

Target Corporation and United Food & Commercial Workers Local 1500. Cases 29–CA–030804, 29–CA–030820, 29–CA–030880, and 29–RC–012058

April 30, 2013

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On May 18, 2012, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel and Charging Party Union filed answering briefs, and the Respondent filed reply briefs. The Acting General Counsel filed limited exceptions, and the Respondent filed an answering brief. The Charging Party filed limited cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party and Acting General Counsel each filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² only to the extent consistent with this Decision, Order, and Direction of Second Election

and to adopt the judge's recommended Order as modified and set forth in full below.³

For the reasons stated below, we reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by maintaining its parking lot policy. We adopt the remainder of the judge's unfair labor practice findings for the reasons stated by the judge, except as modified below.⁴

1. As more fully set forth in the judge's decision, part of the Respondent's no-solicitation/no-distribution policy prohibits solicitation during working time and in work areas, and distribution of pamphlets or other literature during working time or in work areas. There is no contention that this part of the rule violates the Act. The judge found, however, and we agree, that the following additional prohibitions in the policy did violate the Act:

Certain activities are prohibited at all times on Target premises. Soliciting, distributing literature, selling merchandise or conducting monetary transactions, whether through face-to-face encounters, telephone, company mail or e-mail, are always off limits (even during meal and break periods) if they are:

For personal profit

For commercial purposes

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's finding that the Respondent did not threaten employees with store closure during employee group meetings.

The Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB 621, 621 fn. 1 (2013).

² The judge found that the Respondent violated Sec. 8(a)(1) of the Act by, inter alia, creating the impression that employee Sonia Williams' union activities were under surveillance and threatening employee Tashawna Green with unspecified reprisals because she engaged in union activity, and we adopt those findings. However, the judge inadvertently omitted conclusions of law corresponding to these two unfair labor practice findings. The judge's conclusions of law are hereby amended accordingly.

³ We shall modify the judge's recommended Order to reflect the violations found and in accordance with the Board's standard remedial language and its decision in *J. Picini Flooring*, 356 NLRB No. 9 (2010). The judge recommended a broad order requiring the Respondent to cease and desist from violating the Act as found or "in any other manner." We find that a broad order is not warranted under the circumstances of this case, and we shall substitute a narrow order, requiring the Respondent to cease and desist from violating the Act as found or "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979).

⁴ In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining its information security policies, we rely additionally on *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 547–548 (2013) (finding unlawful a rule prohibiting disclosure of "employee records"); *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012) (finding unlawful a rule prohibiting disclosure of "personnel information and documents"); and *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (2011) (finding unlawful a rule prohibiting "[a]ny unauthorized disclosure from an employee's personnel file"). The policies at issue here prohibited employees from disclosing "confidential information," broadly characterized as confidential "all Target information that is not public," and listed as one example of confidential information "team member [i.e., employee] personnel records." Under the just-cited precedent as well as that cited by the judge, the Respondent violated Sec. 8(a)(1) by maintaining these policies. Although the judge erroneously stated that the information security policies prohibited disclosure of personnel "information" rather than "records," the error does not affect our decision.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by creating an impression of surveillance of employees' union activities, we note that the Respondent's exceptions turn solely on the judge's relevant credibility determinations.

For a charitable organization that isn't part of the Target Community Relations program and isn't designed to enhance the company's goodwill and business.

Generally speaking, an employer's ban on solicitation that is not limited to working time, or on distribution of literature not limited to working time and working areas, is presumptively invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 615–621 (1962).⁵ Thus, unless the stated purposes for which solicitation and distribution are banned “at all times on Target premises” are carefully crafted to exclude union and other activity protected under Section 7 of the Act, the rule is unlawful. Phrasing the issue in accordance with the applicable test, if employees would reasonably construe the rule to include within its scope union solicitation and distribution, the Respondent violated Section 8(a)(1) by maintaining it. See *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).⁶

Here, the problematic phrase is “[f]or commercial purposes.” The Respondent does not define this phrase or furnish any illustrative examples that might clarify its scope. Viewed in isolation, it could appear to designate solicitation and distribution aimed at selling goods and services. But the phrase does not exist in isolation. It immediately follows language banning solicitation and distribution “[f]or personal profit,” a narrower and more precise phrase that employees would readily understand to encompass solicitation and distribution aimed at selling goods and services. With the subject of selling goods and services having been addressed, it would be entirely reasonable for employees to conclude that “[f]or commercial purposes” means something different, including solicitation and distribution for other organizations, such as unions. Whether the Respondent actually intended this interpretation is beside the point, as employees should not have to decide at their own peril what conduct a rule covers. *Flex Frac Logistics*, supra, 358 NLRB 1131, 1132.

Moreover, the Respondent itself encouraged that very interpretation during its preelection campaign. As the judge details in his decision, the Respondent told em-

ployees that the Union is a “business” that “sells memberships.” Moreover, on several occasions, high-level managers at the Respondent's store told employees engaged in union activity that there was “no soliciting on the premises,” including the parking lot, and no distribution of literature, even in the breakroom. Although there is no evidence that the managers expressly invoked the no-solicitation/no-distribution rule, these authoritative indications of the scope of the prohibition further support our finding that employees would reasonably construe the rule's application to “commercial” activities to prohibit protected Section 7 activity. See *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).⁷

2. The judge found certain language in the Respondent's parking lot policy unlawful. The policy in its entirety states as follows:

Park in the area of the lot for team members. Always lock your car. Use the “buddy system” or walk in pairs when you leave at night. It'll make leaving safer. After the store closes, you may be asked to move your car closer to the store for safety. If you see people you don't know loitering around the team member parking area, notify Assets Protection or your leader on duty immediately. (Target is not responsible if your car is damaged or stolen while in the parking lot.)

The part of the policy the judge found unlawful is the sentence stating: “If you see people you don't know loitering around the team member parking area, notify Assets Protection or your leader on duty immediately.” The judge reasoned that because “it is possible that not all the workers know each other,” and because some employees may want to engage in union activity pre or postshift in the parking lot, the parking lot policy violates the Act “because it requires the workers to inform the Respondent of anyone who might be engaged in union activities in the lot.”

We disagree. The disputed provision of the parking lot policy does not explicitly restrict Section 7 activity, and there is no evidence that the rule was promulgated in response to union activity or that it has been applied to restrict the exercise of Section 7 rights. The judge appears to have found the provision unlawful under the “reasonable construction” prong of the *Lutheran Heritage Village* test. 343 NLRB at 647. As the Board stated in that decision, however, when (as here) a rule does not refer to Section 7 activity, “we will not conclude that a

⁵ Retail stores may additionally prohibit employees from soliciting on the selling floor even during nonworking time. *Id.* at 617 fn. 4.

⁶ An employer violates Sec. 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Sec. 7 rights. If the allegedly unlawful rule explicitly restricts activity protected by Sec. 7, its maintenance is unlawful. If it does not, then whether the Act has been violated depends on a showing of one of the following: (1) employees would reasonably construe the language to prohibit Sec. 7 activity; (2) the rule was promulgated in response to Sec. 7 activity; or (3) the rule has been applied to restrict the exercise of such activity. *Lutheran Heritage Village–Livonia*, above at 646–647.

⁷ Our conclusion that in these circumstances employees subject to this rule reasonably would conclude that the Respondent understood union activity to constitute “commercial” activity does not suggest that we agree with the Respondent's characterization.

reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.” *Id.* The Board must give the rule a reasonable reading, must refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights. *Id.* at 646. Here, the requirement that employees report unknown loiterers is embedded in a rule the overall purpose of which is (in the judge’s own words) “to ensure the safety of the employees in the store’s parking lot.” In our view, a reasonable employee would realize the lawful purpose of the challenged provision from its context and infer that the Respondent’s purpose in promulgating it was to ensure employee safety, “not to restrict Section 7 activity.” *Id.* at 648.⁸

3. On May 10, 2011, the Union filed a representation petition in Case 29–RC–012058. An election by secret ballot was held on June 17, 2011. The tally of ballots showed 85 for and 137 against the Union, with 6 non-determinative challenged ballots. The Union filed timely election objections, many of which mirror the unfair labor practices we find here. We find that the results of the election must be set aside. In so finding, we agree with the judge’s apparent conclusion that the Respondent’s maintenance of unlawful rules is sufficient by itself to set aside the election. However, we additionally rely on the other 8(a)(1) violations the Respondent committed during the critical period—including a coercive interrogation, a threat of unspecified reprisals, and the distribution to employees of a leaflet that unlawfully implied a threat to close the store if employees selected the Union—in reaching our conclusion that the election must be set aside and a second election directed.

AMENDED REMEDY

The standard affirmative remedy for maintenance of unlawful work rules is immediate rescission of the offending rules; this remedy ensures that employees may

⁸ Although we agree with the judge that it is possible that not all Valley Stream store employees know each other, the Respondent’s dress code requires employees to wear a red shirt, khaki pants, and an employer-issued name tag. Except during cold weather, employees would easily identify their coworkers on sight. Even during such weather, employees likely would be identifiable by their khaki pants.

In finding the parking lot policy unlawful, the judge relied on the Board’s finding unlawful, in *Lutheran Heritage Village*, a rule prohibiting loitering on company property without permission. That rule was materially different from the one at issue here. It prohibited employees from “loitering” anywhere on company premises, without defining what was thereby proscribed, and was devoid of any context that would indicate a lawful purpose. A reasonable employee would construe that rule to prohibit off-duty employees from engaging in Sec. 7 activity in nonworking areas. In contrast, the rule at issue here merely requires the reporting of unknown individuals seen loitering in the employee parking area, and embeds that requirement in a context that clearly shows the rule’s lawful purpose.

engage in protected activity without fear of being subjected to the unlawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *Guardsmark*, the Respondent may comply with the Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully broad rules, until it republishes the handbook either without the unlawful provisions or with lawfully-worded rules in their stead. Any copies of the handbook that are printed with the unlawful rules must include the inserts before being distributed to employees. See *2 Sisters Food Group*, 357 NLRB 1816, 1823 *fn.* 32 (2011); *Guardsmark*, *supra* at 812 *fn.* 8.

Further, the unlawful rules have been or are in effect at the Respondent’s facilities nationwide.⁹ “[W]e 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.” *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011) (quoting *Guardsmark*, *supra*, 344 NLRB at 812). As the D.C. Circuit observed, “only a company-wide remedy extending as far as the company-wide violation can remedy the damage.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007). We amend the remedy and will modify the judge’s recommended Order accordingly.

ORDER

The Respondent, Target Corporation, Valley Stream, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining information security policies that prohibit employees from discussing or otherwise disclosing information regarding wages, benefits, and other terms and conditions of employment.

⁹ Dawn Major, the Respondent’s human resources director for the East Coast Region, testified that store-level executives do not have authority to set employment policies for a particular store. She also stated that the corporate employee relations department developed the employee handbook and that all employees receive a copy during new-hire orientation. She explained that the Respondent does not issue new handbooks each time a rule is revised because the handbooks apply to “hundreds of thousands” of employees.

(b) Maintaining a no-solicitation/no-distribution policy that prohibits union solicitation and distribution at all times on Target premises.

(c) Enforcing a no-solicitation policy that prohibits union solicitation at all times, including nonworking time.

(d) Telling employees that it would enforce its unlawfully overbroad no-solicitation/no-distribution policy.

(e) Maintaining an "After Hours" policy that prohibits off-duty employee access to the exterior and other nonworking areas of its premises.

(f) Maintaining a dress code policy that prohibits wearing union buttons or other union insignia while at work.

(g) Threatening to close its Valley Stream store in the event that the employees select the Union as their bargaining representative.

(h) Creating the impression that it was conducting surveillance of protected employee activities.

(i) Coercively interrogating employees about their union or other protected concerted activities.

(j) Threatening to discipline employees for their union or other protected concerted activities.

(k) Threatening employees with unspecified reprisals for their union or other protected concerted activities.

(l) 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.

(a) Rescind, nationwide, the information security, no-solicitation/no-distribution, "After Hours" and dress code rules.

(b) Furnish all current employees nationwide with inserts for their current employee handbooks that (1) advise that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees nationwide revised employee handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

(c) Within 14 days after service by the Region, post at its Valley Stream, New York store copies of the attached notice marked "Appendix A" and at all other stores nationwide copies of the attached notice marked "Appendix B."¹⁰ Copies of the notices, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consec-

utive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at its Valley Stream store at any time since March 1, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[Direction of Second Election omitted from publication.]

APPENDIX A

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 Federal labor law and has ordered us to post and obey 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 benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the following rules in our team member handbook:

Information security policies that prohibit you from discussing or otherwise disclosing information regarding wages, benefits and other terms and conditions of employment.

