

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MASTEC, NORTH AMERICA, INC.

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 488, AFL-CIO

Case 34-CA-090246

**BRIEF TO THE BOARD ON BEHALF OF
COUNSEL FOR THE GENERAL COUNSEL**

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I. SUMMARY OF THE CASE

This case involves Mastec, North America, Inc.'s (Respondent) maintenance in its "Employee Handbook and Policies and Procedures," three overly broad provisions that have a reasonable tendency to interfere with, restrain, and coerce employees in their exercise of the rights guaranteed in Section 7 of the Act. In particular, the provisions in issue are the Dispute Resolution Policy that prohibits employees from arbitrating disputes as a class; the Tape Recording Policy that strictly prohibits the recording of all conversations in the workplace; and the Use of Derogatory Language Policy that bans "Use of abusive, threatening or derogatory language towards employees, customers or management" and makes violations subject to discipline up to and including termination.

As will be discussed in detail herein, the Dispute Resolution Policy is unlawful under *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), in which the Board examined similar mandatory arbitration policies and found them to be inherently restrictive of employees' Section 7 right to collective legal action. Although the Board's reasoning has been called into question by Circuit Courts of Appeal, as yet, no Supreme Court decision has spoken directly to the Board's rationale that the NLRA is distinguishable from every other statute that the Court has addressed on the issue. Therefore, the Board should follow the precedent set in *D.R. Horton* and *Murphy Oil*, to find that the policy in this case violates Section 8(a)(1).

Similarly, the Board should find Respondent's Tape Recording Policy to be an unlawful infringement on Section 7 rights. The policy makes no distinction between work time and non-work time, leaving employees to conclude that they may never

record conversations at work, regardless of who is involved in the conversations, or when or where they take place. Such an overly broad prohibition would lead employees to reasonably interpret the rule as proscribing the recording of all conversations at any time, including protected conversations occurring during non-work time. While ALJ decisions on the lawfulness of such policies are divided, the Board should find Respondent's policy unlawful for the reasons discussed herein.

Finally, Respondent's Derogatory Language Policy is ambiguous and overly broad under well-settled Board law. Rules restricting negative or derogatory speech have consistently been held to violate Section 8(a)(1), as employees would reasonably interpret them to prohibit discussions about management that touch on working conditions. Because they inevitably intrude on employees' rights to complain concerted about their working conditions, the Board finds such rules to be facially unlawful.

Since the "Employee Handbook and Policies and Procedures" has been maintained and applied at Respondent's facilities throughout the United States, General Counsel seeks a nationwide remedy.

II. FACTS

A. Procedural History

The charge in this case was filed by International Brotherhood of Electrical Workers, Local 488, AFL-CIO ("Union") against Respondent on September 28, 2012. (SR 1(a); JX A)¹ An amended charge was filed by the Union on November 21, 2012,

¹ Paragraphs from the Stipulated Record are referred to herein as SR, followed by the paragraph number. Joint exhibits are referred to as JX.

(SR 1(b); JX C) and a second amended charge was filed by the Union on May 9, 2013.

(SR 1(c); JX E)

On May 23, 2013, the Regional Director for Region 1, Subregion 34, issued a Complaint and Notice of Hearing ("Complaint"), alleging that Respondent has maintained, in its "Employee Handbook and Policies and Procedures" (the Handbook), a Dispute Resolution Policy, a Tape Recording Policy, and a rule prohibiting "use of abusive, threatening or derogatory language towards employees, customers or management" ("Derogatory Language Policy"). (SR 2(a); JX G) The complaint alleges that, by maintaining these policies, Respondent has violated Section 8(a)(1) of the Act by interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. On June 6, 2013, Respondent filed a timely Answer to the Complaint, generally denying that the policies described above were overbroad in violation of Section 8(a)(1) of the Act. (SR 2(b); JX I)

On June 19, 2014, the parties filed a Joint Motion and Stipulation of Facts ("Stipulated Record") with the Board, which was refiled on September 26, 2014. Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, the parties have stipulated that: during the 12-month period ending April 30, 2013, Respondent derived gross revenues in excess of \$500,000 from the installation of satellite television services, and sold and shipped from its Connecticut facilities goods valued in excess of \$50,000 directly to points located outside the State of Connecticut; that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act; and that the Union is a labor organization within the meaning of Section 2(5) of the Act. (SR 3, 4) The parties also waived a hearing before an administrative law judge

and agreed to submit the record in this case directly to the Board for findings of fact, conclusions of law, and a Decision and Order.

