

**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 REPLY TO RESPONDENT’S  
ANSWERING BRIEF IN RESPONSE TO THE ACTING GENERAL COUNSEL’S  
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARK CARISSIMI’S DECISION**

**1. The Exceptions Complied with the Rules and Regulations**

Respondent asserts that the Acting General Counsel’s Exceptions are not in compliance with the Board’s Rules and Regulations, Sections 102.46(b)(1) and (c) and therefore not properly before the Board because the exceptions are too broad and do not provide enough detail.<sup>1</sup>(R. Ans. Br. at 3) The Acting General Counsel’s Exceptions are clear and state that the Administrative Law Judge (ALJ) erred by failing to find that Respondent violated Section 8(a)(1) of the Act and to issue an appropriate remedial order with respect to Respondent’s promulgation and maintenance of Conflict of Interest and Unsatisfactory Conduct work rules and policies. (ALJD, pp. 15-20) (GC Excp. Br. at 1) The ALJ addressed the Conflict of Interest and

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<sup>1</sup> Section 102.46(b)(2) does not preclude the Board from ruling on what may be determined to be defective exceptions. The Board has the authority to consider exceptions not in accordance with the Rules and Regulations. Dish Network Corp., NLRB No. 32, \*8 (2012).

Unsatisfactory Conduct work rules and policies as a group. The Counsel for the Acting General Counsel grouped her exceptions to be consistent with the ALJ's findings.

The Board has held that exceptions comply with Section 102.46 (b) when the "exceptions are considered in context with the Respondent's brief to which the exceptions refer." United Cement Co., 209 NLRB 1137, FN 1(1974) Thus, the Board has found exceptions substantially, if not fully, comply with the Board's requirement if they cite transcript testimony, record exhibits and pages of the decision. Loudon Steel, Inc., 340 NLRB 307, FN 1(2003). The Acting General Counsel's brief containing detailed facts, citations to the ALJ's decision, citations to the record and exhibits and Board law relied upon in support of the exceptions, falls squarely within the Board's standards as set forth in United Cement Co. and Loudon Steel, Inc. (GC Excp. Br. at 2-7)

Furthermore, in United States Postal Service, 339 NLRB 400 (2003), the Board held that in the absence of substantial prejudice, even deficient exceptions will be considered. In that case, the respondent's exceptions failed to cite transcript pages as required by 102.46(b) and failed to specifically address each exception as required by Section 102.46(c). The Board found there was no substantial prejudice as the General Counsel filed an answering brief addressing the issues. Id. at FN 1. While the Acting General Counsel's Exceptions fully comply with the Board's Rules and Regulations, Respondent's claim that it has been deprived of due process is belied by its Answering brief which responds to the Conflict of Interest and Unsatisfactory Conduct work rules and policies. Indeed, Respondent admits that it used the same format-- that its "brief addresses them in the same manner for the sake of consistency." (R. Ans. Br. at 5, FN 4)

**2. The Acting General Counsel did not Waive Exceptions to the Red Cross Affiliation, Best Interest of the Red Cross and the Code of Conduct Certification Policies**

The Respondent also misrepresents Counsel for the Acting General Counsel's Exceptions and the scope of the ALJ's decision. The Acting General Counsel did not waive exceptions to Red Cross Affiliation, Best Interest of the Red Cross, and Code of Conduct Certification policies. In his decision, the ALJ grouped the Red Cross Affiliation<sup>2</sup>, Best Interest of the Red Cross<sup>3</sup>, and Code of Conduct Certification<sup>4</sup> with the Conflict of Interest and Unsatisfactory Conduct rules. Similarly, Counsel for the Acting General Counsel grouped her exceptions to the ALJ's findings related to Red Cross Affiliation<sup>5</sup>, Best Interest of the Red Cross<sup>6</sup>, and Code of Conduct Certification<sup>7</sup> with the other rules. Thus, there is no waiver as claimed by Respondent. Counsel for the Acting General Counsel's exceptions are consistent with the framework of the ALJD. The Exceptions are clear and are properly before the Board and in conformity with the Rules and Regulations as discussed above in Section 1.