A no-solicitation/no-distribution policy that prohibits union solicitation and distribution at all times on Target premises.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

An “After Hours” policy that prohibits you from accessing exterior and other nonworking areas of our store premises during your off-duty hours.

A dress code that prohibits you from wearing union buttons or other union insignia while at work.

WE WILL NOT tell you that we will enforce an unlawful no-solicitation/no-distribution policy.

WE WILL NOT threaten to close the Valley Stream store if you select the Union as your bargaining representative.

WE WILL NOT give you the impression that we are engaging in surveillance of your union or other protected concerted activities.

WE WILL NOT coercively interrogate you about your union or other protected concerted activities.

WE WILL NOT threaten you with discipline if you engage in union or other protected concerted activities.

WE WILL NOT threaten you with unspecified reprisals if you engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL rescind the information security, no-solicitation/no-distribution, “After Hours” and dress code rules.

WE WILL furnish all of you with inserts for your current employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all of you a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides lawfully-worded rules.

TARGET CORPORATION

APPENDIX B

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 Federal labor law and has ordered us to post and obey 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 benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the following rules in our team member handbook:

Information security policies that prohibit you from discussing or otherwise disclosing information regarding wages, benefits and other terms and conditions of employment.

A no-solicitation/no-distribution policy that prohibits union solicitation and distribution at all times on Target premises.

An “After Hours” policy that prohibits you from accessing exterior and other nonworking areas of our store premises during your off-duty hours.

A dress code that prohibits you from wearing union buttons or other union insignia while at work.

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

WE WILL rescind the information security, no-solicitation/no-distribution, “After Hours” and dress code rules.

WE WILL furnish all of you with inserts for your current employee handbook that (1) advise you that the unlawful rules listed above have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or WE WILL publish and distribute to all of you a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides lawfully-worded rules.

TARGET CORPORATION

Michael Berger and Lara Haddad, Esqs., for the Acting General Counsel.

Alan I. Model, Esq. (Littler Mendelson, P.C.), of Newark, New Jersey, for the Respondent.

Jessica Drangel Ochs and Patricia McConnell, Esqs. (Meyer, Suozzi, English & Klein, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on charges filed by United Food & Commercial Workers Local 1500 (the Union) in Case 29–CA–030804 on May 23, 2011, in Case 29–CA–030820 on June 8, 2011, and in Case 29–CA–030880 on July 8, 2011, a second order consolidating cases and amended consolidated complaint was issued on December 30, 2011,

against Target Corporation (Respondent, Employer, or Target).¹

The complaint alleges, essentially, that in its team member handbook revised in July 2009, the Respondent promulgated and since then has maintained certain unlawful rules, as follows: (a) No-Distribution rule, (b) "Use Technology Appropriately" policy, (c) "Communicating Confidential Information" policy, and (d) "Unauthorized access to confidential information" policy.

It is also alleged that in its team member handbook revised in July 2009 and February 2011, the Respondent promulgated and since then has maintained certain unlawful rules, as follows: (a) "After Hours" rule, (b) no-solicitation/no-distribution policy, (c) "Dress Code" policy, and (d) a parking lot policy.

The complaint also alleges that the Respondent threatened employees with discipline for engaging in activities on behalf of the Union; gave employees the impression that their activities on behalf of the Union were under surveillance; and enforced its no-solicitation policy by directing employees not to solicit for the Union anywhere on the Respondent's premises, which includes nonwork areas.

The complaint also alleges that the Respondent threatened employees with unspecified reprisals for their support for and/or activities on behalf of the Union; distributed a leaflet to its employees in which it threatened them that its Valley Stream facility would close if they chose the Union as their collective-bargaining representative; and in or about April and/or May, 2011, showed its employees a video which states that the Respondent will enforce its solicitation and distribution policies.

The complaint further alleges that the Respondent enforced its no-solicitation policy by directing employees not to solicit for the Union on the Respondent's property, and interrogated employees regarding their union activities. Finally, the complaint alleges that the Respondent threatened its employees that if they chose the Union as their collective-bargaining representative and there was a strike, the Valley Stream facility would close.

The Respondent's answer denied the material allegations of the complaint.

On May 10, the Union filed a petition in which it sought to represent a unit, essentially, of all full-time and regular part-time employees. The parties entered into a Stipulated Election Agreement pursuant to which an election was held on June 17. The tally of ballots showed that of approximately 268 eligible voters, 85 cast their ballots for the Union, 137 voted against the Union, and there were 6 challenged ballots which did not affect the outcome of the election.

On June 24, the Union filed objections to conduct affecting the results of the election. On January 20, 2012, the Regional Director for Region 29 issued a Report on Objections, order consolidating cases and notice of hearing. The report stated that certain objections were substantially identical to the complaint allegations, and accordingly, ordered that the objections case and the unfair labor practice case be consolidated for hearing.²

On February 1-3, 6-7, 10, and 13, 2012, a consolidated hearing was held before me in Brooklyn, New York. On the evi-

dence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel, Respondent, and the Union, I make the following

Jurisdiction and Labor Organization Status

The Respondent, a domestic corporation with various retail stores, including a retail store located at 500 West Sunrise Highway, Valley Stream, New York, the only location involved herein, is engaged in the operation of department stores. During the past year, the Respondent derived gross annual revenues valued in excess of \$500,000 from the operations of its stores and, during the same time period, received at its Valley Stream facility goods valued in excess of \$50,000 directly from enterprises located outside New York State. The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Background

The Respondent, a major nationwide retail store, opened 50 years ago. None of its 1755 stores have been successfully organized by a union. As set forth above, the Union filed a petition to represent the employees of the Valley Stream store, leading to a campaign for and against union representation by the Union and the Respondent.

During the course of the campaign, both parties distributed literature and conducted meetings in an effort to convince the workers of the merits of their cause. In addition, the Respondent showed videos to its workers.

Organizational Hierarchy and Operations

The Respondent's headquarters is located in Minneapolis where the human resource executives set the employment policies of the Valley Stream store. That store has about 268 unit employees, called "team members" who are supervised by "team leaders" who report to "executive team leaders."

The store manager, Laura Pena, is called the "store team leader." Respondent's aim is to provide the best possible experience for its customers, called "guests." Pena stated that when she arrived at the store in late September 2010, she found its operations "scar . . . pretty much operationally broken." Pena testified that she did not want the Valley Stream store to become Target's first unionized store, but stated that she did not become upset when she learned that the Union sought to organize it.

The store's human resources department is headed by Executive Team Leader Karrien Stone who became employed at Valley Stream in February 2011 to correct a "disheveled, disoriented" human resources operation.

The store is situated in the Green Acres Mall area. It has two parking lots. The employee entrance to the store is located directly in front of one of the parking lots. The store is open 24 hours a day, 7 days a week. However, it is only open to the public for certain hours during the day. After the store closes for the day, employees on the "overnight shift" perform such tasks as stocking shelves and preparing and setting displays.

¹ All dates are in 2011, unless otherwise stated.

² The Union withdrew certain objections that it had filed.

I. FINDINGS OF FACTS CONCERNING THE ALLEGED THREATS,
CREATION OF THE IMPRESSION OF SURVEILLANCE, AND
INTERROGATION

A. *The Alleged Unlawful Threats*

1. Threat to discharge and the threat of
unspecified reprisals

Employee Tashawna Green, an active supporter of the Union, testified that in early March 2011 she spoke with employee Matthew King in the store's fitting room. King told her that a union was needed in the store and Green agreed. At that point, team leader and admitted Supervisor Deborah Joseph told them "not to let them hear us mention anything about a union. You could be terminated." Green asked Joseph if she was serious, and Joseph replied that she was, adding "they don't want to hear anything mentioned about a union."

King testified that in early March 2011 he was working with Green in the fitting room when Joseph gave him a work order. King, stating that he was "just playing around," said, "Oh, we need a union. We need a union." He stated that just then Joseph walked by and was in a position to hear his comment. He quoted Joseph as saying "don't talk like that. You could get written up for talking like that" or "talking about stuff like that." Although King first stated that Green did not say anything to prompt Joseph's comment, he also commented that he and Green were speaking about a union, and his pretrial affidavit states that "Green and I were discussing unions in general. I don't recall our exact words."

Joseph denied knowledge of the above incident and denied the comments attributed to her by Green and King, specifically denying telling them that they could be fired for speaking about a union.

A newspaper article in "Newsday" bears a date of May 16 and pictures Green holding a "Target Change" poster. "Target Change" is the Union's slogan used in the campaign. The article quoted Green as saying that "concerns she and her co-workers have raised were not being addressed. We decided in order for us to be heard, we need a union, otherwise they are not listening."

Green, who stated that she gave statements to the news media about the organizational campaign, testified that on May 17, admitted Supervisor Nicole Barrett "pulled" her into the men's accessories department and told her that she saw an article in which Green claimed that management was not listening to what the workers had to say. Green stated that Barrett read the article briefly while standing there. Barrett asked her "what management" she was referring to. Green replied that it was "management overall." Green quoted Barrett as saying, "I'm not here to tell [you] what to do; it's [your] decision on how [you] want to vote. Just be careful of what you do cause you never know what could happen."

2. The threats to close the store

a. *The leaflet*

The Respondent distributed the following leaflet to its employees before the election:

WILL THE STORE CLOSE IF THE UNION GETS IN?

There are **no guarantees**. Here are the FACTS:

Companies close stores for economic reasons.
Our store will stay open only so long as it meets Target's economic and operational needs. **A UNION WILL NOT CHANGE THESE FACTS.**

The Union has a terrible record of store closings:

The International union has lost 89,000 members in 10 years because MEMBERS LOST JOBS.

32 store closings announced by A & P February 11.

The local was happy that only 4 NY stores were closing.

We all owe our jobs to the closing of the Caldor store that was in our building. It had the union. It closed.

Target's record is different:

Almost doubling of stores and jobs in the same 10 years where the UFCW International union lost over 89,000 members!

No dues payments for the right to work.

Target has closed stores that did not perform economically.

Our future depends on:

Each of us, doing our job to the best of our abilities.

Our store's economic health.

Would a union help?

Rigid union work rules and seniority systems could hurt.

They *could* help economically by negotiating wage and benefit CUTS.

Who wants to pay dues for that kind of help?

WHEN WAS THE LAST TIME YOU HEARD OF A UNION HELPING MEMBERS DO THEIR JOB . . . OR BENEFITING A COMPANY'S ECONOMIC HEALTH?

VOTE NO

/s/ Laura Pena

PS Any leader can show you the union's membership drop and A & P store closings. [Emphasis in the original.]

The Respondent alleges that the above leaflet was distributed as a response to one of the Union's messages contained in a flyer concerned with "myths and facts about union." According to the Union's flyer, one "myth" was that "companies close due to unions." The "fact" set forth in the flyer stated that "companies close for economic reasons—and the vast majority of companies that close are nonunion. Some companies, however, like to keep this myth alive. Half of employers illegally threaten workers who form a union by saying the plant will close. Studies have shown that, in fact, unions help decrease employee turnover and can increase efficiency."

b. *The meetings with employees*

The Respondent routinely holds frequent, two to three times per day, informal "chat sessions" or "huddles" during which supervisors speak to the workers concerning matters of interest relating to the store. During the period prior to the election, the Respondent utilized those sessions to speak to the workers about the Union. The Respondent's managers testified that they were trained by its labor relations department as to what they could and could not lawfully say to the workers about the

union campaign.

In response to the Union's campaign, the Respondent designed a program in which four distinct topics were presented to its employees at meetings.

The large number of employees and the different shifts they worked prevented all the workers from attending the meetings at one time, so each of the four topics was presented at about 10 meetings of 10 to 15 employees each. Separate videos were shown to the employees at the first three meetings. It was stipulated that almost all the employees in the unit had been shown the three videos. The meetings took place between April and June 2011 before the election.

Present at the first three meetings were Store Manager Pena and Pablo Eguez, the Respondent's labor relations manager. Respondent's senior vice president for human resources, Derek Jenkins, spoke at the fourth meeting. Pena and Jenkins stated that they read from a script at each of the meetings and did not vary from the script. However, when questions were asked by employees at the end of each meeting, they did not read from a script in answering the questions. Pena stated that the purpose of the script was to ensure that she gave a "consistent" message to all the workers. Workers testified variously that the managers read from a script at the meetings, or did not read from a script.