On November 17, 2014, the Board approved the Stipulated Record and transferred the proceeding to itself for a decision based on the Stipulated Record.

B. The Employee Handbook

Respondent maintains an “Employee Handbook and Policies and Procedures” (“Handbook”), which was last revised in June 2007. (SR 8(a)) The Handbook contains the following provisions:

1. Dispute Resolution Policy

“Foreword: The MasTec Employee Handbook also contains a Dispute Resolution Policy, providing for final and binding arbitration of designated employment-related disputes. Please note that the Dispute Resolution Policy will apply to you unless you choose to opt out. Please review the Dispute Resolution Policy immediately, as you will have a period of **thirty (30) days** from the date of receipt of this Handbook to return a form to the Company’s Legal Department should it be your choice to opt out. MasTec supports the Dispute Resolution Policy as an efficient, economical way to resolve disputes without having to go through lengthy court processes. However, should you choose to opt out there will be no adverse employment action taken against you as a consequence of that decision.

“Dispute Resolution Policy: This Dispute Resolution Policy is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Policy applies to any dispute arising out of or related to Employee’s employment with the Company or termination of employment. Except as it otherwise provides, this Policy requires all such disputes that have not otherwise been resolved to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include, without limitation, disputes arising out of or relating to interpretation or application of this Policy, but not as to the enforceability or validity of the Policy or any portion of the Policy. The Policy also applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor

Standards Act, Employee Retirement Income Security Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Claims arising under any law that permits resort to an administrative agency notwithstanding an agreement to arbitrate those claims may be brought before that agency as permitted by that law, including without limitation claims or charges brought before the National Labor Relations Board, the Equal Employment Opportunity Commission, and the United States Department of Labor. Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

A neutral arbitrator shall be selected by mutual agreement of the parties. The location of the arbitration proceeding shall be in the general geographical vicinity of the place where the Employee last worked for the Company, unless each party to the arbitration agrees in writing otherwise. If for any reason the parties cannot agree to an arbitrator, either party may apply to a court of competent jurisdiction for appointment of a neutral arbitrator. The court shall then appoint an arbitrator, who shall act under this Policy with the same force and effect as if the parties had selected the arbitrator by mutual agreement.

A demand for arbitration must be in writing and delivered by hand or first class mail to the other party within the applicable statute of limitations period. Any demand for arbitration made to the Company shall be provided to the Company's Legal Department, 800 Douglas Road, 11th Floor, Coral Gables, Florida 33134. The arbitrator shall resolve all disputes regarding the timeliness or propriety of the demand for arbitration.

In arbitration, the parties will have the right to conduct civil discovery and bring motions, as provided by the forum state's procedural rules. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, in all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. If under applicable law the Company is not required to pay all of the Arbitrator's and/or arbitration fees, such fee(s)

will be apportioned between the parties by the Arbitrator in accordance with said applicable law.

Within 30 days of the close of the arbitration hearing, any party will have the right to prepare, serve and file with the Arbitrator a brief. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in a court of law for the claims presented to and decided by the Arbitrator. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. Except as may be permitted or required by law, neither a party nor an Arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of all parties. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration.

An Employee may submit a form stating that the Employee wishes to opt out and not be subject to this Policy. The Employee must submit a signed and dated statement on a "Dispute Resolution Policy Opt Out" form ("Form") that can be obtained from the Company's Legal Department, 800 Douglas Road, 11th Floor, Coral Gables, Florida 33134, by calling 305-406-1875. In order to be effective, the signed and dated Form must be returned to the Legal Department within 30 days of the Employee's receipt of this Policy. An Employee choosing to opt out will not be subject to any adverse employment action as a consequence of that decision.

