

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LILY TRANSPORTATION CORPORATION

and

Case 01-CA-108618

ROBERT SUCHAR, AN INDIVIDUAL

Thomas E. Quigley, Esq., of Hartford, CT.,
for the General Counsel
Katherine D. Clark, Esq., of Boston, MA.,
Stoneman, Chandler & Miller LLP
for the Respondent

DECISION

Statement of the Case

Kenneth W. Chu, Administrative Law Judge. This case was tried in Hartford, Connecticut, on December 17, 2013. The charge was filed July 5, 2013¹ and the complaint was issued on September 30, 2013. On July 30, the Regional Director of Region 1 of the National Labor Relations Board (NLRB or Board) approved the withdrawal of the portion of the complaint regarding the termination of Robert Suchar. The remaining complaint alleges that Lily Transportation Corp. (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (Act) when it maintained three overly broad work rules that interfere, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act (GC Exh. 1).² At the hearing, the parties stipulated to the following

1. The handbook policies cited in the complaint have not been used as the basis for discipline of employees at Lily Transportation.
2. Lily Transportation revised its Employee Handbook, including the policies cited in the complaint, and distributed this revised Employee Handbook to employees on or around December 6, 2013.
3. The handbooks were distributed in hand to employees with no accompanying notice.
4. The revised handbook was distributed to employees of Lily Transportation nationwide on or about December 6, 2013 (Tr. 8, 9).

¹ All dates are in 2013 unless otherwise indicated.

² The Transcript is identified as “Tr.” The General Counsel exhibits are identified as “GC Exh.” The Joint exhibits are identified as “J Exh.” The closing briefs for the General Counsel and the Respondent are identified as “GC Br.” and “R Br.”

Based upon the stipulations, no witnesses were presented and the hearing was closed. On the entire record and after considering the briefs filed by the parties, I make the following

Findings of Fact

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I. Jurisdiction

At all material times, Respondent Lily Transportation, a corporation, is a dedicated logistics carrier that delivers goods from a Whole Foods distribution center in Cheshire, Connecticut, to other Whole Food facilities throughout the New England States. During a representative 1-year period, Respondent performed services valued in excess of \$250,000 and purchased and received at its Cheshire facility, goods valued in excess of \$5,000 directly from points outside the State of Connecticut. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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II. Alleged Unfair Labor Practices

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when it maintained overly broad work rules in the employee handbook that has been in effect since November 2011 (J Exh. 1 at 22-28). The three work rules were subsequently revised nationwide prior to the hearing date on or about December 6 (J Exh. 2). The General Counsel argues that the Respondent failed to provide notice of the revisions to its employees and to fully repudiate the violations. The Respondent argues that the rules have never been used as a basis to discipline any employee and only came to light because of Suchar's unfair labor charge, which was subsequently withdrawn prior to the issuance of this complaint. The Respondent also maintains that the revisions to the three rules had sufficiently cured any violations of the Act.

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a. Applicable Legal Standards

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A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998), enf. 203 F.3d 52 (D.C.Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board's analytical framework for determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act was set forth in *Lutheran Heritage Village-Livonia*

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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. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language 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.

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The General Counsel does not argue that the work rules explicitly restrict activities protected by Section 7 or that the rules were promulgated in response to Section 7 activity. The General Counsel argues that employees would reasonably construe the language in the rules to prohibit Section 7 activity (GC Br. at 4). The Respondent argues that none of the policies explicitly restrict protected, concerted activities and could not be reasonably construed by

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employees to restrict their rights to discuss wages and working conditions (R Br. at 4).

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” In turn, Section 8(a)(1) of the Act makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of [those] rights.” See, *Brighton Retail Inc.*, 354 NLRB 441, 447 (2009).

The test for evaluating if the employer’s rule violate Section 8(a)(1) is “whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities.” *Hills & Dales General Hospital*, 360 NLRB No. 70 at slip op. at 5. As with all alleged Section 8(a)(1) violations, the judge’s task is to “determine how a reasonable employee would interpret the action or statement of her employer...and such a determination appropriately takes account of the surrounding circumstances.” *The Roomstore*, 357 NLRB No. 143, slip op. at 1 fn. 3 (2011).

b. The Dress Code Rule

The employee handbook provides for an appropriate dress uniform and the prohibition in wearing lettering, numbering, word slogans and other graphics on the uniform except for the Lily logo or insignia (J Exh. 1 at 22) and states