Pena led the first meeting which was concerned with the general topic of "unions." A video entitled "Think Hard Protect Your Signature" was shown. Pena testified that the script that she read portrayed the Union as a business. An actor in the video stated that "a union is a business. And like any other business, it has to bring in money to survive. But it doesn't have any products to sell. Instead, it sells memberships. The more memberships it sells, the bigger the business." That video also contained the message that "you can rely on us to enforce all solicitation, distribution, and harassment policies."

Employee Charmain Brown testified that at one of the meetings in May at which about five employees were present, Pena told them that the meeting was called because an employee mentioned that the union was "harassing" workers. Pena, speaking from a script, told the assembled workers that the union "took over" Wal-Mart and the union "shut down" that store. Pena told the employees that her boyfriend was in a union, was injured and, although he was no longer employed, the union continued to deduct dues from his pay. Pena concluded by saying that she loved the store and did not want to see it change or go any place, but "if the union comes in this store is going to shut down." Brown stated that an employee asked why the store would close if the plans were that the store would expand. Pena did not answer that question.

Pena denied telling the employees that the store would close if the union successfully organized the employees.

The second meeting, which took place on about June 9, concerned negotiations and collective-bargaining. A video was shown entitled "Essentials: Collective Bargaining."

Employee Averil Bracey was present at the meeting and testified that Pena used a flip chart to demonstrate "the figures if the Union were to come in." According to Bracey, Pena said that the Union did not have the "nerve" to collect dues payments itself and instead relied on the Respondent to do its

"dirty work" by deducting dues from employees' paychecks. Bracey stated that Pena claimed that such extra work would cost the Respondent "administration fees" of \$3 million per year "which is going to make the store close."

Bracey challenged Pena, stating that since a sign advises the store's customers that it gives \$3 million per week to charity, the Respondent should take one of those weekly donations and "take care of the union thing." According to Bracey, Pena became angry, slapped her hand on the table, and said, "Averil, I'm not going to go through this with you all night long . . . it's plain to see how you're voting. I can see you're voting for the union." Pena then directed her assistants to leave and they left with Pena.

Pena conceded that Bracey asked that the money the Respondent gives to volunteer events should instead be given to its employees. Pena stated that Bracey was loud, boisterous, and "belligerently disrespectful," interrupting her repeatedly during the meeting, raising her voice in a mocking way, and asking how the Respondent could give money to charity rather than to its employees. Pena denied banging on the table, losing her temper, or walking out. Human Resources Official Stone denied that Pena or Eguez told the workers that the store may close if the union came in. She denied that Pena lost her temper, slammed a book on a table, or stormed out of the room in response to Bracey's comments.

Pena stated that she read from a script and showed employees a flipchart containing the cost to the Respondent if all employees received a \$2-hour wage increase and were guaranteed a 4-hour workweek, benefits the Union allegedly promised to the workers if it won the election. However, she admitted speaking about union dues at the meetings, but denied saying that the Respondent would have to do the Union's dirty work of deducting dues from workers' paychecks.

Pena denied telling the employees, at any meeting, that the store would or may close, and indeed did not mention anything about a store closing at all. Pena specifically denied telling the workers that a \$3-million expense would cause the store to close, and Eguez denied that they mentioned that it would cost \$3 million to administer the dues deductions. Indeed, Pena stated that she is in no position to decide if the store would close.

At the third meeting, led by Pena and Eguez, a video was shown, entitled "Essentials: Strikes." Employee Betsy Ann Wilson saw Pena read from a script.

The fourth meeting, called the "25th hour meeting," was held on about June 15. Pena introduced official Jenkins. She stated that they both read from their scripts, rehearsing before the meetings. They stated that they did not entertain employee questions at the meeting.

According to employee Averil Bracey, Pena spoke from a script and introduced Jenkins. Bracey stated that Jenkins, not reading from a script, said that the Valley Stream facility was a good store. He told the workers that sometimes when a union organizes a store, it encourages the workers to strike, but Target had 33,000 employees who could replace the 280 workers at the store. He added that "in case of a strike I have no problem closing the store because . . . sometimes . . . when they're striking they'll just close a store." Pena then said that employees

should “vote for yourself . . . vote no for the Union, because if the union come[s] in then this will lead to closing the store.”

Jenkins stated that the Respondent’s labor relations department wrote his speech but he retyped it, putting it into his “own words.” He then returned it to the labor relations department for its review and approval.

The script that Jenkins stated that he read from, reads as follows on this point:

One thing you need to think about very seriously is that we have ALMOST 1800 STORES and 350,000 TEAM MEMBERS. We would have no difficulty hiring PERMANENT REPLACEMENTS for ECONOMIC STRIKERS. Unions like to call a strike an “economic war.” The 260 TMs [team members] here against 350,000 does not feel like good odds to me. I repeat 260 against 350,000. [Emphasis in original.]

Jenkins testified that his only mention of a store closing was that he told the workers that the store closed once before when it was owned by Caldor. His script, which he read, stated as follows on this point:

YOUR STORE CLOSED ONCE BEFORE WHEN IT WAS OWNED BY CALDOR. I know some of you were here and remember that situation. At that time, it was RERPESENTED BY THIS SAME UNION. It closed because the company DID NOT PERFORM well enough economically to continue operating. THE UNION DID NOT CHANGE THAT FACT FOR CALDOR. [Emphasis in original.]

Jenkins testified that, in reading his script to the workers, he emphasized the economic factors that cause businesses to close. He was aware that employees had asked whether the store would close, and he answered that this store would not close but that there are reasons why a store could close. Employees Pebrow and Smaine stated that Jenkins and Laura read from scripts. Human Resources Official Stone stated that Jenkins and Pena spoke from scripts, and she denied that either said the store would close if the union came in or that the store would close for any reason.

In addition, numerous employees, including Sonia Williams, an active union supporter, Jennifer Pebrow, Eva Reaves, Betsy Ann Wilson, Wesly Symby, and Antonia Smaine denied that Pena or Jenkins said that the store would or may close due to the Union during the meetings held with the workers at which they were present.

Team Leader Lance King testified that at the first meeting he did not see any scripts. He did not attend the next two meetings, but at the fourth meeting, Pena and Jenkins spoke from scripts. Neither said the store would close because of the Union. He noted that Jenkins said that a store would close only for business reasons—if it was not meeting sales goals or not making money.

Pena, Egeuz and Jenkins all denied telling the workers that the store would or may close if the Union was selected as the employees’ representative. Employer Official Karrien Stone denied that Pena or Jenkins said that the store would or may close.

B. The Creation of the Impression of Surveillance

Employee Sonia Williams, a union supporter, stated that on about April 26 and 27, she distributed about 24 copies of a Crain’s New York article to employees before her work shift and while she was on her break. The article spoke about this organizing campaign.³

Williams stated that on April 28 she was called in to Store Manager Pena’s office. Also present was Human Resources Supervisor Stone. Pena told Williams “Sonia, I know we’re in the midst of a campaign, but it has been brought to my attention that you are soliciting team members for the union.” Williams replied, “[Y]ou know where I stand with the union and if I speak to a team member, I’m speaking to them off the clock.” Pena answered that “[W]e’re not supposed to do it in Target premises” whereupon Williams asked, “[I]n the break room, on my break time?” Pena replied “not on Target’s premises.” Williams asked “in the parking lot?” Pena said “No.” Williams then asked whether she could solicit in the “adjoining parking lot” and Pena said that she would have to research that, but did not contact Williams with the answer. Pena concluded the meeting by asking “[A]re we clear on that?” Williams said they were.

Pena denied that she met with Williams in her office with Stone on April 28, but admitted that she and Stone met with Williams in response to her learning that she had been “soliciting” employees while they were working. Also Pena had received a report that several employees claimed that they were being “bothered” by her—being asked by her to speak about “something.” Pena stated that one of her leaders saw Williams speak to an employee. Pena testified that she told Williams that she could solicit other workers but not while either she or those employees were on the clock. Pena denied telling Williams that she could not solicit on Target’s property. Pena acknowledged that Williams asked if she could solicit in the second parking lot, and she replied that she was not certain, but she or Stone would respond to that question.

Stone denied meeting with Pena and Williams on April 28, and similarly denied any meeting in which Williams was told not to solicit on Target’s property. She further denied prohibiting any employee from soliciting when they were not on duty.

C. The Alleged Unlawful Interrogation

Aly Waddy is the Union’s director of special projects who directed the campaign and coordinated the Union’s activities. The Union’s campaign to organize the Respondent’s unit employees began in about March 2011.

Waddy testified that she had an appointment to pick up several employees on June 9 at the store and drive them to an organizing meeting. She arrived at the facility just prior to 8 a.m. She parked her car and employee Dennis Baker left the store and entered her car. A few minutes later employees Devin Jones and Raul Stewart left the store and were walking to their car. Waddy left her car and walked toward Stewart’s car. They began speaking at Stewart’s car when admitted Supervisor and Executive Team Leader Michael Casolino, and store security guard Ajay Bharat approached them.

³ The article is dated April 24, 2011.

Casolino asked Jones and Stewart, “[W]hat are you guys doing?” To Waddy, the two workers appeared frightened and nervous. According to Waddy, Casolino, referring to all three employees said, “[Y]ou guys can’t talk here.” Waddy asked why not and Casolino said that “you are on Target’s property.” Waddy protested that they were just having a conversation. Casolino repeated, “[Y]ou can’t talk here.” Casolino repeated that “you can’t talk there.” Waddy asked him if he is prohibiting people from speaking there and Casolino said, “[Y]ou are on Target’s property.” Waddy asked him to define which property was Target’s, and Casolino replied, “[T]he store, the two parking lots.”

Later in her testimony, Waddy said that Casolino told her that they could not speak there “because you are talking about the union.” At that time Waddy asked if they could speak across the street, and Casolino replied, “[N]ot if you are talking about the same thing. The whole mall would have a problem with it.”⁴ Waddy answered that he could not “mandate” what his employees speak about, and Casolino replied that “we can do whatever we want, we’re a corporation.” Waddy said, “[T]he whole mall? Really?” Casolino laughed and asked them to leave, and Casolino then asked employee Stewart what he was doing and Stewart walked away.

According to Waddy, Stewart then opened his car door and started the engine. He then began to walk away from the area, but then ran away leaving the engine running. After Stewart left the area, Casolino asked Jones, “[W]hat are you doing?” and Jones left the area. Then Casolino told Waddy “you have to go.” She replied that Stewart’s car’s engine was still running. She returned to her car and sat there, waiting. After about 10 minutes, Jones and Stewart returned and left in their car. They did not attend the organizing committee meeting that day.

Waddy’s testimony is generally consistent with an incident report she wrote on the day the incident occurred. Moreover, she testified that she did not recall distributing any literature on the store’s property prior to the election.

Casolino testified that during the election campaign he observed Target’s employees and union representatives distributing literature in the store parking lot. On the day at issue, he did a “random walk” through the parking lot. As he left the building he noticed three employees who had just left work being given flyers by Waddy at a car. Waddy testified, contradicting Casolino, that neither she nor any other union agents distributed literature at the store or in the parking lot.

Casolino stated that he approached Waddy alone and told her that “there’s a no solicitation policy on Target property so you can’t distribute this to any of our team member . . . you can’t solicit on Target property. You know you don’t work for Target, you cannot be on our property soliciting, handing out any kind of material or just giving anything to our team—you can’t distribute anything.” Casolino and Waddy “argued back and forth” and she asked where she could “go.” Casolino replied that she could be anywhere not on Target property. According to Casolino, Waddy became argumentative and he left the area.

⁴ Later in her testimony, Waddy stated that Casolino mentioned that whether they could speak in that area “depends on what they’re speaking about.”

She remained at the lot for a period of time and then left, and the employees with her entered their car and left also.

Casolino stated that security guard Bharat was present at the time but did not know if he was present when he spoke to Waddy. Casolino denied directing any of his remarks toward any employee, specifically denying that he asked employees what they were doing or telling them that they could not talk at that location. He also denied that an employee’s car’s engine was running or that anyone ran from the area. Casolino further denied mentioning anything to Waddy about the mall.

Guard Bharat testified that on June 9 between 8 and 9 a.m. while standing at the employee entrance to the store, he observed Waddy hand a “pamphlet” to the store’s cart attendant in the parking lot. Bharat stated that he called Casolino to accompany him to the parking lot. He and Casolino approached Waddy. Bharat told her that the Respondent’s no-solicitation policy prohibits solicitation of employees while they were working, and he asked her to leave the property. He said that no mention was made of union solicitation or soliciting at the mall. Bharat stated that Casolino did not speak to Waddy.

Bharat stated that about three other employees were in the lot at that time, whom he later learned had just finished their shifts. He did not hear Casolino say anything to Waddy or the three overnight employees, and did not see a car’s engine running or anyone running from the lot, stating that if he witnessed such activity he would have called the police.