This Policy is the full and complete policy relating to the formal resolution of employment related disputes. Nothing contained in this Policy shall be construed to prevent or excuse an Employee from utilizing the Company's existing internal procedures for resolution of complaints".

(SR 8(b)(1); JX J)

2. Tape Recording Policy

"Tape Recording Policy: The Company strictly prohibits the recording of conversations with a tape recorder or other recording device unless prior approval is received from your supervisor or a member of senior management and all parties to the conversation give their consent.

The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Violation of this policy will result in disciplinary action, up to and including immediate termination. Notwithstanding this policy, the Company reserves the right to monitor its technical resources including, but not limited to, its telephone systems, e-mail systems and the internet”.

(SR 8(b)(2); JX K)

3. Abusive, Threatening or Derogatory Language Policy

“Termination: Use of abusive, threatening or derogatory language towards employees, customers or management.

(SR 8(b)(3); JX L)

Until January 31, 2013, the Handbook, including the rules described above, was maintained and enforced at all of Respondent’s U.S. locations. Effective February 1, 2013, Respondent issued a new handbook at all its locations *except* the Durham, Connecticut location. The revised handbook replaced the rule prohibiting the “use of abusive, threatening or derogatory language towards employees, customers or management” with a prohibition on “Exhibiting violent behavior, including threatening or intimidating language; any form of physical assault; or possessing weapons on or in company property.” The other two rules at issue in this case remain unchanged at all Respondent locations. (SR 9, 10)

Since about April 12, 2012, the Union has represented field technicians and field warehouse employees at Respondent’s Durham facility. (SR 6, 7) However, there is no evidence that the rules described above were promulgated in response to any union activity or applied in any manner to restrict Section 7 rights. (SR 11)

Nor has Respondent by any other actions, led employees to believe that the rules prohibit Section 7 activity. (SR 12)

III. ARGUMENT

A. The Applicable Law

In determining whether a rule or policy violates Section 8(a)(1), the Board balances the employer's right to implement rules of conduct in order to maintain order and discipline against employees' right to engage in Section 7 activity. *Relco Locomotives*, 358 NLRB No. 32, slip op. at 15 (2012). The Board has held that the mere maintenance of overly broad work rules, whether or not they are enforced, can violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 and 828 (1998). Moreover, a rule that prohibits unprotected conduct may be unlawful if it also contains prohibitions so broad that they can reasonably be understood to encompass protected conduct. *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 4, 294 (1999) (rule prohibiting "false, vicious, profane, or malicious statements" unlawful because it prohibits statements that are "merely false" and might include union propaganda); *Lafayette Park Hotel*, *supra*, at 828.

In determining whether an employer's maintenance of a work rule reasonably tends to chill employees, the Board applies the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under that framework, the first inquiry is "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) If the rule does not explicitly restrict protected activities, the Board examines whether: (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. *Id.* at 647.

In determining the rule's lawfulness, it must be given a reasonable reading; particular phrases should not be read in isolation; and there is no presumption of improper interference with employee rights. *Lafayette Park Hotel, supra* at 825, 827. Additional considerations are whether the rule addresses legitimate business concerns, whether it is ambiguous as written, whether the employer has exhibited antiunion animus, and whether the employer has by other actions led employees to believe the rule prohibits Section 7 activity. *Id.* at 826. Rules that are ambiguous regarding their applicability to Section 7 activity, and that contain no context or limiting language that would clarify for employees the rules' reach are unlawful. *Claremont Resort & Spa*, 344 NLRB 832, 836 (2005) (rule prohibiting "negative conversations" about managers, without clarification or examples, was unlawful because of its potential chilling effect on protected activity); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992), quoting *Paceco*, 237 NLRB 399 fn. 8 (1978) ("Where ambiguities appear in employee work rules ..., the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it.)

Here, there is no evidence that the rules were promulgated in response to union activity, or that they have been applied to restrict the exercise of Section 7 rights. Therefore, the inquiry is whether the rules at issue explicitly restrict Section 7 rights, whether employees would reasonably construe them to restrict protected activity, or whether they are ambiguous in their applicability to protected activity.