1. PERSONAL APPEARANCE AND DEMEANOR

Lily Transportation Corp. provides professional services to its clients. It is extremely important that our drivers dress in a manner that reflects Lily's professional image and reputation. Lily Transportation Corp. has instituted a Driver Uniform and Dress Code policy for drivers. Drivers must wear Lily Uniforms where required, and conform to the Dress Code while on the job as set forth below. Uniforms are comprised of:

Lily Shirts (provided by Lily)	Lily Hats (provided by Lily)
Lily Jackets (provided by Lily)	Work pants (provided by employee)
Lily Vests (provided by Lily)	Work shoes (provided by employee)

No lettering, numbering, wording slogans or graphics are allowed on clothing worn by drivers visible to others while on the job except that which is the logo or insignia of the clothing manufacturer (i.e. Nike, Reebok, etc.). No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp.

The General Counsel argues that the problem with the dress code is that portion stating “No articles of clothing may be worn displaying other than the Lily logo or insignia unless specifically approved by Lily Transportation Corp” because the language could reasonably read to deter protected activity, such as wearing a union button or sticker (GC Br. at 5). The Respondent argues that the dress code prevents employees from advertising other products on Lily uniforms but does not prohibit the wearing of buttons that support a union (R Br. at 6).

Analysis and Discussion

Under Section 7 of the Act, employees have the right to wear and display union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In particular,

“the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent's curtailment of that right is clearly violative of the Act.” *Republic Aviation Corp.*, above, 802 at fn. 7. The test is whether the insignia prohibition reasonably tends to interfere with the free exercise of employee rights under the Act.” *St. Luke’s Hospital*, 314 NLRB 434 fn. 4 (1994); *Albis Plastics*, 335 NLRB 923, 924 (2001). Absent “special circumstances” justifying restrictions on union insignias or apparel, the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. “[T]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982); *Smithfield Packing Co.*, 344 NLRB 15 fn. 20 (2004); *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1086 (2003); and *W San Diego*, 348 NLRB 372 (2006).

The Board has held that “An employer’s concern about the ‘public image’ presented by the apparel of its employees is...a legitimate component of the ‘special circumstances’ standard.” *W San Diego*, above at 380; and *Bell-Atlantic-Pennsylvania, Inc.*, above. As such, the Board has found that the prohibition of wearing a white button with red lettering as lawful and the prohibition of wearing a “day-glow” button with black lettering also lawful. *United Parcel Service*, 195 NLRB 441 (1972); and *Con-Way Central Express*, 333 NLRB 1073 (2001).

However, the special circumstances exception is narrow and “a rule that curtails an employee’s right to wear union insignia at work is presumptively invalid.” *E & L Transport Co.*, 331 NLRB 640 fn. 3 (2000). The burden of establishing the existence of special circumstances rests with the employer. *Pathmark Stores*, 342 NLRB 378, 379 (2004).

Here, the offending language in the dress code rule states “No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp.” The Respondent argues that the rule merely prevents employees from advertising other products while wearing a Lily uniform and not to prohibit the wearing of a union button or insignia. However, I find that an employee interpreting this prohibition would reasonably believe that wearing any type of logos or insignias, including lawfully permissible union buttons is forbidden. Unlike *NLRB v. Starbucks*, 679 F.3d 70 (2d Cir. 2012) (a very restrictive dress code for employee attire but allows employees to wear a single union button was held not to be overbroad or unduly restrictive), cited by the Respondent, the language in this dress code rule does not carve out an exception to the prohibition of wearing any kind of items on the employee attire. A close reading of the rule does not distinguish between wearing a union button as opposed to non-union advertisement. I find this lack of a distinction would cause employees to reasonably read the rule as prohibiting wearing union logos or insignias.

Upon my review, I find that the Respondent has not proffered evidence to establish special circumstances for this prohibition. I agree with the General Counsel that the Respondent has not shown special circumstances that the prohibition is a concern about interfering with a public image that the employer has established as part of its business plan.

The Respondent also argues that the dress code allows employees to seek permission to wear clothing insignias or logos and maintains that the General Counsel has not presented evidence that employees have sought such permission. While true, I find nevertheless that the mere fact that employees would have to seek approval to wear clothing insignias or logos demonstrates that the rule is unlawfully overbroad and restrictive because the employees would still reasonably read the rule as prohibiting the wearing of any union insignia and to seek

permission would chill their Section 7 rights. See, *Lafayette Park Hotel*, above at 825 (holding that maintaining rules that are likely to chill Sec. 7 rights “is an unfair labor practice, even absent evidence of enforcement”).