Store Manager Pena testified that on June 9, upon her arrival at the store, she saw Waddy distributing literature to two employees in the parking lot. She asked Casolino to tell her to stop “soliciting” in the lot. She did not definitely recall, but she may have also asked Bharat to accompany Casolino. Nevertheless, two supervisory people went to the lot at her request—Casolino and an asset protection person.

II. ANALYSIS AND DISCUSSION CONCERNING THE ALLEGED THREATS, CREATION OF THE IMPRESSION OF SURVEILLANCE, AND INTERROGATION

A. *The Threats to Close*

1. *The leaflet*

The complaint alleges that the leaflet distributed to employees during the campaign unlawfully threatened that the Respondent would close its store if the Union successfully organized its employees.

As set forth above, the leaflet stated that the store would remain open only as long as it was economically feasible to do so. However, the leaflet emphasized that the Union “has a terrible record of store closings” as if it was responsible for a store’s shutting its doors. Specifically, the leaflet stressed that there were 32 closings of A & P stores which were represented by the Union, and that the Union lost 89,000 members in 10 years because the Union’s members lost their jobs.

It is well settled in Board law that an employer is free to predict the economic consequences it foresees from unionization, so long as the prediction is “carefully phrased on the basis of objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control” If there is any implication that an employer may or may not take action solely on his

own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation . . . without the protection of the First Amendment.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Absent the necessary objective facts, employer predictions of adverse consequences arising from unionization are not protected by Section 8(c), rather they constitute threats that violate Section 8(a)(1). *Homer Bronson Co.*, 349 NLRB 512 (2007).

In *Quamco, Inc.*, 325 NLRB 222, 223 (1997), the Board found that the employer created a “UAW WALL OF SHAME” in which it listed the names of UAW-represented companies that had closed, and with the respondent’s name followed by a question mark. The Board found that, although the display was factually accurate as to the union-represented plants that closed, the display “clearly implies that the closings were the fault of the UAW.” The Board found that the employer offered no explanation of the basis for its assertion that the UAW was to blame for the closings of the other plants, or any objective facts as the basis for a belief that, for reasons beyond its control, selection of that union might cause this employer’s plant to close.

The Board noted that, as here, there is no evidence that the employees had been told that the future of the respondent’s store was in doubt or that the respondent had any economic reasons for considering closing the plant.

Rather, here, the Respondent asserts that the Union first raised the question whether the store would close if the Union successfully organized it, and the leaflet was the Respondent’s answer to that question. That may be true, but in answering the question the leaflet states no objective facts to warrant such a possibility.

Similarly, in *Bronson*, above, the Board found that the employer’s chart showing that over the last 15 years, 13 companies, which had been represented by the union that sought to organize it, closed. The Board held that the employer presented no objective facts to support the “respondent’s clear implication that the . . . plant closing was caused solely by the fact that the ‘strike happy’ UAW represented those employees.” In finding that the employer threatened plant closure, the Board found an “inevitable linkage between unionization and job loss, and that the employees could reasonably infer that a vote for the union will threaten the employees’ future employment.”

While it is true that the leaflet mentions that stores close for economic reasons, that message constituted only a small part of the leaflet, with the major emphasis being on the Union’s being an important factor in the closing of a large number of stores.

I accordingly find and conclude that the leaflet constituted a threat to close the Respondent’s Valley Stream store, and as such violated Section 8(a)(1) of the Act.

2. The remarks made at the meetings

As set forth above, employees Bracey and Brown testified that at meetings conducted by Respondent’s officials the workers were told that if the Union was selected as the employees’ representative the store would close.

Making a finding concerning what employees hear at a meeting is especially difficult. Of the more than 200 employees

who heard the officials’ speeches, only 2 testified that they heard the threats. Significantly, other employees present at the meetings at which the threats were allegedly made denied hearing those threats. It is clear that if the Respondent was intent on making such threats it would have repeated the threats at all the meetings held with employees.

The Respondent’s officials stated that they spoke from scripts and did not deviate from those scripts. Witness testimony, however, was unclear on this point. Certain employees testified that they saw them speaking from scripts, and others said that they did not speak from scripts. A review of the scripts, which are in evidence, establishes that no threats were made as testified by the employees.

As to Brown’s testimony, she conceded that Pena read from a script during that meeting, but the script does not contain a threat to close. Brown’s testimony concerning the threat would have been more credible if there was evidence that the store expected to expand. That would have supported Brown’s testimony that Pena was asked why the store would close if it had plans to expand. However, no evidence was adduced that there were plans to expand the store.

As to Bracey’s quotation of Pena that if the Respondent had to undertake to check off dues, the added expense of \$3 million would cause the store to close does not make sense. First, there is no requirement that an employer agree to a dues-checkoff clause. Second, the amount at issue seems unusually large.

Finally, I cannot credit Bracey’s testimony that Jenkins told the workers that if there was a strike, the store would close, or that if the union was voted in, the store would close. What he actually said, which is confirmed in the script he read, was that employees could be permanently replaced in the event of an economic strike.

I accordingly cannot find that Pena or Jenkins threatened employees with store closure during the group meetings they held with the workers as testified by Bracey and Brown, above.

B. The Threats of Discharge

As set forth above, employees Green and King testified about their conversation concerning the Union in early March 2011, which I find was overheard by Supervisor Joseph. I find, as testified by Green and King, that Joseph told them that they should not be speaking about a union or they could be discharged.

I credit Green and King essentially because their testimony was mutually corroborative. They both identified the area in which they were situated at the time of their conversation, and that Supervisor Joseph was in the area.

The Respondent correctly notes that there was some discrepancy between the testimony of the two employees. Thus, King did not recall Green asking if Joseph was serious in threatening them, and that King did not hear Joseph use the word “union” during their conversation. Nevertheless, Joseph’s remark clearly contemplated that she was rebuking the two because they spoke about the Union.

It is also true, as Respondent argues that Green’s credibility suffered somewhat in denying that she spoke with another employee about the Union although she testified that she spoke to King about the need for a union. Further, she denied distrib-

uting union literature in the parking lot although other witnesses saw her engaging in such activities. However, such infirmities in her testimony do not lead me to discredit it as to the alleged threats.

I accordingly find and conclude that the Respondent unlawfully threatened Green and King with discharge because they spoke about a union.

C. *The Threat of Unspecified Reprisals*

I also credit Green's testimony that Supervisor Nicole Barrett told her that she should be careful in what she does because "you never know what could happen." Barrett did not testify. I credit Green because the undisputed documentary evidence supports a finding that this incident occurred. Thus, Barrett's comment occurred 1 day after the *Newsday* article appeared in which Green criticized the Respondent for not addressing certain concerns that she and her coworkers had. As set forth above, Barrett asked her "which management" she was referring to and warned her to "be careful . . . cause you never know what could happen." Green's quotation in the article lends support to her testimony that she was warned about such conduct. Inasmuch as Barrett did not testify, the statement attributed to her was undenied.

I find, as alleged, that Barrett's comment to Green constituted a threat of unspecified reprisals.

D. *The Creation of the Impression of Surveillance*

Regarding the allegation that the Respondent created the impression that it was engaging in surveillance of employees' union activities, I credit employee Sonia Williams' testimony that only 1 or 2 days after she distributed about 2 dozen copies of a newspaper article concerning this campaign, she was called into Manager Pena's office and told that it was "brought to my attention that you are soliciting team members for the union."

The Board's test for determining whether an employer has created an unlawful impression of surveillance is whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295-1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007).

When an employer tells employees that it is aware of their union activities but fails to tell them the source of that information, Section 8(a)(1) is violated because employees are left to speculate as to how the employer obtained the information, causing them reasonably to conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, above at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007).

Here, Pena advised Williams that she was aware that Williams was soliciting employees for a union. I find that such a statement would cause Williams to reasonably conclude that Pena received that information by surveilling her union activities. Inasmuch as Pena did not tell Williams how she received that information, the violation has been proven.

Although Pena testified that she received such information from other employees and a supervisor, such information was

not conveyed to Williams, who could reasonably believe that Pena was watching her. I accordingly find that the Respondent violated Section 8(a)(1) of the Act by creating the impression in Williams that her union activity was under surveillance.

E. *The Alleged Interrogation*

As set forth above, it is alleged that Manager Casolino interrogated two employees, Jones and Stewart, in the parking lot while they were speaking to Union Agent Waddy. The evidence establishes that Casolino walked up to the group and asked the two workers what they were doing.

I credit Waddy's account of the meeting. She gave clear, precise testimony of what happened at that time. The incident report which she completed that day is consistent with her testimony.

In contrast, the Respondent's witnesses gave different versions of the incident, none of them consistent with each other. Thus, Casolino testified that he approached Waddy alone as he was doing a "random walk" through the parking lot and he, alone, spoke to Waddy. Pena testified that she saw Waddy hand out leaflets and asked Casolino to tell her to stop soliciting in the lot. Security guard Bharat testified that he asked Casolino to accompany him to approach Waddy and that he (Bharat), alone, spoke to Waddy.

Waddy's testimony is the only consistent account of the incident. In *Rossmore House*, 269 NLRB 1176 (1984), the Board set out its rules concerning evaluation of allegations of interrogation, as follows.

Under Board law, it is well established that interrogations of employees are not per se unlawful, but must be evaluated under the standard of whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter.

Here, Executive Team Leader Casolino pointedly asked the two employees what they were doing in the parking lot. The question was unnecessary because he knew what they were doing there because he testified that they had just finished their overnight shifts. They were obviously in the parking lot preparing to leave the area, but his questioning them in the presence of Waddy, who he knew was a union agent, was designed to elicit what they were doing with Waddy at the time. That was clearly an attempt to inquire as to their union activities.

There was no evidence that the employees questioned were open or active union supporters. I find that the questioning by Casolino tended to restrain, coerce, or interfere with their right to engage in union activities. I accordingly find that Casolino's questioning of the two employees constituted unlawful interrogation.

III. FINDINGS OF FACT CONCERNING THE ALLEGED UNLAWFUL HANDBOOK RULES

A. *Paragraphs 7 and 8 of the Complaint and the Handbook Provisions*

The complaint alleges that the Respondent has "promulgated

and since then has maintained” in its team member handbook revised in July 2009,⁵ and in its handbook revised in February 2011,⁶ certain unlawful rules concerning solicitation, distribution of literature, release of confidential information, discussion of confidential information, reporting of unauthorized or misuse of confidential information, and threats of discipline for violating its policy on confidential information.

The 2009 handbook was given to employees on their hire during their orientation session. The employees signed a receipt that they received and read the handbook. The 2011 handbook was made available to employees after the election, but not distributed to the then-employed workers. Instead, they were told that it was available on their request. The 2009 handbook was not rescinded upon the issuance of the 2011 version. It was stipulated that the 2009 handbook was the only handbook applicable to employees from July 2009 to at least the last week of June 2011.

1. The Respondent’s information security policies

Under the broad heading of “Information Security,” the Respondent’s handbook sets forth certain policies concerning employee access to, and use of confidential information. One of those policies have been alleged as unlawful, as follows.

a. The “Use Technology Appropriately” policy

Paragraph 7(b) of the complaint alleges as unlawful, the following:

A “Use Technology Appropriately” policy prohibiting its employees from releasing confidential guest, team member, or company information.

The handbook provides on (GC Exh. 8) page 54:

Use technology appropriately

Communication technology such as e-mail and the Internet makes us more efficient and better equipped to serve our guests. Be sure to use this technology wisely and appropriately to avoid increasing our risk of a security breach.

If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note there are guidelines to follow if you plan to mention Target or your employment with Target in these online vehicles:

Don’t release confidential guest, team member or company information, including any video footage.

Clearly distinguish yourself from Target, so as not to appear as an official Target spokesperson.

Do not harass or make any threats to guests or team members.

For complete guideline or more information, please see your HR partner.

Paragraph 7(c) of the complaint alleges as unlawful, the following:

A “Communicating Confidential Information” policy which:

(1) prohibits its employees from sharing confidential infor-

mation with other employs;

(2) directs its employees to talk to their supervisors if they are unsure regarding sharing confidential information; and

(3) prohibits its employees from having discussions regarding confidential information in the break room, at home or in open areas and public places.

The handbook provides on (GC Exh. 8) page 53:

Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules you need to follow:

Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.

Develop a healthy suspicion. Don’t let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.

Watch what you say. Don’t have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.

Paragraph 7(d) of the complaint alleges as unlawful, the following:

An Unauthorized access to confidential information policy which:

(1) directs its employees to report unauthorized access to confidential information or misuse of confidential information to Respondent; and

(2) threatens its employees with corrective action, including termination and criminal prosecution, for a violation of the policy on confidential information.