B. The Dispute Resolution Policy

Respondent maintains a policy requiring employees, as a condition of employment, to submit all employment-related disputes to mandatory and binding arbitration. The policy applies to all employees, unless they opt out by contacting Respondent's legal department and filling out the required form within 30 days of hire. As discussed in detail below, the Board has held that such mandatory arbitration agreements, even with an opt-out provision, violate Section 8(a)(1) because they preclude employees from filing collective employment-related claims and therefore restrict their Section 7 right to engaged in concerted action for mutual aid or protection.

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board considered the same issue that is present here, and found that mandatory arbitration agreements such as the one Respondent maintains violate Section 8(a)(1) of the Act. Although the Board's *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) analysis was rejected by the Fifth Circuit Court of Appeals, and viewed as unpersuasive by the Second and Eighth Circuits,² the Board recently reaffirmed and further explained its *D.R. Horton* decision in the *Murphy Oil* case. In addition, as the Board stated in *Murphy Oil*, no decision of the Supreme Court speaks directly to the Board's determination that the substantive nature of the right to group legal redress about terms and conditions of employment, which is at the core of the Act, distinguishes the NLRA from every other statute the Supreme Court has addressed in its Federal Arbitration Act³ (FAA) jurisprudence. Thus, in *Murphy Oil, supra*, slip op. at

² *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297-298 fn. 8 (2d Cir. 2013); *Owens v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013).

³ 9 U.S.C. Section 1 et seq.

2, the Board reaffirmed that employer-imposed mandatory individual arbitration “agreements” that purport to restrict employees’ Section 7 rights to pursue employment claims collectively violate Section 8(a)(1).⁴

The Board’s decisions in *D.R. Horton* are controlling in this case, rather than the above-cited adverse decisions of the Fifth, Second and Eighth Circuits. In *Murphy Oil*, the Board noted that the Supreme Court has not addressed whether the NLRA permits employees to pursue employment-related collective claims, grounded in fundamental Section 7 rights, notwithstanding the provisions of the FAA. The Board pointed out that none of the Supreme Court’s class-action waiver jurisprudence under the FAA addresses a case in which the fundamental statutory protection is the right of employees to act as a group in improving their working conditions. Rather, the Supreme Court has addressed only situations in which the underlying right was an individual right to be free from unfair market behavior. *Murphy Oil, supra*, slip op. at 12 fn. 66. In these circumstances, Board precedent is controlling unless and until it is overruled by the United States Supreme Court. *Id.* at 2, fn. 17; see also *Gas Spring Co.*, 296 NLRB 84, 97 (1989).

In *Murphy Oil*, the Board emphasized that the NLRA does not create or guarantee a right to class certification of a lawsuit or the equivalent, as such right is to be determined by the court or other forum in which a claim is filed. However, the Act creates the core substantive right, not merely the procedural right, of employees to act in concert by pursuing joint, class, or collective claims without the interference of an

⁴ Similar provisions have been found unlawful by Administrative Law Judges in *24 Hour Fitness Worldwide*, JD(SF)-51-12, slip op. at 16-18 (November 6, 2012) and *Advanced Services, Inc.*, JD(ATL)-16-12, slip op. at 6 (July 2, 2012), based on the legal principles the Board set forth in *D.R. Horton*.

employer-imposed restraint. Therefore, the Board stated in *Murphy Oil*, its decision in *D.R. Horton* does not conflict with the FAA, which favors arbitration for procedural reasons. *Murphy Oil, supra*, slip op. at 1-2. The Board concluded that “because mandatory arbitration agreements like those involved in *D.R. Horton* purport to extinguish a substantive right to engage in concerted activity under the NLRA, they are invalid.” *Id.* at 8.

