

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE

FRESH & EASY NEIGHBORHOOD  
MARKET

and

Cases 31-CA-077074  
31-CA-080734

UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION

Nicole Buffalano, Esq.,  
for the General Counsel.  
Joseph A. Turzi, Esq. and Colleen  
Hanrahan, Esq., of DLA Piper LLP (US),  
Washington, D.C., for the Respondent.  
David A. Rosenfeld, Esq., of Weinberg,  
Roger & Rosenfeld, Alameda, CA, for the  
Union.

**DECISION**

**Statement of the Case**

**Gerald A. Wacknov, Administrative Law Judge:** This decision is based on a stipulated record. The charges were filed by United Food and Commercial Workers International Union (Union) on March 15 and May 9, 2012, respectively. On October 22, 2012, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Fresh & Easy Neighborhood Market (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged. Thereafter, on about January 16, 2013, the parties entered into a stipulation and joint motion to transfer the matter to the Division of Judges.

Following the assignment of this matter to me, briefs have been received from counsel for the Acting General Counsel, counsel for the Respondent, and counsel for the Union. Upon the entire record and consideration of the briefs submitted, I make the following:

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## **Findings of Fact**

### **I. Jurisdiction**

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The Respondent is a Delaware corporation with an office and place of business located in El Segundo, California, and with retail grocery stores located throughout the United States. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of \$500,000 and purchases and receives at its California grocery stores products, goods and materials valued in excess of \$5000 directly from points outside the State of California. At all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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### **II. The Labor Organization Involved**

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### **III. Alleged Unfair Labor Practices**

#### **A. Issues**

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The stipulated issue in this proceeding is whether certain language contained within the Respondent's Code of Business Conduct that applies to employees at its retail grocery stores violates Section 8(a)(1) of the Act.

#### **B. Facts and Analysis**

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The Respondent maintains a 20-page booklet entitled, "Code of Business Conduct." The booklet is available to employees on the Respondent's website. The booklet may fairly be described as essentially a compendium of policy "do's and don'ts" regarding ethical business conduct, which all employees are required to follow. Under the heading "The resources of the company and our customers," beginning on page 14 of the booklet, are the following sections: Intellectual property; Responsible use of company IT; Confidentiality and data protection; and Accurate accounting and money laundering. The Confidentiality and data protection section, on page 16, is as follows:

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#### **CONFIDENTIALITY AND DATA PROTECTION**

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We have an important duty to our customers and our employees to respect the information we hold about them and ensure it is protected and handled, responsibly. The trust of our staff and customers is very important so we take our obligations under relevant data protection and privacy laws very seriously. We should also regard all information

5                   concerning our business as an asset, which, like other important assets, has a value and needs to be suitably protected.

**What does it mean for me?**

10           **DO**

- Make sure any customer or staff information you collect, is relevant, accurate and, where necessary, kept up to date. Keep it for no longer than necessary.
- 15           • Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.<sup>1</sup>
- Ensure that data is appropriately and securely stored and disposed of. Be aware of the risk of discussing confidential information in public places.

20           **DON'T**

- Release information, without making sure that the person you are providing it to is rightfully allowed to receive it and, where necessary that it has been encrypted in accordance with Fresh & Easy policy.

25           **CONTACT**

If you are ever unsure about how to handle Fresh & Easy data, be cautious and seek advice from:

- Your Line Manager
- Information Security
- Our Legal Department

35           The complaint alleges that the following language violates Section 8(a) (1) of the Act: “Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.”

40           The General Counsel and Union, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), argue that this language “would reasonably tend to chill employees in the exercise of their Section 7 rights,” in that employees would interpret this language to prohibit disclosure of employee wages and other terms and conditions of employment to other employees or individuals including union representatives.

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<sup>1</sup> On October 12, 2012, prior to the issuance of the complaint herein, the Respondent posted on its website a revised Code of Business Conduct in which this language was modified as follows: “Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained. This policy does not limit non-supervisory employees’ rights to engage in protected activities under the National Labor Relations Act, including the right to share information related to terms and conditions of employment.” The revised Code of Business Conduct was neither distributed directly to employees nor were employees given notice that the Code had been revised.

5           The category heading, Confidentiality and Data Protection, under which the alleged unlawful language appears, is about insuring that employees take their “obligations under relevant data protection and privacy laws very seriously.”

10           The language alleged to be violative of the Act is one component of various additional requirements: that employees who “collect” customer or staff information should collect it, maintain it, update it, and dispose of it when it is no longer needed; that the data should be kept and disposed of in a secure manner; and that the information should not be released to persons unauthorized to receive it and, even when released to such persons, the information should be in encrypted form when necessary.

15           Significantly, there is nothing in the Confidentiality and Data Protection section that defines what type of information or data is subject to the confidentiality safeguards. The General Counsel and Union argue that because of this lack of specificity the alleged violative language is ambiguous, and should therefore be interpreted to impliedly preclude the release by employees of information concerning their own wages and conditions of employment and the wages and conditions of employment of other employees.

20           I do not agree. The Code of Business Conduct booklet is a stand-alone booklet devoted to ethical matters. It is not a typical employee handbook that provides information and establishes policies, rules and requirements governing employees’ day-to-day activities; and it does not deal with or even mention wages and working conditions. The alleged violative language does not appear in isolation. A reading of the entire Confidentiality and Data Protection section may be fairly understood to prohibit the release of “collected” information. Collected information may be reasonably understood to mean information obtained from customers or employees such as, for example, customers’ credit information and employees’ social security numbers, medical information and other such information which is customarily maintained in employees’ personnel files. Obviously, the Respondent does not need to obtain information from employees regarding their wages and working conditions as this is information that the Respondent generates; and conversely, confidential information that the Respondent may collect and maintain is clearly not germane to the Act’s protection of Section 7 rights. Accordingly, I find that employees reading this language, in the context of the booklet’s overall purview and the essence of the section of the booklet in which the language appears, would not reasonably interpret it to preclude them from revealing and discussing with coworkers specific information regarding wages and working conditions or sharing such information with outside sources in furtherance of their Section 7 rights.<sup>2</sup> See, generally, *Lafayette Park*, 326 NLRB 824, 826 (1998); *Lutheran Heritage*

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<sup>2</sup> The Union in its brief maintains that the language is also violative of the Act in that it precludes the release of customer information, and that employees have a right under the Act to identify and approach customers as well as other employees with their concerns; thus, the identity of customers may not be prohibited. Assuming *arguendo* that the complaint allegation encompasses this matter, I find that employees would not reasonably interpret the language to preclude them from identifying and approaching customers in furtherance of their Sec. 7 rights.

5 *Village-Livonia*, 343 NLRB 646 (2004); *Mediaone of Greater Florida, Inc.*, 340 NLRB 277,  
279 (2003).

I recommend that the complaint be dismissed in its entirety.<sup>3</sup>

**Conclusions of Law**

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1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
  2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
  3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended<sup>4</sup>

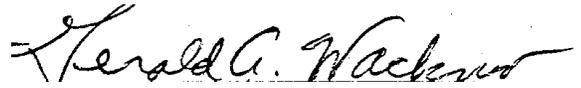
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**ORDER**

The complaint is dismissed in its entirety.

Dated: March 22, 2013

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Gerald A. Wacknov  
Administrative Law Judge

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<sup>3</sup> In view of the finding that the language is not violative of the Act, it appears unnecessary to address the General Counsel's contention that the Respondent neither effectively repudiated the original language, nor did it timely or adequately communicate the revision to the employees in accordance with the guidelines enunciated by the Board in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978).

<sup>4</sup> 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.