5 Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by prohibiting employees from wearing union insignias and logos on the Lily uniform.

c. The Confidential Information Rule

10 Under the “Inappropriate Conduct” section in the employee handbook, employees are subjected to discipline, including discharge for various violations of company policy (J Exh. 1 at 23, 24). One violation which may result in the discharge of an employee states

15 Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files.

20 The General Counsel argues that the Respondent’s confidential information rule violates Section 8(a)(1) of the Act because employees would reasonably interpret the rule to prohibit their Section 7 right to discuss their terms and conditions of employment (GC Br. at 8). The Respondent argues that this single sentence must be read in the larger context of the employer’s confidentiality policy statement, and when read together, employees would not reasonably construe the rule to also prohibit discussing wages and other terms and conditions of employment (R Br. at 4). The confidentiality policy (J Exh. 1 at pp 8, 9) states

25 It is the policy of Lily to ensure that the operations, activities, and affairs of Lily and our clients are kept confidential to the greatest possible extent. If, during their employment, employees acquire confidential or proprietary information about Lily and its clients, such information is to be handled in strict confidence and not to be discussed with outsiders. Employees are also responsible for the internal security of such information.

30 Employees, depending on their position within the Company, may be asked to sign a statement of confidentiality at the time of hire and periodically throughout their term of employment to acknowledge their awareness of, and reaffirm their commitment to, this policy.

35 Lily also collects and maintains certain personnel information on current and past employees, employee dependents and employment candidates. Lily endeavors to safeguard the personnel information we possess from unauthorized access, and maintains a Comprehensive Written Information Security Plan. Lily will fully cooperate with investigative agencies and will report known information breaches to affected parties and the appropriate law enforcement agencies as required by applicable laws and regulations. If you have reason to suspect that your personnel information kept by Lily has been compromised, please notify the Human Resources Department immediately.

45 *Analysis and Discussion*

50 The issue is whether a particular portion of the confidentiality rule is unlawfully overbroad because employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, above. First, there does not appear to be any dispute over the validity of the portion of the rule that prohibit employees from disclosing acquired confidential or proprietary information about the Respondent and its clients and not to discuss

with outsiders such information since that portion is “...designed to protect the confidentiality of the [the Company’s] proprietary business information.” See, *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003); also, *Super K-Mart*, 330 NLRB 263 (1999) (affirming the employer’s “legitimate interest in maintaining the confidentiality of its private business information”).

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Nevertheless, the General Counsel challenges that portion of the confidentiality rule that prohibits the “disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” to include the prohibition for employees to discuss their wages and conditions of employment. This portion of the rule, by its terms, prohibits employees from discussing employee information, such as wages, contained in confidential personnel files to any persons on pain of discipline, including termination.

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There is no exception to the confidentiality rule which would permit employees to discuss wages, compensation or any other specific terms and conditions of employment. While I find that the Respondent apparently sought to prevent the disclosure of proprietary and financial information, I also find that the Respondent went on to include “personnel files,” which would mean that disclosure of various kinds of information about employees, such as wages, would also be prohibited. In *Flex Frac Logistics*, 358 NLRB No. 127 (2012), affd. in relevant part, 198 LRRM 2789 (5th Cir. 2014), the Board restated established precedent that “...nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act,” citing *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 12 (2011) (finding rule unlawful that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”); and *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that stated all information about “employees is strictly confidential” and defined “personnel records” as confidential).

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Here, the Respondent’s confidentiality rule does not present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to -- among other things --certain protected concerted activities, such as communications that are critical of the Respondent’s treatment of its employees. By including non-disclosure of “employee information in confidential personnel files,” in its confidential policy, the Respondent leaves to the employees the task of determining what is permissible and “...speculate what kind of information disclose may trigger their discharge.” *Flex Frac*, above at slip op. at 10. In trying to comply with this restriction, employees would reasonably believe they would not be permitted to discuss with other employees or union representatives, their wages, benefits and other terms and conditions of employment. *MCPc, Inc.*, 360 NLRB No. 39 (2014) (the Board held that an employee handbook stating that “dissemination of confidential information, such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination” as an overly broad confidentiality rule and violated Section 8(a)(1) because employees would construe the rule to prohibit discussion of wages and other terms and conditions of employment with their coworkers, an activity protected by Section 7 of the Act).³

The Respondent argues that the portion found to be offensive by the General Counsel must be read in its entire context. As noted, in finding that the maintenance of a rule did not violate Section 8(a)(1), the Board’s analysis followed the dictates of *Lutheran Heritage*, which

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³ In contrast, more narrowly drafted confidentiality rules that do not specifically reference and restrict information concerning employees and their jobs have been found lawful. *Super K-Mart*, at 263-264.

require that the rule be considered in context. 343 NLRB at 647 fn. 6. The problem with the Respondent’s argument is that we are not dealing with the lawfulness of the “Confidentiality of Information” policy in the handbook at pp 8, 9 but rather with the facial challenge of the single sentence under the “Inappropriate Conduct” provision in the handbook at pp 23, 24.