As the Board noted in *D.R. Horton* and *Murphy Oil*, the Supreme Court’s decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978), establishes that the right to engage in collective legal action in administrative and judicial forums is the core substantive right protected by the NLRA, and not merely a procedural right as the Fifth Circuit concluded in its *D.R. Horton* decision. *Murphy Oil, supra*, slip op. at 5, 7-8, citing *D.R. Horton, supra*, slip op. at 2-4. Even an individual employee engages in protected concerted activity by seeking to induce group action, i.e., as the preliminary step to acting in concert. *Murphy Oil, supra*, slip op. at 12-13, citing *Salt River Valley Water Users Assn.*, 99 NLRB 849 (1952), *enfd.* 206 F.2d 325 (9th Cir. 1953).

In addition, the Supreme Court has found that individual employment contracts that prohibit employees from pursuing discharge grievances through their union, or in any manner other than individually, violate the NLRA. *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940). Thus, the Court has found that employees’ right to pursue claims related to their terms and conditions of employment on a collective basis is a substantive right protected by Section 7 of the Act, one that cannot be extinguished by individual agreements between employers and employees. *Murphy Oil, supra*, slip op. at 15.

The Board has convincingly explained how the NLRA and FAA are “capable of co-existence” in a manner that does not permit employers to impose mandatory individual arbitration of disputes related to such claims. *Id.* at 6-11; *D.R. Horton, supra*, slip op. at 9-12. The Board pointed out that when the NLRA was enacted in 1935 and re-enacted in 1947, the FAA had not been applied to individual employment contracts. The Board further noted:

It is hardly self-evident that the FAA – to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees – survived the enactment of the Norris-LaGuardia Act and its sweeping prohibition of “yellow dog” contracts. *Murphy Oil, supra*, slip op. at 10, 14-16.⁵

The Board found that even if there is a conflict between the NLRA and the FAA, the Norris-LaGuardia Act prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees’ concerted activity, including an agreement that seeks to prohibit a “lawful means [of] aiding any person participating or interested in” a lawsuit arising out of a labor dispute. The Board further noted that this indicates the FAA would have to yield insofar as necessary to accommodate Section 7 rights. *Id.*

In *D.R. Horton*, the Fifth Circuit stated that a federal statute will not be interpreted to override the FAA absent a specific congressional command in the statutory text. However, the Board specifically rejected that analysis in *Murphy Oil, supra*, slip op. at 6-10. Moreover, even applying the Fifth Circuit’s framework to resolve conflicts between the FAA and the NLRA, the Board determined that its *D.R. Horton* decision was correct because the FAA’s savings clause provides for revocation of contracts, such as

⁵ The “yellow dog” contracts outlawed by the Norris-LaGuardia Act of 1932, which was passed after the FAA was enacted in 1929, prohibited applicants or employees from seeking union representation.

mandatory arbitration agreements, “upon such grounds as exist at law.” Certainly, such grounds would include the protections afforded by Section 7 of the NLRA, which amounts to a “contrary congressional command” overriding the FAA. *Id.* at 9.

As in *D.R. Horton*, the *Murphy Oil* Board found that the mere maintenance of a mandatory agreement that claims be made on an individual basis is unlawful because such agreements are overly broad rules prohibiting protected concerted activity. The Board distinguished between an employer’s unlawful unilateral imposition of such an “agreement” on unrepresented employees and an employer’s lawful collectively bargained agreement requiring arbitration of certain employment disputes. *Murphy Oil*, *supra*, slip op. at 13.

That Respondent’s Dispute Resolution Policy includes an opt-out provision does not require a different result. In *Domino’s Pizza*, 29-CA-103180, JD(NY) 15-14 (March 27, 2014), an ALJ found that an agreement containing similar opt-out language violated Section 8(a)(1). Notwithstanding the employer’s contention that the opt-out provision rendered the agreement voluntary, the ALJ found the employer’s requirement that employees agree to binding arbitration as a condition of employment unlawfully restricted core rights guaranteed in Section 7. Although the ALJ’s decision is not controlling precedent, his reasoning is consistent with the Board’s recent decisions in *D.H. Horton* and *Murphy Oil*, and is equally applicable here. The ALJ noted:

