications. *See Cintas Corp.*, 482 F.3d at 470 (“A more narrowly tailored rule that does not interfere with the protected employee activity would be

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<sup>11</sup> (GC 8)

<sup>12</sup> (GC 19)

sufficient to accomplish the Company's presumed interest in protecting confidential information").

**E. Response to Exceptions 19 and 20: Savings Clause**

Respondent's contention that the ALJ erred in finding the 2005 CIIPA's savings clause to be an insufficient cure for its unlawful rules is wholly unsupported by the record or precedent. Indeed, Respondent asserts, "[i]t requires a high degree of mental gymnastics to conclude on the one hand that an employee would reasonably comprehend the infringement of NLRB rights under the CIIPA, while simultaneously on the other hand having no understanding of the NLRA protections provided by its savings clause." (R. Excp. Br. at 30) This again suggests that the Acting General Counsel bears a novel evidentiary burden- that the Acting General Counsel must prove that an employee is knowledgeable enough to know what Section 7 rights are, what the National Labor Relations Act permits employees to discuss, and what provisions of a work rule infringe on those rights. (R. Excp. Br. at 29) Again, there is no Board precedent to support this circular logic. Simply stated, Respondent's overbroad rules restrict employees from discussing their terms and conditions of employment, conduct that is protected by the statute. A savings clause is not a panacea: the overbroad rule continues to be unlawful.

Further, an effective savings clause would inform employees in plain language that they are permitted to discuss their terms and conditions of work. Respondent's savings clause is as follows:

[T]his Agreement does not deny any right provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining.

This is the polar opposite of plain language that can be reasonably understood by employees. It is legal jargon. It provides employees with no specifics about what rights they have

under the NLRA and what specific conduct is protected and/or prohibited. As the ALJ correctly summarizes, the “‘savings clause’ ,...,would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside their employer.” (ALJD, p. 10:22-40)

**F. Response to Exceptions 31 through 34: Unlawful Litigation Rule**

Respondent excepts to the ALJ’s finding that the rule prohibiting employees from sharing “information on litigation” restricts Section 7 rights. In its exceptions, Respondent asserts that this language should be examined under the *Lutheran Heritage* analysis. This is not supported by Board law. The Board has found, as did the ALJ, that rules restricting discussions about litigation are facially invalid and violate Section 8(a)(1). While Respondent attempts to distinguish the phrases “all information on litigation” and “information on all litigation,” the distinction is meaningless. A broad rule prohibiting discussion about “litigation” clearly encompasses employees’ terms and conditions of employment. As noted by the ALJ, in *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), the Board found a rule prohibiting employees from discussing litigation to be unlawful, unless an employer could establish a litigation business justification that outweighs employee rights to discuss litigation. (ALJD, p. 12:22-25)

Significantly, Respondent fails to cite any legal authority in support of its contention that the rule is not facially invalid. It speculates that employees, considering Respondent’s status as a health care provider, would read the rule knowing that its prohibition was limited to donor, patient or medical information. It suggests that Respondent’s status as a healthcare organization guarantees there is a legitimate business justification that outweighs employees Section 7 rights. (R. Excp. Br. at 35) However, the mere fact that Respondent operates in the medical field cannot

be used as a blanket defense for its overbroad rules. If Respondent intended the rule to prohibit employees from disclosing donor, patient or medical information in litigation or investigations, the rule should be limited to those areas.

Moreover, it was proper for the ALJ to apply Board cases regarding internal investigations to this issue. (ALJD, p. 12:28-29) In *Fresenius United States Mfg.*, 358 NLRB No. 138 (2012), the Board held it was unlawful when the employer, during an investigative meeting, unlawfully directed an employee not to speak with any other employees about the investigation. Investigations, like lawsuits, are inevitably tied to terms and conditions of employment. The ALJ did not err in making such a comparison.

**G. Response to Exceptions 14 and 42: Communication Systems Policy**

The Communication Systems policy prohibits employees from “distributing sensitive, proprietary, confidential or private information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.” (GC 8 at p. 41) Respondent asserts that the ALJD does not contain findings of facts or conclusions of law regarding the allegation that its “Communications Systems” policy violates the Act. This is simply not true. The ALJ analyzed the Red Cross Communication Systems policy specifically (ALJD pp. 6:42-43, 7:1-6, 8:35-37, fn. 5, p. 9:1-13), and in concert with his discussion of other confidentiality policies. (ALJD, pp. 6-10) The ALJ concluded that each term in the work rule restricts employees Section 7 Rights.

The ALJ relied on *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) in concluding that Respondent’s rule prohibiting the distribution of sensitive information and private information is overbroad. The ALJ properly rejected Respondent’s reliance on *Windstream Corp.*, 352 NLRB 510 (2008), as it has no precedential value. (ALJD, p. 8:fn. 5)

In *Costco*, the Board determined that the employer’s electronic communication policy that prohibited employees from sharing or transmitting “[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information” and its policy prohibiting employees from discussing “private matters” were overbroad and violative of Section 8(a)(1) of the Act. (ALJD, p. 8:26-37, p. 9:1-22 citing *Costco*, slip. op. at 10, 12, fn.19, 15) Respondent’s communication systems’ rules prohibiting employees from sharing sensitive and private information are even more broad and vague than the rules the Board found unlawful in *Costco*. Furthermore, the ALJ relied on *DirecTV*, *Sheraton Anchorage*, 359 NLRB No. 95 (2013,) and *Cintas Corp.* in concluding that a rule prohibiting employees from disclosing proprietary or confidential information is facially overbroad. (ALJD, p. 9:38-47, 10:1-3) The ALJ properly relied on the same cases previously addressed in response to Respondent’s Exceptions regarding other confidentiality policies. See, *supra*.

In sum, the ALJ correctly decided the issues excepted to by Respondent and his findings and conclusions on these issues should be sustained.

Dated at Cleveland, Ohio this 16th day of August, 2013.

Respectfully submitted,

/s/ Gina Fraternali

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 16th day of August 2013:

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