

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

_____	X		
TARGET CORPORATION	:		
	:		
Respondent,	:		
	:	Case Nos.	29-CA-30804
-and-	:		29-CA-30820
	:		29-CA-30880
UNITED FOOD AND COMMERCIAL WORKERS	:		29-RC-12058
LOCAL 1500	:		
	:		
Charging Party.	:		
_____	X		

**REPLY TO RESPONDENT’S ANSWERING BRIEF TO UNITED FOOD AND
COMMERCIAL WORKERS LOCAL 1500’S CROSS-EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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PRELIMINARY STATEMENT

Charging Party United Food and Commercial Workers Union Local 1500 (“Charging Party” or “the Union”) respectfully submits this Reply Brief to Respondent’s Answering Brief to Union’s Exceptions to the Decision of the Administrative Law Judge (“Resp. Br.”), whose decision issued May 18, 2012. We reaffirm the arguments in our Answering Brief to Respondent’s Exceptions and Brief in Support of Cross-Exceptions, and reply here only to Respondent’s¹ answer to our exception over scope of remedy.

I. A NATIONWIDE REMEDY IS APPROPRIATE

Respondent maintained and distributed corporate-wide the 2009 and 2011 Handbooks (collectively, “Handbook”), which the ALJ found contained eight unlawful rules. See *Charging Party Brief in Support of Cross-Exceptions* (“CP Brief in Support”) at 2-3.

As the Board stated in *Guardsmark, LCC*, “concerning the scope of notice posting, we have consistently held that, where an employer’s overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.” 344 NLRB 809, 812 (2005), *enf’d*, 475 F.3d 369 (D.C. Cir. 2007). The ALJ, without geographic limitation, recommended Respondent, “be ordered to rescind those rules, remove them from the Handbook Team Member Handbook, and advise its employees in writing that these rules are no longer being maintained or enforced.” ALJD 37:50-38:2.² However, he did not recommend a notice posting at all Respondent locations nationwide.

¹ Respondent Target Corporation is also referred to herein as “Target”.

² We cite to the hearing transcript as Tr. ____; and to the parties’ hearing exhibits as R Ex. ____, CP Ex. ____, and GC Ex. ____.

Respondent does not dispute the record evidence that the Handbook was maintained nationwide. Instead, Respondent argues that a nationwide remedy is not appropriate because the record does not establish that “employees at other Target stores actually received” the Handbooks at issue in this case.³ Resp. Br. at 3. This argument fails for two reasons.

First, Board law does not require the General Counsel to prove that every employee at a location, or any specified number of employees, received a copy of the unlawful rules in order for the Board to find those rules unlawful. Rather, if a rule on its face is found to chill Section 7 rights, its “mere maintenance” is sufficient to establish a violation. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). See also *Cintas Corp.*, 344 NLRB, 943, 946 (2005), *enf’d*, 482 F.3d 463, 467 (D.C. Cir. 2007).

Second, contrary to Respondent’s claim, the record evidence establishes that the Handbook was both maintained and *distributed* to employees at all Target locations. Respondent’s own witness, Dawn Major, the Human Resources director for Respondent’s East Coast Region, testified on direct that Respondent distributed the Handbook⁴ nationwide, through various means. She testified that it is the corporate practice to distribute the Handbook to employees at orientation sessions, who then sign an acknowledgment form. She also stated that the current company Handbook is made available to employees throughout their employment and may be distributed based on follow-up conversations.

Q. Do you have knowledge as to how handbooks are **distributed** to team members?

³ Respondent refers only to the 2009 Handbook in its brief. The ALJ found that Respondent made the 2011 Handbook available to employees beginning in late June 2011, ALJD 15:17, and it contained four of the eight rules found unlawful in the 2009 Handbook. See Complaint ¶¶ 7 & 8. The ALJ’s recommended order applies to both the 2009 and 2011 Handbooks. See ALJD 37:3-5.

⁴ Throughout her testimony, Major referred to the 2009 Handbook, GC Ex. 8. See, e.g., Tr. 589, 593, 597-98, 603.

A. Yes. **They are given to all of our new -- newly hired team members at orientation.** Beyond that, they're made available to our team members should they, you know, request a copy or want to -- or have a question about it through the team leader of HR.

Q. Does Target provide a new copy of a handbook to each team member whenever it's revised?

A. No, we do not. We --

Q. Why not?

A. We inform them of the update, that an update may have been made to the handbook and have copies of the update for them in the store should they want to look at it. Given the number of team members that are employed at Target in the **hundreds of thousands**, it would be, you know, not cost effective to recreate copies each time we have a handbook updated.

Q. Do you know whether or not employees acknowledge receipt of a handbook upon hire?

A. They do.

Q. How do they acknowledge receipt?

A. There's a sign off paper that they sign acknowledging that they received it.⁵

Q. Do you know where those handbook receipts are maintained?

A. They're maintained in the team member's file, which is on file in Minneapolis, our headquarters.

Tr. 583-84 (emphasis supplied).

Nothing in Major's testimony indicated that these practices were limited to the Valley Stream store. Tr. 576-624. In fact, Major had very little firsthand knowledge concerning Valley Stream, as she made only occasional visits to the store. Tr. 602-03.

⁵ This form is used nationwide as evidenced by the space at the bottom for insertion of the store location. See Tr. 994-95; CP Ex. 12.