The handbook provides on (GC Exh. 8) page 53, as follows:

Unauthorized access to confidential information

If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information by contacting your supervisor (who should send an e-mail to Integrity@Target.com or calling the Employee Relations and Integrity Hotline at 800-541-6838.

We’re serious about the appropriate use, storage and communication of confidential information. A violation of Target policies regarding confidential information will result in corrective action, up to and including termination. You also may be subjected to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

The term “confidential information” is not defined in the handbook. However, certain examples of “confidential information” are given in the handbook, pages 51–52, as follows:

Confidential information

⁵ GC Exh. 8.

⁶ GC Exh. 9.

All Target information that is not public must be treated as confidential. Here are some examples of confidential information:

- Non-public company information, including:
 - Financial information (for example, store sales)
 - Strategic plans (for example, pricing and capabilities)
 - Marketing plans (for example, circular prices prior to public distribution)
 - Guest information, including guest credit information
 - Team member personnel records
 - Protected health information obtained through our pharmacy operations or medical plans

Annual evaluations of employees by their supervisors are done in April or May. The performance of the employee during the past year is discussed with the worker who is told at that time the amount of any wage increase he will be given. Store Manager Pena stated that no directions are given to the supervisors concerning what they should tell the workers they could discuss with others about the review process, but it is her understanding that most employees speak with their coworkers about their wage increases.

In fact, employees testified that they spoke freely and openly with their coworkers about the exact amount of their raise, and how much they believed they deserved.

Employees testified that they knew of no restrictions concerning employees speaking to each other about their wages or benefits, and there was no evidence that any worker was disciplined for having such discussions.

Employees were not told by their supervisors that they should keep the amount of their raises confidential, or that they should not speak with other workers about their raises. On the other hand, employees were not told that they could discuss their wages with their coworkers.

Indeed, Dawn Major, the human resources director for the Respondent's east coast region stated that the term "confidential information" does not include wages, benefits and other terms of employment, noting that employees are permitted to speak about those items. For example, she stated that it is the Employer's policy to encourage the discussion of wages and benefits at work between the workers and their supervisors. Such opportunities include chat sessions and group meetings at which employees are asked how they feel about their job, and during which, wages and benefits may be discussed. Further, Major testified that the Respondent conducts surveys in which it asks its employees how they feel about their pay and benefits. Individual discussions with the workers concerning their pay are also held.

In this regard, it is important to note that the Respondent encourages its employees to speak with supervisory personnel, not with other workers, concerning their wages and terms of employment.

However Major testified that employee personnel records, including the wages and benefits of the workers, and also their personal health information, medical records, credit card, and debt records are confidential information to the extent that if an employee asked a supervisor for another worker's "information" such a disclosure would be prohibited. Major stated

that, although that application of the policy is not included in the handbook, it is enforced to prohibit one employee's learning about the wages and benefits of another through disclosure by a supervisor. Nevertheless, employees may speak about their wages and benefits with their supervisors, who encourage such conversations.

2. The "After Hours" policy

Paragraph 8(a) of the complaint alleges as unlawful, the following:

An "After-Hours" rule prohibiting its employees from returning to Respondent's premises, which includes non-work areas, during their off hours.

The handbook provides on (GC Exh. 8) pages 20 and (GC Exh. 9) 25, as follows:

After hours

Team members must leave the premises after hours. You should only be on company property during your scheduled work hours or for other authorized company business.

The evidence establishes that employees visit the Valley Stream store regularly when they are not scheduled to work, in order to shop, to meet friends who are about to finish their shifts, to check on a matter in the human resources department, to use a computer there which is set aside for employee use, or for company sponsored activities. Employee Betsy Ann Wilson is unaware of any policy that prohibits workers from entering the store when they are not scheduled to work.

Team Leader Lance King stated that he was not aware of any policy stating when he could or could not enter the property when he was off duty, nor was he aware of any rule which stated that he could not be in the parking lot after his work hours. On the other hand, no management person told him that he could return to the Target facility after his work hours.

Employee Green stated that, although she has shopped in the store when she was off duty, she is not permitted to enter the breakroom while off duty. Nevertheless, she has been in the breakroom before and after her shift. She also admitted entering the store on her days off to pick up her paycheck or check her schedule. She conceded not being told that she could not enter the store when she was not working. She stated that she was never advised that off duty employees are permitted in the breakroom.

Human Resources Official Stone testified that she never told the workers that they were permitted to return to the premises after their shift. Employees also testified that no one told them that they could return to the store when they were not scheduled to work that day, or when their shift was completed.

Dawn Major, the human resources director for the Respondent's east coast region, who is responsible for 433 stores, testified that the "after hours" policy is not enforced in any of the Employer's stores, adding that employees are frequently in the stores when they are not working, in order to pick up a paycheck, check their schedule, see their friends, or to shop for merchandise. She did not know if employees were told that they were permitted to be in the store after their regular work hours.

There was no evidence that any employee has been disci-

plined for being in the store when they are off duty or not scheduled to work.

Human Resources Official Stone testified that between April 1 and June 17, 2011, 8125 unit employees used their employee discount benefit to make a purchase of merchandise at the store either before they clocked into work for their shift, after their shift was over, or on a day when they were not scheduled to work.

3. The “No-Solicitation/No-Distribution Rule”

Paragraph 7(a) of the complaint alleges as unlawful, the following:

A no-distribution rule that prohibits its employees from distributing any literature at any time on Respondent’s premises, which includes non-work areas.

The handbook provides, on (GC Exh. 8) pages 27–28:

Don’t distribute flyers, pamphlets or other information to team members.

While you or the team members you’re talking to are on work time or in work areas, you must not pass out or distribute any pamphlets or other literature. Also, you must never pass out any literature and/or products, sell merchandise or exchange money on Target premises if these activities are for personal profit, commercial purposes or any charitable organization that is not part of our Community Relations program.⁷

Paragraph 8(b) of the complaint alleges as unlawful the following:

A No Solicitation/No Distribution Policy prohibiting solicitation or distribution of literature by its employees, at all times on Respondent’s premises, which includes nonwork areas.

The handbook provides on (GC Exh. 8) pages 44–55, as follows:

No Solicitation/No Distribution Policy

Please follow and help enforce the Target No Solicitation/No Distribution Policy, which states: Target wants to make sure all team members can work free of distraction and uncomfortable pressure that can be created by solicitation and distribution. That’s why Target maintains a No Solicitation/No Distribution Policy for all team members and others with authorized access to Target property.

The policy is simple: during working time (yours or your fellow team members) and in work areas, you cannot “solicit” team members. “Soliciting” includes things like asking coworkers to join organizations or pools, to buy memberships or subscriptions, or to make pledges or gifts to charities.

“Working time” does not include meal and break periods, or any other time when a team member is not expected to be engaged in work activities. The “No Distribution” part of the policy requires that team members do not distribute literature during working time, in work areas, or through Target com-

munication channels, including e-mail.

Certain activities are prohibited at all times on Target premises. Soliciting, distributing literature, selling merchandise or conducting monetary transactions, whether through face-to-face encounters, telephone, company mail or e-mail, are always off limits (even during meal and break periods) if they are:

For personal profit

For commercial purposes

For a charitable organization that isn’t part of the Target Community Relations program and isn’t designed to enhance the company’s goodwill and business.

Because Target supports the United Way, Target Volunteers and non-profit grant partners, some of these organizations may be eligible to distribute information or conduct annual drives without violating the No Solicitation/No Distribution Policy; however, Employees relations must approve the activity.

On the day before the election, more than 10 union organizers and about 3 off-duty employees walked through the store wearing “Target Change” T-shirts, including employee Williams who stated that none of the Union’s demonstrators gave any literature to the workers present that day.

Employee Antonia Smaine stated that she saw employee Green, at the end of her shift, change from her work shirt into a “Target Change” T-shirt and then walk around the store wearing that shirt.

Human Resources Executive Team Leader Karrien Stone testified that from April to June 2011, she saw two employees wearing a Target Change shirt—one which was worn backwards under the worker’s vest while he was working. She did not say anything to the worker wearing the shirt. She noted that no one asked her for permission to wear union paraphernalia at work, and she did not tell any worker that they could not wear such union garb.

Employee Sonia Williams testified that she gave out union cards and literature in the breakroom on several occasions to employees who were on their break. She also gave cards to employees in the Target parking lot and left union literature in the bathroom. Union organizers distributed flyers in the lot.

Manager Casolino stated that prior to the election he saw union literature in the breakroom and bathrooms.

Employee Bracey stated that Pena and Supervisor Kevin approached her and employee Tashawna Green when they were distributing leaflets and speaking to employees about the union in the parking lot near the employee entrance. The two managers told them “no soliciting. You have to leave. Oh, no you can’t talk to them.” Pena denied speaking with Bracey or any other employee in the parking lot regarding soliciting others.

Supervisor of Asset Protection Jason Jones testified that during his tenure at the store from January 2011 to January 2012, neither he nor the other guards prohibited any employee from distributing literature in the store or in the parking lot. He observed “literature” in the breakroom and at the employee entrance to the store.

Jones affirmed that Target property, for the purpose of his

⁷ “Target Premises” is defined under “Common Terms” on p. 61 of the handbook as “all the buildings, grounds, vehicles and parking areas Target uses to conduct its business.”

enforcement of the no-solicitation/no-distribution policies includes the Target building itself, its property up to the gate on Sunrise Highway, the parking lot, and the adjacent parking lot across the road near Sunrise Highway.

Manager Casolino stated that nonemployee solicitors such as the Girl Scouts, people selling candy for school events have been evicted from the store's premises.

Tashawna Green testified that on June 9, she stood outside the employee entrance to the store speaking to another employee. She asked the worker how he felt about "everything that has been going on." The coworker asked Green about union dues and union procedures. She replied that she does not pay union dues. At that point, admitted Supervisor Karrien Stone approached her with store security guard Kyle Bennetier. According to Green, Stone said, "[Y]ou are soliciting on Target's property and they do not tolerate (allow that) soliciting on Target's property." Green then left the area and walked to the mall entrance.

Stone testified that she was walking past the Target employee entrance when one or two employees complained to her that Green was "blocking" them, "bothering" them, and preventing them from entering the building. Stone asked Bennetier to accompany her. As Stone approached Green she did not notice that Green was with any other employees.

Stone then told Green that she could not stand in front of the entrance because she was blocking employees from entering. Stone described Green as being so close to the entrance door that when Stone opened the door, she hit Green's back. Stone denied telling Green that she could not solicit on the property, and suggested that she could stand at the cart corral nearby.

As set forth above, employee Sonia Williams testified that she was asked to report to Pena's office, where she was told "Sonya, I know we're in the midst of a campaign, but it has been brought to my attention that you are soliciting team members for the union."

Williams replied, "[Y]ou know where I stand with the union and if I speak to a team member, I'm speaking to them off the clock." Pena answered, "[W]e're not supposed to do it in Target premises" whereupon Williams asked, "[I]n the break room, on my break time?" Pena replied, "[N]ot on Target's premises." Williams asked "in the parking lot?" Pena said, "[N]o." Williams then asked whether she could solicit in the "adjoining parking lot" and Pena said that she would have to research that, but did not contact Williams with the answer. Pena concluded the meeting by asking "are we clear on that?" Williams agreed.

Pena denied that she met with Williams in her office with Stone on April 28, but admitted that she and Stone met with Williams in response to her learning that she had been "soliciting" employees while they were working. Also, Pena had received a report that several employees claimed that they were being "bothered" by her—being asked by her to speak about "something." Pena stated that one of her leaders saw Williams speak to an employee. Pena testified that she told Williams that she could solicit other workers but not while either she or those employees were on the clock. Pena denied telling Williams that she could not solicit on Target's property. Pena acknowledged that Williams asked if she could solicit in the second parking lot, and she replied that she was not certain, but she or Stone

would respond to that question.

Stone denied meeting with Pena and Williams on April 28, and similarly denied any meeting in which Williams was told not to solicit on Target's property. She further denied prohibiting any employee from soliciting when they were not on duty.

I credit Williams' testimony that Pena said that she could not solicit on Target's premises. This prompted an admitted response from Pena that she would check to see if solicitation could take place in the Respondent's second parking lot. Clearly, the emphasis of the conversation was on the location of the solicitation, not the worktime of the conversants.

Thus, Williams credibly testified that, in response to Pena's telling her that she could not solicit anywhere on Target premises, she asked whether such activity could take place in the breakroom or one of the parking lots. Corroborating Williams, Pena admitted that Williams asked if solicitation could take place in the second parking lot and Pena replied that she did not know but would find out.