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The “disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” resulting in potential discipline does not reference the confidentiality of information policy located towards the front of the handbook. Employees would not necessarily understand that the inappropriate conduct statement refers to the confidential policy statement. The inappropriate conduct statement does not refer to or reproduces the confidentiality of information policy statement. Employees would reasonably assume that the “disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” standing alone could result in discipline. It is unlikely that employees reading this sentence would also search the handbook and derive a narrower interpretation of the prohibited disclosure of information by reading the two separate provisions together, especially in light of the fact, that the confidentiality statement is located at the front of the handbook while the violation for disclosing of employee information is one of numerous conduct violations printed near the end of the handbook. See, *Boulder City Hospital, Inc.*, 355 NLRB 1247, 1248 (2010).

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Accordingly, I find that the Respondent’s maintenance of a rule that prohibits employees from disclosing employee information maintained in a confidential personnel files has a reasonable tendency to inhibit employees’ protected activity and, as such, violates Section 8(a)(1). *The NLS Group*, 352 NLRB 744, 745 (2008); *Security Walls, LLC*, 356 NLRB 396 (2011); and *Quicken Loans, Inc.*, 359 NLRB No. 141 (2013).

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d. The Information Posting Rule

The information posting rule in the employee handbook advised employees to refrain from posting certain information and comments on the internet (J Exh. 1 at 27) and states

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Information posted on the internet may be there forever, and employees would be well advised to refrain from posting information or comments about Lily, Lily’s clients, Lily’s employees or employees’ work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily’s employees and associates on the internet and may take corrective action up to and including discharge of offending employees.

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The General Counsel argues that this internet rule is overly broad because 1) it advises employees to refrain from posting information or comments about Lily and to Lily’s clients, 2) the rule requires the employee to seek permission before posting the information, and 3) the rule unlawfully coerces employees from engaging in protected activity by holding them accountable for making disparaging, negative, false or misleading information or comments about Lily and its employees (GC Br. 12). The Respondent argues that employees would not reasonably construe this rule prohibiting disparagement against the employer to restrict their right to discuss wages or terms and conditions of employment (R Br. at 6).

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Analysis and Discussion

The issue is whether the prohibition against posting information on the internet, including

making disparaging, negative, false, or misleading information or comments regarding the company, employees and customers without the approval of the Respondent and to hold the responsible employee under threat of discipline, including discharge, is a violation of Section 8(a)(1) of the Act.

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In applying the *Lutheran Heritage Village-Livonia* standard, it is clear that the information posting rule chills employees in the exercise of their Section 7 rights. In *Albertson's Inc.*, 351 NLRB 254, 259 (2007), the Board stated

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In determining whether an employer's maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasonable reading and refrain from reading particular phrases in isolation.

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I find that a reasonable reading of this work rule restricts employees' rights to engage in protected activity. The posting on the internet is not restricted to confidential or even company information. This provision prohibits the posting of *any information* without the approval of the Respondent. The rule does not distinguish between disclosing information about customers or company business, which is conceivably lawful⁴, and any information, which is inherently overbroad. In *Lafayette Park*, above, the employer maintained a rule prohibiting employees from making "false, vicious, profane or malicious statements" regarding the employer, the Board held that the rule reasonably tended to chill employee exercise of Section 7 rights. In *Claremont Resorts & Spa*, 344 NLRB 832 (2005), the employer issued a "Top Ten List" of prohibited conduct to include "Negative conversations about associates and/or managers are in violation of our Standards of Conduct" that may result in disciplinary action, the Board held that the rule would "...reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaged in protected activities." In *Hills and Dales General Hospital*, 360 NLRB No. 70 (2014), the employer maintained a rule that prohibited employees from making "negative comments about our fellow team members," including coworkers and managers, the Board held that the negative comments and negativity language was unlawful.