The Act unambiguously confers to employees the right to engage in protected activities without interference from his or her employer. It follows, therefore, that an employer may not lawfully require its employees to affirmatively act (in this case, opt out, in writing within 30 days) in order to obtain or retain such rights. *Ishikawa Gasket America, Inc.*, 337 NLRB 175-176 (2001); *Mandel Security Bureau, Inc.*, 202 NLRB 117 (1973). Moreover, those employees who do choose to opt out are precluded from engaging in concerted activities with those who do

not, further limiting their options for engaging in conduct protected by the Act. Additionally, the decision making process itself – of whether to consent to or opt out of the Agreement – is itself a mandatory condition of employment as it is required of employees and is not a ministerial matter devoid of consequences. Employees are required to make a decision, under time-sensitive constraints, regarding the relinquishment of certain class action rights they possess under federal law. Whatever choice they make impacts their employment relationship with their employer in perpetuity and, for those who choose not to opt out, precludes them irrevocably from engaging in certain conduct which the Act protects.

Domino's Pizza, ALJD at page 6 line 51 through page 7 line 12.⁶

Similarly, Respondent's Dispute Resolution Policy, even with its opt-out provision, unlawfully restricts employees' Section 7 rights because it interferes with employees' statutory right to engage in concerted legal actions. For the reasons set forth in *Domino's* and in *24 Hour Fitness*, *supra*, the arbitration policy's provision in the Forward of the handbook, permitting employees to opt out of Respondent's arbitration policy during their first 30 days of employment, does not affect its unlawful interference with employees' Section 7 right to file and participate in collective and class litigation under *D.R. Horton*.

C. The Tape Recording Policy

As quoted above in its entirety, Respondent's tape recording policy prohibits employees from recording conversations without prior management approval and without the consent of all parties to the conversation. Its stated purpose is to eliminate the "chilling effect" that secret recording may have on the free expression of ideas, and

⁶ Like the policy at issue in *Domino's*, Respondent's policy expressly states that it does not apply to claims arising under the NLRA and specified other employment statutes. However, the policy also explicitly covers disputes involving wages and other terms and conditions of employment. As the ALJ noted in *Domino's*: "The Board has long held that concerted legal action addressing wages, hours and working conditions, whether in a courtroom setting, before an administrative agency or through arbitration, represents concerted protected activities under Section 7 of the Act." *Domino's Pizza*, *supra*, quoting *D.R. Horton*, *supra*, slip op. at 2-3.

to encourage “spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.” Violations of the policy are subject to disciplinary action, including immediate termination.

The policy does not explicitly restrict activities protected by Section 7. It does not preclude employees from speaking with one another on matters pertaining to their terms and conditions of employment. *Lafayette Park Hotel, supra*, 326 NLRB at 826.

Nevertheless, such a broad rule may be reasonably construed to prohibit the recording of statements, conversations, or activities that involve Section 7 rights, such as picketing, or recording evidence to be presented in administrative or judicial forums in employment-related matters. See, e.g., *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), *enfd.* 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite for Department of Labor investigation considered protected). Compare *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (rule prohibiting photographs of hospital patients or property lawful in light of “weighty” privacy interests of hospital patients and “significant” employer interest in preventing wrongful disclosure of individually identifiable health information).

The Board has not yet ruled on the issue of whether an employer may bar all recordings in the workplace. However, three administrative law judges addressing the issue have reached differing conclusions. In *Whole Foods Market, Inc.*, JD(NY)-50-13 (October 30, 2013), the ALJ noted that “[m]aking recordings in the workplace is not a protected right,” and went on to conclude that the no-recording rule at issue did not “prohibit employees from engaging in protected, concerted activities, or speaking about them.” The judge rejected the General Counsel’s argument that the rule’s prohibitions

encompassed activity protected by Section 7, such as recording picketing or other protected activity, or recording conversations related to terms and conditions of employment. In finding the rule to be lawful, the ALJ noted that the rule could not reasonably be read to encompass Section 7 activity. He further opined, without distinguishing the two, that because the rule at issue involved recordings and not employee solicitation, the employer was entitled to ban recordings during both work time and non-work time.