4. The "Dress Code" policy

Paragraph 8(c) of the complaint alleges, as unlawful, a "dress code" policy prohibiting its employees while at work from wearing any buttons or logos on their clothing unless approved by a team leader.

The handbook on (GC Exh. 8) page 21, states in relevant part:

Dress Code.

Don't wear:

Any buttons or logos on your clothing (unless approved by your team leader).

The handbook also prohibits the wearing of various items of clothing including jeans, tank tops, halter tops, flip flops, open-toed shoes, beat up tennis shoes, lycra pants, and sheer or revealing clothing.

Employees must wear a red shirt and, preferably, khaki colored pants. The shirts that they wear are not provided by Target. Therefore, the workers wear shirts with the manufacturer's logo imprinted thereon, such as "Polo," "Tommy Hilfiger," "Nike," "Ralph Lauren," sports themes, team logos, and others. The logos are usually woven into the shirt and do not extend above the shirt's surface. In addition, employees wear pins and buttons including seasonal items such as a tiny Christmas tree, an angel, and insignia and pins advertising their support of people with AIDS or breast cancer.

Employee Team Leader Lance King stated that he was not prohibited from wearing shirts with logos or buttons. However, he was not told that he could wear such logos on his shirts.

Manager Casolino stated that he has seen employees wear small logos on their shirts such as a "Nike" emblem, and small pins and badges, noting that as long as they are wearing red and khaki, they can wear those items.

Employee Bracey testified that she heard supervisors tell employees that they could not wear any logo on their uniforms, and that if they wore such ornamentation they had to turn it inside out so that it was not visible, or cover it with their identification badge. There was no evidence that any employee was disciplined for wearing a shirt with a logo.

Employee Sonia Williams testified that, about 1 or 2 weeks before the election, she and other employees were off-duty and not working. They stood outside the store wearing the “Target Change” T-shirt. They then entered the store and spoke with Pena who told them “as long as you don’t wear it with your uniform.” She also told them that they could wear those shirts outside the store but not inside the store.

During the campaign, employees wore, while working, a red, rubber bracelet with a union logo. Pena conceded seeing employees wearing the union bracelet and the Target Change shirt in the store during their off hours, and denied telling Williams or any other worker that they could not wear union garments with logos. She conceded that no one asked for permission to wear union items.

On the other hand, employees were not told that they were permitted to wear union buttons or logos at work. Similarly, Human Resources Official Stone testified that she did not tell any workers that they were permitted to wear union logos or buttons at work.

Human Resource Director Major testified that the dress code is not strictly enforced at the store. She stated that upon her visits to the store she heard from her team that “there’s flexibility in our dress code guidelines.” Specifically, she noted that the Respondent permits employees to wear pins supporting breast cancer awareness, and other similar causes “that are important to them” as long as the pin is not too large, or offensive or vulgar, and does not interfere with the employee’s name badge or with the person being identified as a team member. Major said that the Respondent permits logos, such as “Ralph Lauren” or other designer emblems on shirts as long as the logo is not offensive and the shirt is red.

Major was unaware of any instance in any store in which an employee was told not to wear a union logo, or was disciplined for wearing one. She stated that she was not aware that any employee requested permission to wear union items in the store, although she is aware that certain union items have been worn. She further stated that she did not know whether employees were told that they were permitted to wear union buttons or other union logos.

5. The “Parking Lot” policy

Paragraph 8(d) of the complaint alleges, as unlawful, “a parking policy directing its employees to report anyone they do not know that is loitering in Respondent’s parking lot.”

The handbook on (GC Exh. 8) page 21 states, in relevant part:

Parking

Park in the area of the lot for team members.

Always lock your car.

Use the “buddy system” or walk in pairs when you leave at night. It’ll make leaving safer.

After the store closes, you may be asked to move your car closer to the store for safety.

If you see people you don’t know loitering around the team member parking area, notify Assets Protection or your leader on duty immediately.

(Target is not responsible if your car is damaged or stolen while in the parking lot.)

Supervisor of Asset Protection Jason Jones stated that during his tenure at the store, there was a fire in a dumpster, bomb threats, disputes among customers in the lot concerning parking spots, vehicle crashes, breakins of cars, and propane tanks being left in the lot. He did not know whether any of these incidents were caused by employees. Manager Casolino stated that there have been stabbings and beatings, however, he never heard that any store employees were involved in those incidents.

The Respondent’s official, Major, conceded that with about 200 employees, some workers may not know each other, particularly since they work during various shifts, and some work overnight and some during the day.

Supervisor of Asset Protection Jason Jones stated that off-duty employees are permitted in the parking lot at all times, and that there are no restrictions regarding whether an off-duty employee can enter the store.

Casolino stated that if the store was closed and employees are not scheduled to work, they cannot be in the store. He noted that employees are permitted in the store parking lot at any time.

IV. ANALYSIS AND DISCUSSION CONCERNING THE ALLEGED UNLAWFUL HANDBOOK RULES

The Board’s standard in evaluating work rules is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004):

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). 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. *Id.* at 825, 827. 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.

The complaint alleges that the Respondent has promulgated and since then has maintained in its 2009 team member handbook, and in its 2011 handbook certain unlawful rules concerning solicitation, distribution of literature, release of confidential information, discussion of confidential information, reporting of unauthorized or misuse of confidential information, an after-hours policy, a dress code policy, a parking lot policy, and threats of discipline for violating its policy on confidential information.

The 2009 handbook was given to employees at their hire

during their orientation session for which employees signed a receipt. The 2011 handbook was made available to employees after the election, but not distributed to the then-employed workers. Instead, they were told that it was available on their request. The 2009 handbook was not rescinded on the issuance of the 2011 version.

It was stipulated that the 2009 handbook was the only handbook applicable to employees from July 2009 to at least the last week of June 2011.

A. *The Information Security Policies*

The complaint alleges that the information security rules broadly prohibit employees from releasing confidential guest, team member, or company information, sharing confidential information with other employees, directs them to ask their supervisors if they are unsure regarding sharing confidential information, and prohibits its employees from speaking about confidential information in the breakroom, at home, or in open areas and public places, directs its employees to report unauthorized access or misuse of such information to the Respondent and threatens them with discipline and criminal prosecution if they violate that policy.

The General Counsel alleges that these prohibitions necessarily restrict employees from sharing with other workers information regarding their wages, hours, and other terms and conditions of employment.

“Confidential information” is defined in the handbook as including all Target information that is not public, including employee “personnel records.” The Respondent argues that “personnel records” do not include such information as employee wages and benefits. However, the term “confidential information” is broadly defined as any information that is not public. Clearly, employees’ wages and benefits are not made public. Accordingly, they constitute confidential information which is subject to the handbook’s rules on maintaining their confidentiality.

As such, according to the rule, employees are prohibited from sharing such information as to their wages and benefits with other workers. The handbook provides that employees are prohibited from releasing confidential information and sharing such information with another worker “unless they have a need to know the information to do their job,” and they cannot discuss confidential information at home or in public areas.

It is without dispute that employees have a Section 7 right to discuss their wages, hours and working conditions with their colleagues. In *Cintas Corp.*, 344 NLRB 943, 943, 946 (2005), enfd. 482 F.3d 463, 467 (D.C. Cir. 2007), the Board found that an employer violated the Act by broadly stating that it “recognizes and protects the confidentiality of any information concerning” its employees and that unauthorized release of confidential information could subject the employee to disciplinary action. The Board found that prohibiting the release of “any information” regarding its employees “could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union.”

Applying the Respondent’s rule above, I find that the Information Security rules explicitly restrict activities protected by

Section 7 of the Act. The discussion of an employee’s wages, hours and working conditions is protected by the Act. By prohibiting their discussion, the Respondent explicitly restricted that right. In addition, I find that employees would reasonably construe the language to prohibit Section 7 activity. I further find that Respondent’s ambiguous rule prohibits the dissemination of “personnel information and documents” and because Respondent does not clarify the term, Respondent’s rule reasonably tends to chill protected activity.

By including the wording “personnel information” in the listing of confidential documents, Respondent leaves to employees the task of determining what entails “personnel information” and requires them to speculate as to what kind of information disclosure may trigger their discipline. Accordingly, I find that the rule is overly broad and has language that employees may reasonably construe as restricting the exercise of their Section 7 rights.

The cases cited by the Respondent, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1989), and *Super K-Mart*, 330 NLRB 263 (1999), are easily distinguishable. In both cases, the employers prohibited exclusively company documents from disclosure—“hotel-private information” and “company business and documents.” The Board found that an employee could not reasonably construe the prohibition to include discussions about wages, hours, and working conditions, since neither prohibition specifically implicated employee information. The court in *Cintas* specifically noted that the employer’s rule “did not by its terms include employee wages or working conditions and made no reference to employee information.” 482 F.3d at 470.

Here, in contrast, the handbook specifically prohibits the disclosure of employee-related information—“confidential . . . team member information” and defines confidential information as anything that is not public, including “team member personnel records.” Certainly, wages and benefits are not public information, and accordingly, an employee would reasonably construe the rule as prohibiting discussion of employee related wages, hours, and terms and conditions of employment.

The Respondent argues that it is only “personnel records” and not personnel “information” that is prohibited from disclosure. I do not see the distinction. By definition, personnel records must necessarily include personnel information.

In *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001), the Board dealt with confidentiality language that was similar to that found in the instant case. Specifically, in *IRIS*, the employer prohibited disclosure of confidential information including financial information, leases, licenses, agreements, sales figures, business plans, and proprietary information. As with the confidentiality language in the instant case, it was apparent that the employer sought to prevent the disclosure of information that might give unfair advantage to competitors or adversely affect its ability to compete in its industry. But, as here, the employer also included “personnel records” as confidential and limited their disclosure only to the named employee and senior management. In determining whether the employer’s confidentiality rule was lawful, the judge noted that “personnel records” contain various kinds of information about employees; including their wages. The Board found that the employer violated Section 8(a)(1) by maintaining that confidentiality provision. 336 NLRB at 1014

fn. 1.

I accordingly find and conclude that employees would reasonably construe the language of the rule to prohibit Section 7 activity, speaking to their coworkers about their wages and terms and conditions of employment. I accordingly find and conclude that the maintenance of the “information security policies” would reasonably tend to chill employees in the exercise of their Section 7 rights.

I further find that, inasmuch as the rule directs its employees to report unauthorized access to confidential information or misuse of confidential information to the Respondent, and threatens its employees with corrective action, including termination and criminal prosecution, for a violation of the policy on confidential information, such part of the rule violates the Act by threatening employees for violating an unlawful rule.

The Respondent cites *Security Walls, LLC*, 356 NLRB 596 (2011), for the proposition that a confidentiality provision precluding the copying or disclosing of information in, among other documents, the payroll or personnel records of employees was lawful. It must be noted, however, that in finding no violation in the provision, the Board observed that no exceptions were taken to the judge’s decision. 356 NLRB 596, 596 fn. 1.

B. The No-Solicitation/No-Distribution Policy

The allegedly improper handbook rule provides that employees are prohibited at all times on Target premises from soliciting and distributing literature if these activities are for personal profit, commercial purposes, or any charitable organization that is not part of the Respondent’s community relations program.

The handbook defines “Target premises” as including all buildings, grounds, and parking areas Target uses to conduct its business.

The General Counsel argues, and I agree, that the above rule broadly prohibits the distribution of literature anywhere on Target property if such an activity is for “commercial purposes.”

An employer may lawfully impose some restrictions on employees’ statutory rights to engage in union solicitation and distribution. Such restrictions, however, must be clearly limited in scope so as not to interfere with employees’ right to solicit their coworkers on their own time or to distribute literature on their own time in nonwork areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). On its face, the Respondent’s rule prohibits solicitation and distribution on its premises at any time on its premises. Such a rule violates the principles in *Republic Aviation* which establishes that employees have the right to distribute items on their own time in nonwork areas.

The rule prohibits such distribution if it is for a “commercial purpose.” The General Counsel argues, and I find, that there is ample evidence in the record to support a finding that the Respondent regarded the Union as a “business” and communicated that understanding to its employees. Thus, at the first meeting at which the video “Think Hard Protect Your Signature” was shown to the employees, Store Manager Pena testified that the script that she read to the employees portrayed the Union as a business, and an actor in the video states that “a union is a

business. And like any other business, it has to bring in money to survive. But it doesn’t have any products to sell. Instead, it sells memberships. The more memberships it sells, the bigger the business.” The Respondent’s flyer, signed by Pena, states that “like any other failing business the union needs to increase revenue to stay in business. Taking dues from new members is the only way for them to get more money.”