In arguing against a nationwide remedy, Respondent also asserts that the Union failed “to prove that a true majority of employees received the 2009 Handbook” at the Valley Stream store. Resp. Br. at 4. First, nothing in the Board’s handbook cases suggests that evidence that a majority of a bargaining unit employees received the rules is necessary to establish that the rules are maintained. See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824. Moreover, Respondent’s assertion rests upon its exhibit, R.Ex. 41, showing that approximately 50% of the Valley Stream employees employed during the critical period acknowledged receiving the 2009 Handbook on an orientation form. Tr. 586.⁶ Contrary to Respondent’s conclusion, this calculus actually confirms that the Handbook was maintained and widely distributed.

In addition, Respondent misrepresents the purported significance of its compilation, which does not reflect Respondent’s total cohort of employees including those employees hired after the eligibility date or those who separated from employment before that date. Respondent runs new hire orientations, at which it trains new hires using its most recent handbook, anywhere from every two weeks to every two months depending on the time of year. Tr. 1011. In addition to informing employees of the Handbook rules and distributing the Handbook at orientation, Respondent routinely ran small group meetings (“huddles”) at which team leads discussed store operations. ALJD 5:27-32; Tr. 583-84. As Major testified, and as Valley Stream employees confirmed, as new Handbooks were issued, they were made available to employees, and management referred employees to them. See Tr. 194-95, 299, 424, 584, 866, 962-63. And, Store Manager Laura Pena testified that “it could be assumed” that employees at the store would

⁶ Interpreting R 41 is not straight forward; there are a greater number of employees on the list (273) than were eligible to vote (268), see Report on Objections at 2; and Respondent in its Brief in Support of Exceptions concluded that 42% of employees eligible to vote did not receive the handbook, not 50%. . See Resp. Answering Br. at 32.

consult the Handbook to find out about various terms and conditions of their employment. Tr. 748.

Notwithstanding Respondent's argument to the contrary, this case is analogous to *Guardsmark* and *Longs Drug Stores California, Inc.*, 347 NLRB 500 (2006), in which the Board found a nationwide remedy appropriate. As in those cases, here there is no dispute that the Handbook is maintained nationwide. Those decisions reflect, as here, that corporate practice was to distribute handbooks; they contain no indication that there was direct evidence that handbooks were in the hands of employees. See *Guardsmark*, 344 NLRB at 812, 815-17; *Longs Drug Stores*, 347 NLRB at 501.

In fact, the evidence upon which the Board relied in finding a nationwide remedy appropriate in *Longs Drug Store* is remarkably similar to the record evidence here. In *Longs Drug Store*, the human resource manager testified that the handbooks were distributed at all distribution centers and he "assumed" they were distributed at all retail stores. *Id.* at 501. There is no indication of any direct evidence that employees actually received the handbooks; in fact, the manager appeared to lack direct knowledge as to the distribution of handbooks at the retail stores. Here, Major was clear about Respondent's nationwide practice: Handbooks are distributed, and signed for, at new hire orientations.

Respondent's argument that the pleadings in this matter preclude a nationwide remedy also fails. The Complaint in the instant case, as in *Guardsmark*, issued against the nationwide entity. The fact that the non-Handbook allegations were limited to the Valley Stream location is not relevant to the question of whether the Handbook, distributed nationwide, must be rescinded nationwide. Moreover, contrary to Respondent's assertion (Resp. Br. at 4), the Complaint does not allege the impact of the Handbook as limited to Valley Stream location. Finally, as noted in

our supporting brief, a nationwide remedy is not a special remedy that must be pled separately. See *Case Handling Manual, Part One*, § 10266.1.

Respondent's final argument is that a nationwide remedy, "whether posting or rescission" is not warranted. Resp. Br. at 6. This position is contrary to the ALJ's recommended order and to Board law. Respondent suggests that in the event the Board finds the Handbook rules unlawful here, it is entitled to maintain these very same rules at locations other than Valley Stream. Such a result would be contrary to the Board's mandate to enforce the Act. Here, should the Board affirm the ALJ's findings that the Handbook rules are unlawful, pursuant to Section 10(c) of the Act, the Board is required to issue an order requiring Respondent to "cease and desist from such unfair labor practice, and take affirmative action... as will effectuate the policies of the Act." 29 U.S.C. §160(c). Moreover, the Board's power under Section 10(c) is "a broad, discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964).

In sum, under the record here, a nationwide remedy is warranted. The Board has routinely, with court approval, imposed nationwide remedies where the facts of the case indicate, as here, that such a nationwide order is necessary to remedy or prevent the employer's continuing or future unfair labor practices. See, e.g., *Beverly Health & Rehab. Servs., Inc.*, 355 NLRB 635, 641-642 (2001), enf'd, 317 F.3d 316, 326-27 (D.C. Cir. 2003); *S.E. Nichols, Inc.*, 284 NLRB 556, 559-560 (1987), enf'd, 862 F.2d 952, 960-61 (2d Cir. 1988), cert. denied, 109 S. Ct. 3162 (1989). Thus, Section 10(c) dictates that Respondent must be ordered to both rescind the unlawful rules and to notify employees nationwide of their rescission.

CONCLUSION

For the reasons set forth above and in the Union's Brief in Support of Cross-Exceptions, we request that the Board find merit in the Union's exception as to the remedy and modify the ALJ's order to require a complete nationwide remedy and posting to remedy Respondent's maintenance of the eight unlawful Handbook rules.

Dated: September 7, 2012

Respectfully submitted,

/s/ Jessica D. Ochs

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Resp. Brief to Respondent's Answering Brief to Cross-Exceptions of UFCW Local 1500 to the Decision of the ALJ to be filed electronically via the NLRB's e-filing system. I further certify that I caused copies of the Resp. to be served by e-mail upon:

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this 7th day of September, 2012.

/s/ *Jessica D. Ochs*
Jessica Drangel Ochs