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There are virtually no distinctions between the rules in *Lafayette Park*, *Claremont*, and *Hills and Dales* with the one maintained by the Respondent. Noting under *Lafayette Park*⁵ that any ambiguities must be construed against the Respondent, I find that the Respondent violated Section 8(a)(1) by maintaining this rule.

e. Repudiation of the Work Rules

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In November 2013, the Respondent revised the employee handbook and in doing so, removed the offending three rules cited in the complaint. The confidentiality of information rule no longer makes any references regarding potential discipline of an employee for disclosing employee information contained in confidential personnel records. The revised rule speaks only of confidential information relating to such items as customer lists, transactions, characteristics of customers and suppliers, pricing policies, negotiating strategies and financial information.

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⁴ See, *Super K-Mart*, above (affirming the employer's legitimate interest in maintaining the confidentiality of its private business information by prohibiting the disclosure of company business and documents) and *Mediaone*, above, at 279 (upholding confidentiality rule that employees "would reasonably understand" not "to prohibit discussion of employee wages").

⁵ "Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer." *Flex Frac*, above, at 2.

The revised dress code no longer prohibits the wearing logos or insignias on the employee uniform. The posting of comments on the internet rule no longer holds employees responsible for making disparaging, negative, false, or misleading information or comments about Lily or Lily's employees (J Exh. 2).

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The Respondent argues that even if the three work rules are overly broad, the remedial purpose of the Act has already been served by the Respondent's excision of the policy language cited in the complaint. The Respondent maintains that since it never enforced any of the policies at issue in the complaint, a required posting of a nationwide notice about the policies is unnecessary and unwarranted. The Respondent states that a nationwide notice posting about policies no longer in existence will only serve to create confusion and serve no remedial purpose under the Act (R Br. at 6, 7).

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The General Counsel counters that the Respondent failed to fully repudiate the work rules under the elements in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). The General Counsel maintains that the attempted repudiation was untimely ambiguous, and not specific to the nature of the coercive conduct (GC Br. at pp. 13-18).

Analysis and Discussion

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Under *Passavant Memorial Area Hospital* and its progeny, *Rivers Casino*, 356 NLRB No. 142, slip op. at 2 (2011); *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); and *DirectTV*, 359 NLRB No. 54 (2013), the Board held that

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It is settled that under certain circumstances an employee may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).⁶

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Having find that the three work rules violated Section 8(a)(1), the question is whether the Respondent had adequately and sufficiently repudiated the unlawfully over broad work rules. I find that the Respondent's revisions of the handbook did not repudiate the offending work rules.

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I find that the Respondent's purported repudiation was not timely. In *Passavant*, at 139, the Board held that the employer was not timely after disavowal "...until nearly the eve of the issuance of the complaint..." In *DirectTV*, at 4, the employer did not post its disclaimers until nearly a full year after it promulgated the rules and waited until after the complaint had issued.

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⁶ In *Claremont Resort & Spa*, 344 NLRB 882 (2005), two of the three Board members stated that they "do not necessarily endorse all the elements of *Passavant*." However, *Passavant* remains good law as recent as 2013 under *DirectTV*, above. Additionally, unlike *Claremont*, here, the Respondent failed repudiation of its work rules *under all the elements* of *Passavant* except arguably the element that there were no proscribed conduct on the employer's part after publication.

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In the present case, the Respondent did not repudiate the three work rules more than 2 months after the complaint was filed. See, *Fresh & Easy Neighborhood Market v. NLRB*, 468 Fed. Appx. 1 (D.C. Cir. 2012) (upholding the Board’s conclusion that repudiation after the complaint was issued was untimely and follows logically from the holding in *Passavant*). In addition to acting in an untimely manner, “...the Respondent did not effectively repudiate its misconduct because it did not admit wrongdoing.” *DirectTV* at 4. In revising the handbook and eliminating the three work rules at issue, the Respondent never disclaimed the inappropriateness of the language and more significantly, the Respondent never acknowledged its unlawful conduct. *Branch International Services*, 310 NLRB 1092, 1105 (1993). Equally as significant, the Respondent failed to publish its repudiation of the offending work rules to its employees. The Board held in *DirectTV* at 4, above that “...by failing to publish the repudiation, never provided assurances to employees that, going forward, the employer will not interfere with the exercise of their Section 7 Rights.” See *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6, 1383 (2007) (no effective repudiation in part because employer “did not admit any wrongdoing, it simply informed employees that it was clarifying its policy”). Under these circumstances, Respondent has fallen far short of meeting its burden under *Passavant* of establishing an effective repudiation of its conduct.