Williams stated that Pena told her three or four times that there was “no soliciting on the premises.” Williams further testified that when she gave out flyers in the breakroom during her break, her supervisor, Peta Chen, told her “you can’t distribute those in here. No soliciting.” Williams protested that she was on her break, and Chen replied, “I don’t care; you can’t pass anything out in the break room or on the premises.” Bracey also handed out a flyer in the breakroom and Chen told her “[Y]ou can’t do that in the breakroom. Stop handing out stuff in the break room.” Bracey also stated that when she was in the parking lot with other employees and union agents, Pena approached and said, “[N]o soliciting. Not even in the parking lot. Get away from here. You can’t be there.”⁸

I further find that the Respondent enforced its unlawful rule when, on June 9, Respondent’s official, Stone, told employee Green that she could not solicit on Target’s property. At the time, Green was outside the employee entrance and was off duty. Green credibly testified that she spoke to one other employee outside the store about the Union. At the time, Green was a known union advocate. It would make no sense for Green to bother or block employees from entering, as Stone testified, when she was attempting to interest them in the Union. Nor would it make sense for Green to stand in a place where she would be subjected to being hit by the door.

I also credit Williams’ testimony that Pena said that she could not solicit on Target’s premises. This prompted an admitted response from Pena that she would check to see if solicitation could take place in the Respondent’s second parking lot. Clearly, the emphasis of the conversation was on the location of the solicitation, not the worktime of the conversants.

Thus, Williams credibly testified that, in response to Pena’s telling her that she could not solicit anywhere on Target premises, she asked whether such activity could take place in the breakroom or one of the parking lots. Corroborating Williams, Pena admitted that Williams asked if solicitation could take place in the second parking lot and Pena replied that she did not know but would find out. I accordingly find and conclude that Pena’s advice to Williams that solicitation was not permitted on the Respondent’s property violated the Act.

The Respondent’s reliance on *Register-Guard*, 351 NLRB 1110 (2007), is misplaced. In that case, the Board held that employees do not have a statutory right to use the employer’s e-mail system for Section 7 purposes. The Board stated that “an employer may draw a line between charitable solicitations, between solicitations of a personal nature—and solicitations for the commercial sale of a product—and between business-

⁸ Bracey conceded that her pretrial affidavit did not mention that she was prevented from distributing literature in the breakroom. She testified that the Board agent did not ask her whether she was prohibited from doing so.

related use and non-business related use.” Id. at 1118. Therefore, an employer’s policy prohibiting the use of a system for “nonjob related” purposes would not by itself violate Section 8(a)(1) of the Act. *Register-Guard* involved the disparate enforcement, not the maintenance, of an allegedly unlawful rule. The Respondent argues that if an employer may permissibly disparately enforce such a rule it may also validly maintain such a rule.

However, in *Register-Guard* the Board noted that employees had the full right to engage in oral solicitation and distribution pursuant to *Republic Aviation*. As set forth above, here they did not have that right. The question in *Register-Guard*, not present here, was whether the employer could prohibit employees’ use of company equipment to engage in modern forms of communication.

In addition, there is no evidence that the rule here was actually communicated to employees in such a way as to convey intent clearly to permit solicitation in nonworking areas when employees were not actively at work. Accordingly, the rule at issue here is overly broad and discriminatory on its face.

Under the standard set forth in *Lutheran Heritage*, I find that the rule explicitly restricts activity protected by Section 7 of the Act. The distribution of union literature is protected by Section 7, and the rule impermissibly prohibits such distribution at all times on its premises. In addition, I find that employees would reasonably construe the rule to prohibit Section 7 activity. Thus, by labeling the Union a “business” engaged in “sell[ing] memberships,” employees would reasonably believe that the rule prohibits the “commercial purpose” of selling memberships in the union by the solicitation of membership and the distribution of literature on its premises. Accordingly, I find and conclude that this rule violates Section 8(a)(1) of the Act.

I further find that employees would reasonably construe the language of the rule to prohibit Section 7 activity. I accordingly find and conclude that the maintenance of the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.

I further find that by showing its employees a video in which it was stated that “you can rely on us to enforce all solicitation, distribution, and harassment policies” the Respondent affirmed its intent to unlawfully enforce the impermissible no-solicitation/no-distribution rules alleged in the complaint.

C. The “After Hours” Policy

The handbook rule provides that “team members must leave the premises after hours. You should only be on company property during your scheduled work hours or for other authorized company business.”

In *TeleTech Holdings, Inc.*, 333 NLRB 402 (2001), the Board found that a rule prohibiting “unauthorized presence on the premises while off duty” violated the Act. It stated that “a no-access rule for off-duty employees is valid only if it limits their access solely with respect to the interior of the plant premises and other working areas; it is clearly disseminated to all employees; and it applies to off-duty employees seeking access to the plant for any purpose and not just those employees engaging in union activity. In addition, a rule denying off-duty employees access to parking lots, gates, and other outside non-

working areas is invalid unless sufficiently justified by business reasons.” *Tri-County Medical Center*, 222 NLRB 1089 (1976).

Similarly, in *Lafayette Park Hotel*, above at 828, the Board found that a rule requiring employees to leave the premises immediately after the completion of their shift, and not return until their next scheduled shift, violated the Act.

The Respondent’s rule broadly prohibits employees from being on its premises, which has been defined as its building, grounds and parking lots, during their nonscheduled work hours or for other authorized company business. It does not limit access to the interior of the store as required by *TeleTech*, above.

There was testimony that there have been various incidents, including crimes, committed in the parking lot, but there was no evidence that any employees were involved in such incidents. Accordingly, the Respondent has not established any business reason for excluding employees from being in its parking lot during their off hours.

There was evidence that large numbers of employees routinely return to the store after their work hours to shop, to engage in company functions, to pick up a pay check or visit the human resources department. However, those instances where employees return to the store after their work hours are consistent with the rule that permits them to be on the premises for “authorized company business.”

The rule clearly would prohibit employee visits to the store’s parking lot to solicit coworkers for membership in the Union, or to distribute literature in its behalf. Indeed, there was evidence that employees who were not on work time engaged in such solicitation and distribution in the parking lot.

The Respondent argues that the rule has not been enforced, citing testimony that employees have engaged in solicitation and distribution in the parking lot while off duty. However, although employees have engaged in such activities, nevertheless, the rule has been maintained. I find that employees would reasonably construe the language of the rule to prohibit Section 7 activity. I accordingly find and conclude that the maintenance of the “after hours” would reasonably tend to chill employees in the exercise of their Section 7 rights.

The Respondent cites its “visitors” rule as evidence that its “after hours” rule is lawful. The “visitors” rule provides, in part, that “if you are not scheduled to work, please do not visit the non-public areas of the store except for authorized company business such as picking up your paycheck.”

I find that, inasmuch as the “visitors” rule permits off-duty employees to return to the nonpublic parts of the store for authorized company business, it is essentially the same rule as the “after hours” rule. However, although the “visitors” rule permits visits to the nonpublic areas of the store, it is silent as to the public areas, including the parking lot. In contrast, the “after-hours” rule requires employees to leave the “premises” after their work shift, and permits access to the premises only during authorized company business. Thus, as stated above, the “after hours” rule prohibits employees from being in the parking lot at times other than their working hours or when they are engaged in authorized company business. Such a rule restricts the right of employees to engage in union activities in the parking lot while they are off duty.

I find that employees would reasonably construe the language of the rule to prohibit Section 7 activity. I accordingly find and conclude that the maintenance of the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.

D. The "Parking Lot" Policy

I agree with the Respondent that the parking lot policy is clearly intended to ensure the safety of the employees in the store's parking lot. The rule provides, *inter alia*, that employees should lock their car, and use the "buddy system."

However, it also provides that if the employee sees people he does not know "loitering" around the parking lot, the worker should notify a security guard or a supervisor immediately.

Although the rule is not primarily intended to limit employee access to the Respondent's nonwork areas, it has that effect and it has been maintained. In *Lutheran Heritage*, above at fn. 16, the Board found that the respondent's "loitering rule" violated the Act since "employees could reasonably interpret the rule to prohibit them from lingering on the respondent's premises after the end of a shift in order to engage in Sec. 7 activities, such as the discussion of workplace concerns."

Here, although the rule does not specifically prohibit "employees" from loitering, it provides broadly that the worker should report anyone who he does not know who he sees loitering in the lot. As set forth above, the fact that there are over 200 employees working in the store with round the clock shifts, it is possible that not all the workers know each other. According to the rule, an employee is required to report anyone, even a fellow worker who he does not know, who is loitering in the parking lot.

I further find that the requirement that employees report to the asset protection department or to their supervisor anyone who they do not know who is loitering in the parking lot, violates the Act because it requires the workers to inform the Respondent of anyone who might be engaging in union activities in the lot.

E. The "Dress Code" Policy

The Respondent's dress code policy prohibits its employees from wearing various items of clothing and "any buttons or logos on your clothing (unless approved by your team leader)."

In *Republic Aviation*, above, the Supreme Court held that employees have a protected right to wear union buttons at work. This right has been extended to articles of clothing. *Medco Health Solutions of Las Vegas*, 357 NLRB 170, 179 (2011). This right is balanced against the employer's right to maintain order, productivity and discipline. The Board has struck this balance by permitting employers to prohibit employees from wearing union insignia where "special circumstances" exist. 324 U.S. at 797-798. See *Sam's Club*, 349 NLRB 1007, 1010 (2007). "The Board has found special circumstances justifying the proscription of union insignia when its display may jeopardize employee safety, damage machinery or products, exacerbate employee dissention, or unreasonably interfere with a public image which the employer has established as part of its business plan, through appearance rules for its employees." *United Parcel Service*, 312 NLRB 596, 597 (1993). A rule based on

special circumstances must be narrowly drawn to restrict the wearing of union insignia only in areas or under circumstances which justify the rule. *Sunland Construction Co.*, 307 NLRB 1036 (1992). Customer exposure to insignia is not, by itself, a special circumstance, nor is the requirement that an employee wear a uniform. *United Parcel Service*, above.

The Respondent argues in its brief that because its established brand is "red and khaki" which permits the employee to be identified as a team member, any button or logo which detracts from that identification unreasonably interferes with its carefully crafted public image and business plan of "red and khaki." In *Stabilus, Inc.*, 355 NLRB 836 (2010), the Board stated that "an employer cannot avoid the "special circumstances" test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The same would apply here. The ban on wearing union insignia is complete and not limited to areas which would justify the rule. For example, the rule also applies to the overnight employees who work when the store is closed to the public.

I find that the prohibition of all buttons or logos does not unreasonably interfere with the Respondent's public image, particularly since the Respondent has permitted employees to wear pins and buttons of all kinds, including health-related and holiday appropriate pins. There has been no showing that the wearing of any insignia would interfere with the Respondent's "red and khaki brand."

In its brief, the Respondent asserts that it has demonstrated the "special circumstances" permitting the prohibition of buttons or logos because "the display of any button or logo, not just limited to union support, unreasonably interferes with Target's carefully crafted public image and business plan of 'red and khaki.'" Nevertheless, there is ample evidence that employees routinely wear pins showing their support for health-related causes, or in celebration of holidays, on their uniforms.

The wearing of union insignia is protected by Section 7, and the Respondent's rule impermissibly prohibits the wearing of any buttons or logos at all times on its premises. Under the standard set forth in *Lutheran Heritage*, I find that employees would reasonably construe the language of the rule to prohibit Section 7 activity. I accordingly find and conclude that the maintenance of the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. I accordingly find that this rule violates Section 8(a)(1) of the Act.

The fact that employees, according to the rule, had to obtain their supervisor's approval, is contrary to the freedom accorded to workers pursuant to *Republic Aviation*, above. As the Board pointed out in *Brunswick Corp.*, 282 NLRB 794, 795 (1987), any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful.

F. The Respondent's Defenses to the Handbook Rules

In its brief, the Respondent argues that the handbook rules were not known to the employees, and it is "highly unlikely that employees have ever seen these policies in writing" and thus it was as if they "did not exist." I cannot agree. Each

employee signed an “orientation completion form” upon the completion of the orientation program which stated that the worker “received and read” the handbook. Further, the handbook states that the employee should use it “as a guide to find out about your training, pay, schedule and time off, as well as company policies, guidelines and expectations.” In addition, Supervisors and Officials Bharat, Casolino, Jones, Major, and Pena all testified that the no-solicitation/no-distribution rules were in effect, and stated their understanding of those rules.

The Respondent first argues that the rules set forth in the handbooks are lawful. It contends, further, that even if the rules are unlawful, they have not been enforced. In answer to the complaint’s allegations that the mere maintenance of the rules, even without evidence that they were enforced, violates the Act, the Respondent asserts that maintenance of an unlawful rule does not constitute a violation of the Act.