**3. Credibility Determination**

The Respondent erroneously asserts that the Acting General Counsel excepted to the ALJ's credibility findings as related to the testimony of Vice President of Human Resources and Labor Relations, Keith Sherman. (R. Ans. Br. at 7) A clear reading of the Acting General

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<sup>2</sup> ALJD, p. 16:10-12

<sup>3</sup> ALJD, p. 15:27-28, 44; 16:4-5.

<sup>4</sup> ALJD, p. 15:39-47.

<sup>5</sup> ALJD, p. 16:10-12

<sup>6</sup> ALJD, p. 15:27-28, 44; 16:4-5.

<sup>7</sup> ALJD, p. 15:39-47.

Counsel's Exceptions and Brief in Support demonstrates that the exception addresses the ALJ's failure to give proper weight to the evidence in the record to give context to employees' reading of the work rules and has nothing to do with Sherman's credibility. The ALJ erred by not considering the work rules in the context of all of the evidence in the record, relying instead on, and giving undue weight to, Sherman's testimony. (GC Excp. Br. at 4-5)

#### **4. Burden of Proof**

Ignoring established Board precedent, Respondent mistakenly asserts that it has no burden to demonstrate that its rules are lawful. The burdens of proof are clearly set forth in Lutheran Heritage Village, 343 NLRB 646, 647 (2004) and in Lafayette Park Hotel, 326 NLRB 824, 828 (1998). The General Counsel has an initial burden to show that with regard to rules which do not explicitly prohibit protected activity "employees would reasonably construe the language [of the rule] to prohibit Section 7 activity." 343 NLRB at 647. The promulgator of the rule bears the burden to establish that an ambiguous rule does not restrict Section 7 rights. Norris/O'Bannon, Dover Resources Co., 307 NLRB 1236, 1245 (1992). Thus Board precedent establishes that once the General Counsel meets its burden of showing that an ambiguous rule would reasonably be understood by employees to prohibit or impede the exercise of Section 7 rights, the burden shifts to the Charged Party to show that, in context, employees could not understand the rule to have such unlawful impact on their protected rights.

Respondent also claims that it has shown that its conflict of interest and unsatisfactory conduct work rules are unambiguous because the Compliance and Ethics Handbook is maintained on its intranet system. It asserts that in the context of the Compliance and Ethics Handbook, a reasonable employee would comprehend that the conflict of interest and unsatisfactory conduct work rules do not restrict their statutory rights. What Respondent fails to

address is that there is no record evidence to demonstrate that employees are aware of the Compliance and Ethics Handbook or that employees know that the Compliance and Ethics Handbook is available to them on the intranet or otherwise. Thus, Respondent presented no evidence at the hearing to show that it directs employees to the intranet system to review the Compliance and Ethics Handbook. Respondent failed to meet its burden of proof that its Compliance and Ethics Handbook creates a context which erases any ambiguity of its conflict of interest and conduct work rules.

#### **5. Waiver of Rights**

Respondent suggests that the Union's failure to raise concerns about the work rules in labor management meetings or contract negotiations prior to filing an unfair labor practice constitutes a waiver of the employees' Section 7 rights. This argument has no merit. Waivers of employees' Section 7 rights must be "clear and unmistakable". Metro. Edison Co. v. NLRB, 460 U.S. 693, 708 (1983) Here, there is no evidence of any waiver.