I find that the Respondent was not timely in revising the unlawful work rules; did not admit to wrongdoing; did not adequately inform its employees of the changes in the work rules; and did not provide assurances that in the future the Respondent would not interfere with the exercise of the Section 7 rights of employees. *Boise Cascade Corp.*, 300 NLRB 80, 83 (1990) (the Board agreeing with the Administrative Law Judge that the repudiation was untimely, ambiguous, not specific, not adequately communicated to the employees, and no assurances that there would be no future interference with employee rights); *Harrah’s Club*, above, and *Passavant*, above. Accordingly, I find that the revisions were not fully repudiated by the Respondent to warrant the dismissal of the pertinent complaint allegations.

CONCLUSIONS OF LAW

1. At all material times, Respondent Lily Transportation, a corporation, is a dedicated logistics carrier that delivers goods from a Whole Foods distribution center in Cheshire, Connecticut, to other Whole Food facilities throughout Connecticut and the New England States.

2. During a representative 1-year period, the Respondent performed services valued in excess of \$250,000 and purchased and received at its Cheshire facility, goods valued in excess of \$5,000 directly from points outside the State of Connecticut.

3. The Respondent constitute an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. By promulgating and maintaining a work rule that proscribes the wearing of logos and insignias on employee uniforms, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

5. By promulgating and maintaining an overly broad work rule that proscribes disclosure of confidential information, including employee information maintained in confidential personnel files, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

6. By promulgating and maintaining an overly broad work rule that refrains employees from posting information, including disparaging, negative, false or misleading information about Lily, Lily’s clients and Lily’s employees, on the internet, the Respondent interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thus violated Section 8(a)(1) of the Act.

7. By committing the unfair labor practices stated in Conclusions of Law 4-6 above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2 (6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by engaging in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining unlawful overly broad work rules, I find that the Respondent be ordered to 1) rescind or revise those rules found to be unlawful from the employee handbook, 2) post “...an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.” *Guardsmark, LLC*, 344 NLRB at 812; and *DirectTV*, above, at 5, and 3) provide disclaimer inserts in the employee handbook that the unlawful provisions have been rescinded or revised.⁷

On these findings of facts and conclusions of law and the entire record, I issue the following recommended⁸

1. Cease and desist from

(a) Promulgating and maintaining a provision in its employee handbook entitled, “Personal Appearance and Demeanor” that contains the following language: “No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp.”

(b) Promulgating and maintaining a provision in its employee handbook entitled, “Inappropriate Conduct” that contains the following language: “Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files.”

(c) Promulgating and maintaining a provision in its employee handbook entitled, “Use of Electronic Equipment/Computers/E-Mail and Internet” that contains the following language: “employees would be well advised to refrain from posting information or comments about Lily, Lily’s clients, Lily’s employees or employees’ work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or

⁷ Although the parties stipulated that the work rules at issue were revised and given to all employees in a revised handbook, I note it significant that the Respondent never fully repudiated the unlawful work rules and the employees are not with union representation as reasons to recommend a need for disclaimer inserts.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees.”

5 (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

10 (a) If not already done so, rescind or revise the overly broad provisions in the employee handbook referenced above in (1) (a-c).

(b) As set forth in Remedy, furnish all current employees with inserts for the current employee handbook that advise the unlawful rules have been rescinded.

15 (c) Within fourteen (14) days after service by the Region, post at all of Respondent's nationwide facilities, a copy of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to
20 employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that,
25 during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 5, 2013.

30 (d) Within 21 days after service by the Region, file with the Regional Director a sworn certificate of a responsible official on a form provided by the Region attesting to the steps the Respondents have taken to comply.

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Dated: Washington, D.C. April 22, 2014

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Kenneth W. Chu
Administrative Law Judge

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⁹ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefits and protection
- Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce the following rule stated in our employee handbook: "No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp."

WE WILL NOT maintain or enforce the following rule stated in our employee handbook: "Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files."

WE WILL NOT maintain or enforce the following rule stated in our employee handbook: "Employees would be well advised to refrain from posting information or comments about Lily, Lily's clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We WILL furnish all of our employees with inserts for the current employee handbook to advise the unlawful rules have been rescinded.

Lily Transportation, Corp.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

10 Causeway Street
Boston Federal Building
Room 601
Boston, Massachusetts 02222-1072
Hours: 8:30 a.m. to 5 p.m.
617-565-6700

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.