I do not agree. As set forth above, the rules discussed above are invalid because they reasonably tend to chill employees in the exercise of their Section 7 rights, and employees would reasonably construe their language to prohibit Section 7 activity. *Lutheran Heritage*, above.

The Respondent further argues that the rules were not enforced, or were loosely enforced, blaming its “poor leadership” at the store. The Respondent’s officials and supervisors testified that the handbook rules were “loosely enforced” or not enforced at all. For example, executive team leader Stone stated that her job is to enforce the Employer’s policies, however she noted that the handbook served as a “loose guide” or “template” to the Employer’s policies. Similarly, executive team leader Michael Casolino stated that it is his job to “loosely enforce” the handbook’s guidelines, which are not followed “line by line.”

However, Casolino conceded that he was not instructed in writing or orally by Pena to loosely enforce the guidelines, or not to enforce the dress code, and he was not aware of any changes to the handbook’s policies as written. He similarly did not issue anything in writing to the workers advising that the handbook’s rules were only loosely enforced.

The Respondent’s human resources official, Dawn Major, denied that some policies are not enforced. She stated that the administration looks at each situation to determine the facts and the course of action required on a case-by-case basis, stating that the guidelines are just guidelines. Major was not aware of any of the rules in the handbook being changed or rescinded prior to the election. Pena testified that the Respondent’s headquarters did not tell her not to follow the handbook’s policies, adding that “we just don’t enforce every single policy maybe as well as we should have.”

The Respondent argues that the rules were not enforced, relying on testimony in which employees solicited other workers to join the Union, distributed union literature, freely discussed their wages with each other, returned to the facility when they were not on duty in order to shop and perform other activities, and wore pins, shirts with logos, and union bracelets in apparent violation of the dress code. The Respondent argues that this evidence excuses it from a finding of violation for maintaining

unlawful rules.⁹

Despite such testimony of “loose enforcement” of the rules, there was evidence that the rules were, indeed, enforced. Thus, at one of the Employer meetings, an actor in the video shown to employees stated that “you can rely on us to enforce all solicitation, distribution, and harassment policies.” Further, handbook, page 44, asks employees to “please follow and help enforce the Target No Solicitation/No Distribution Policy.” In addition, asset protection supervisor Jones stated that it is his job to enforce the Employer’s no-solicitation/no-distribution policies in the Target building itself, its property and parking lots.

Further, as set forth above, I have credited employees Green and Williams’ testimony that they were told that they could not solicit on Target’s property. Accordingly, I find that the rules against solicitation and distribution were, in fact, enforced.

However, even if the rules were not enforced, the Respondent remains responsible for their maintenance. A rule is unlawful even if not enforced. *Radisson Place Minneapolis*, 307 NLRB 94, 94 (1992). The D.C. Circuit in *Cintas*, above, dealt with the arguments that the Respondent raises, finding that even though there was no evidence that any employee actually interpreted the rules to prohibit their lawful discussion of Section 7 matters, “no such evidence is required to support the Board’s conclusion that the rule is overly broad and thus unlawful. The Board is merely required to determine whether employees would reasonably construe the [disputed] language to prohibit Section 7 activity.” The court also answered the employer’s argument that it never applied the rules in the manner asserted by the union. It stated that “the mere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice ‘even absent evidence of enforcement.’” If the Board concludes that employees would reasonably construe the company’s confidentiality language to restrict discussion of their wages and other terms and conditions of employment with each other, the Board is under no obligation to consider whether the disputed restriction has ever been enforced against employees exercising their Section 7 rights.” 482 F.3d at 467–468.

There is no evidence that any employee has been disciplined for acting in contravention of these rules. However, there is also no evidence that the rules have been rescinded, that store management has been given permission to loosely enforce or not enforce those rules, or that the workers have been told that they are not bound by those rules. Accordingly, the rules remain in effect and have been maintained. As alleged in the complaint, the maintenance of the rules violates the Act even if they have not been enforced.

V. THE REPRESENTATION CASE

A. *The Objections to the Election*

1. Relevant principles

When an objection is filed asserting that the “laboratory conditions” of an election were violated by a party to an election,

⁹ The Union’s request that I reconsider my ruling permitting the Respondent to adduce evidence that employees engaged in union activities in apparent contravention of the rules, including my receipt in evidence of union campaign literature, is denied.

the decisional standard is whether “the conduct reasonably tends to interfere with the employees’ free and uncoerced choice in the election. *Baja’s Place, Inc.*, 268 NLRB 868, 868 (1984). As the objecting party, the union has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547 (1988). The test, an objective one, is whether the employer’s conduct has the tendency to interfere with the employees’ freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001).

2. Conclusions as to the representation case

The Report on Objections directed that the following objections, set forth in Objections 1(a) through (e); 1(g), 5, 8, 9, 10, 12, and 13 be merged with the complaint. They include the Respondent’s access policy; the dress code policy; the no-distribution/no-solicitation policy; the information security policy and the social media policy which prohibit the discussion by employees of their terms and conditions of employment with others; the rule which requires employees to report coworkers’ union activity; threats of unspecified reprisals; creation of the impression of surveillance; the announcement and enforcement of an overly broad no-solicitation policy; interrogation of employees; and threats to close the store.

In *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962), the Board held that 8(a)(1) conduct occurring during the critical period is “a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.” However, the Board noted that an exception to that rule does not require the setting aside of an election where the “conduct is so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results.”

The Respondent, citing *Long’s Drug Stores California*, 347 NLRB 500, 501 (2006), and *Delta Brands, Inc.*, 344 NLRB 252, 253 (2005), argues that the election should not be set aside even if the handbook’s confidentiality rules are found to be unfair labor practices.

In *Long’s*, above, the Board held that the maintenance of a handbook provision that considered employee wage rates to be confidential information which must not be disclosed, violated Section 8(a)(1) of the Act. The Board nevertheless did not find that the election’s results should be overturned. In refusing to overrule the election results, the Board stated that the confidentiality provisions were not adopted in response to the union’s organizing campaign, the handbook at issue was only distributed to five unit employees, there was no evidence that the employer called employees’ attention to other confidentiality provisions in the handbook, and there was no evidence that those provisions were ever enforced. Rather, there was evidence that employees openly discussed wages and other terms and conditions of employment during the critical period, and the election was lost by a wide margin. The Board concluded that it was impossible to conclude that the confidentiality provisions could have had an effect on the results of the election.

Similarly, in *Delta Brands and Safeway, Inc.*, 338 NLRB 525 (2002), the Board held that the mere maintenance of an invalid rule was not sufficient to overturn the election results.

However, in *Jurys Boston Hotel*, 356 NLRB 927 (2011), a

representation case, the Board held that “the mere maintenance of an overbroad rule can affect the election results because employees could reasonably construe the provision as a directive from their employer that they refrain from engaging in permissible Section 7 activity.” *Pacific Beach Hotel*, 342 NLRB 372, 373–374 (2004) (setting aside election, based on a handbook policy prohibiting solicitation on company property), citing *Freund Baking*, 336 NLRB 847 fn. 5 (2001). The Board noted, in *Jurys Boston*, that, neither in *Delta Brands* or in *Safeway*, did the Board hold that objecting parties in all cases must prove that an objectively overbroad rule was enforced or that it actually deterred employees from engaging in Section 7 activity.” *S.T.A.R., Inc.*, 347 NLRB 82, 84 fn. 7 (2006).

In *Jurys Boston*, the Board found that three of the Employer’s handbook rules—no-solicitation or distribution on hotel property, the prohibition against being in an unauthorized area and/or loitering inside or around the hotel without permission, and the rule prohibiting the wearing of emblems, badges, and buttons—were objectionable since they reasonably tended to interfere with employee free choice. The Board held that those rules had a reasonable tendency to chill or otherwise interfere with the pronoun campaign activities of employees during the election period, and could reasonably be construed by employees as precluding them from communicating with each other about the Union and their wages, hours, and other terms and conditions of employment at their workplace, “the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).

In answer to the Respondent’s argument that in *Jurys Boston*, above, the union lost the election by only one vote, and that here the Union lost the election by a wide margin, the Board noted in *Freund Baking*, fn. 5, above, that although the margin of victory in that case was substantial, “the objectionable conduct affected all the employees in the unit because the employer required each employee to receive and review a handbook. In these circumstances, we find that the employer’s objectionable conduct may have directly accounted for the petitioner’s margin of defeat. In any event, the Board has consistently held that whether an election should be invalidated based on alleged misconduct does not turn on election results but rather upon an analysis of the character and circumstances of the alleged objectionable conduct.”

As set forth above, in the video shown to employees, the Employer stated that it would enforce its no-solicitation/no-distribution rules, and such rules were enforced against employees Green and Williams. Even assuming that the handbook rules were not enforced, nevertheless, they were maintained, they were not rescinded, and employees, who certified that they received and read the handbook, were not told that they were not bound by them.

In addition, the objectionable conduct was disseminated to the entire bargaining unit by the distribution to all employees upon their hire the handbook containing the unlawful rules, the advice in the handbook that they “follow and help enforce the

Target No Solicitation/No Distribution Policy,” and by the video that they were shown which warned employees that “you can rely on us to enforce all solicitation, distribution, and harassment policies.”

Inasmuch as I have found that all the objectionable conduct set forth above constitute unfair labor practices, I recommend that those objections be sustained. *Dal-Tex Optical Co.*, above 1786–1787, I will therefore recommend that the election held on June 17 be set aside, and that the representation proceeding be remanded to the Regional Director for the purpose of conducting a second election.

CONCLUSIONS OF LAW

1. By, in its team member handbook, revised in July 2009, promulgating and since then maintaining the following rules, the Respondent has violated Section 8(a)(1) of the Act:

(a) In its team member handbook, revised in July, 2009, by promulgating and since then maintaining, the following rules:

i. A no-distribution rule that prohibits its employees from distributing any literature at any time on Respondent’s premises, which includes non-work areas;

ii. A “Use technology Appropriately” policy prohibiting its employees from releasing confidential guest, team member, or company information;

ii. A. “Communicating Confidential Information” policy which prohibits its employees from sharing confidential information with other employees; directs its employees to talk to their supervisors if they are unsure regarding sharing confidential information; and prohibits its employees from having discussions regarding confidential information in the breakroom, at home or in open areas and public places.

(b) An “Unauthorized access to confidential information” policy which directs its employees to report unauthorized access to confidential information or misuse of confidential information to the Respondent; and threatens its employees with corrective action, including termination and criminal prosecution, for a violation of the policy on confidential information.

2. By, in its team member handbook, revised in July 2009 and February 2011, promulgating and since then maintaining the following rules, the Respondent has violated Section 8(a)(1) of the Act:

(a.) An “After Hours” rule prohibiting its employees from returning to its premises, which includes nonwork areas, during their off hours.

(b) A “No-Solicitation/No-Distribution” policy prohibiting solicitation or distribution of literature by its employees, at all

times on Respondent’s premises, which includes nonwork areas.

(c) A “Dress Code” policy prohibiting its employees while at work from wearing any buttons or logos on their clothing unless approved by a team leader.

(d) A “Parking Lot” policy directing its employees to report anyone they do not know who is loitering in Respondent’s parking lot.

3. By threatening employees with discipline for engaging in activities on behalf of the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By distributing a leaflet to its employees in which it threatened its employees that its Valley Stream facility would close if employees chose the Union as their collective-bargaining representative, the Respondent has violated Section 8(a)(1) of the Act.

5. By showing its employees a video which states that Respondent will enforce its solicitation and distribution policies, the Respondent has violated Section 8(a)(1) of the Act.

6. By enforcing its no-solicitation policy by directing its employees not to solicit for the Union on Respondent’s property, the Respondent has violated Section 8(a)(1) of the Act.

7. By interrogating its employees regarding their activities on behalf of the Union, the Respondent has violated Section 8(a)(1) of the Act.

8. The Respondent has not violated the Act, as set forth in paragraphs 14(a) and (b) of the complaint, by threatening its employees that the Valley Stream store would close if they chose the Union as their collective-bargaining representative.

9. The Respondent has not violated the Act, as set forth in paragraph 18 of the complaint, by threatening its employees that if they chose the Union as their collective-bargaining representative and there was a strike, Respondent’s Valley Stream facility would close.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I have found the Respondent has maintained unlawful rules in its handbook, I shall recommend that it be ordered to rescind those rules, remove them from the team member handbook, and advise its employees in writing that these rules are no longer being maintained or enforced.

[Recommended Order omitted from publication.]