#### **6. Employees' State of Mind**

The Respondent repeats its argument that employees' state of mind and Respondent's enforcement of its rules is probative in the analysis of a rule's lawfulness. (R. Answ. Br. at 8-9) Again ignoring Board precedent, Respondent erroneously relies on Aroostook County Regional Ophthalmology Center v. NLRB, 81 F.3d 209 (D.C. Cir. 1996), which has been explicitly rejected by the Board. The ALJ correctly applied established Board law finding that analysis of any rule will be based on a reasonable employees' reading of the rule and not employees' state of mind.<sup>8</sup> Furthermore, Board precedent instructs that the mere maintenance of an unlawful rule is

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<sup>8</sup> Cintas Corp. v. NLRB, 482 F.3d 463, 467 (D.C. Cir. 2007)

likely to chill Section 7 activity. The absence of evidence of enforcement is not probative to find that a rule violates Section 8(a)(1).<sup>9</sup>

#### 7. **Business Justification**

Respondent claims that because it maintains medical information and social security numbers, this establishes a legitimate business concern justifying its work rules. Respondent also suggests that any entity retaining medical records and social security numbers would be privileged to maintain unlawful rules. This contention is wholly unsupported by Board law. Indeed numerous Board cases find Section 8(a)(1) violations for overly broad work rules maintained by hospitals, nursing homes and insurance companies. See, University Medical Center, 335 NLRB 1318 (2001) (Board affirmed the ALJ's finding that handbook rules pertaining to standards of conduct proscribing disrespectful conduct or derogatory attacks on fellow employees and supervision, removal or use of records and disclosure or release of confidential information concerning employees to violate Section 8(a)(1)); The Carney Hospital, 350 NLRB 627, 645 (2007) (Confidentiality rule found to be overbroad and violate Section 8(a)(1).)

In Pontiac Osteopathic Hospital, 284 N.L.R.B. 442, 466 (1987), the Board found the hospital's confidential information rule to be unlawful. That rule banned discussion of hospital affairs and employee problems. The Board found that the "ban could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which, could fall under the broad categories of hospital affairs and employee problems." Similar to the instant case, that employer also failed to make any justification

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<sup>9</sup> Brunswick Corp., 282 NLRB 794, 795 (1987); Republic Aviation v. NLRB, 324 US 793, 797-798 (1945).

showing that it might have a substantial and legitimate interest in limiting or prohibiting discussion of its affairs, or of its employees' personal problems. In the absence any justification, the rule was found to be overly broad and unlawful.

#### **8. Name and Emblem Policy**

Respondent deliberately mischaracterizes the Acting General Counsel's Exception regarding Respondent's name and emblem policy. It speciously suggests that the Acting General Counsel somehow sanctions the use of Respondent's name and emblem to "fraudulently create the appearance of endorsement by the American Red Cross" in violation of 18 U.S.C. Section 706. It also accuses the Acting General Counsel of questioning the Geneva Convention and ignoring the safety of domestic and foreign citizens. (R. Answ. Br. at 13) These assertions are baseless and unsupported.

The Acting General Counsel excepted to the ALJ's failure to make a finding that the Respondent's name and emblem policy impedes employees from using Respondent's name and emblem for protected concerted activities and union activities. This restriction violates Section 8(a)(1). Employees have the right to use an employer's name or logo while engaging in protected concerted activity. See Pacific Northwest District of Carpenters, 339 NLRB 1027, 1029 (2003) (finding picket signs depicting employer's name protected); Boise Cascade Corp., 300 NLRB 80, 86 (1990) (finding that wearing of a t-shirt depicting employer's logo in connection with a protest of terms and conditions of employment was protected).

Likewise, in Pepsi-Cola Bottling Co., 301 NLRB 1008, 1019-20 (1991), the Board found the employer's rule prohibiting employees from wearing company logos or insignia while engaging in union activity during non-working time away from the plant to be unlawful.

Accordingly, Counsel for the Acting General Counsel respectfully requests that the Board reverse the ALJ and find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining its conflict of interest, unsatisfactory conduct, and name and emblem policies.

Counsel for the Acting General Counsel further requests that the Board order the Respondent to cease and desist from engaging in such conduct and requests that the Board Revise the ALJ's recommended Order and Notice consistent with the Counsel for the Acting General Counsel's Exceptions.

Dated at Cleveland, Ohio this 30th 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 30th day of August 2013:

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Respectfully submitted,  
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