In *Boeing Co.*, JD(SF)-23-14 (May 15, 2014), a different ALJ concluded that a rule prohibiting employees from taking pictures or video at work was unlawful. The judge rejected the employer's proffered reason for promulgating the rule, finding instead that it would "discourage employees from taking photos of protected concerted activities such as their solidarity marching during a lunch break ... or photographing an unsafe condition at work."

Finally, in *Professional Electrical Contractors of Connecticut, Inc.*, JD(NY)-25-14 (June 4, 2014), the ALJ was persuaded by the General Counsel's argument that a rule broadly banning all types of recordings would tend to prevent employees from recording statements or events that might later be used as evidence in employment related matters, including NLRB cases. The judge noted that such evidence would be more reliable than witness testimony, and opined that the employer's prohibition could be construed to bar protected activity, and therefore violated the Act.

The rule at issue here, like the one in *Whole Foods*, does not clarify or limit the types of conversations or events it is intended to cover. Thus, notwithstanding the ALJ's conclusion, employees may reasonably construe it to preclude the recording of

protected activities. That it has not been applied to prohibit protected activity in the past is not the point, as the possibility is clearly within its ambit. The Board makes no distinction between rules *designed* to inhibit protected activity and those that *reasonably may* inhibit such activity: the Board's concern is whether a rule precludes, restricts, or punishes protected activity.

The absence of any limiting or clarifying language underscores the rule's breadth. For example, the rule is not limited to conversations between employees and supervisors, such as disciplinary meetings and performance evaluations. By its plain language, it would cover recordings of conversations between two union supporters, as well as audio recordings of speeches at rallies or pickets. Nor does the rule inform employees that they may engage in lawful recording during break times. In the absence of such limiting language or clarifying examples, employees may reasonably believe that they cannot record *any* conversation on Respondent's premises, even when it involves activity protected by Section 7, and even in circumstances where there is no possibility that the participants would be chilled by such recordings.

Respondent contends that it has legitimate and clearly articulated business reasons for promulgating and maintaining the no-recording rule. However, the only explanation for the rule is contained within the language of the rule itself:

The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

The rule at issue here contains nearly identical language regarding its purpose to the one in *Whole Foods*. The ALJ found the rule contained “a clear, logical and legitimate description of the reason for the rule,” and concluded that the rule’s plain language could not “reasonably be read as encompassing Section 7 activity and that employees would not reasonably fear that the [employer] would use this rule to punish them for engaging in protected activity.” *Id.* at 7, quoting *Flamingo Hilton-Laughlin*, *supra* at 289. In reaching this conclusion, the ALJ ignored the high bar the Board has set when a rule infringes on important employee rights.

In order to override employees’ protected rights, the Board requires a “weighty” employer interest. Thus, in *Flagstaff*, the Board relied on patients’ privacy interests in upholding a no-recording rule. Here, the record contains no countervailing interests that justify the maintenance of Respondent’s rule. That some employees may be dissuaded from the honest expression of views is hardly the “weighty” interest the Board requires in balancing employer interests against employee rights. See, e.g., *Boeing*, *supra*. This is especially true here, where the prohibition applies to *all* conversations, regardless of what the subject is, who is participating, and when and where they occur. Such a broad prohibition cannot withstand Board scrutiny, especially since protected recordings would clearly be encompassed by the rule. Because Respondent has failed to limit the rule’s reach, to assure employees that they may lawfully record protected activities, and to articulate a substantial and legitimate business justification for the rule, it violates Section 8(a)(1).

D. The Derogatory Language Policy

The Employer's policy provides for termination of employees who use "abusive, threatening or derogatory language towards employees, customers or management. The policy does not define any of those terms. Because it could result in discipline or discharge of employees who engage in protected activities, it is overly broad within the meaning of Section 8(a)(1).

Although the Board has approved rules that prohibit abusive language or threatening conduct,⁷ it has repeatedly held that rules prohibiting negative conversations and derogatory comments about managers are unlawful because they "would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 10 (2014), quoting *Claremont Resort & Spa*, 344 NLRB 832 (2005). Notably, the Board has applied this reasoning to rules prohibiting "derogatory attacks" on employer representatives, holding that such rules are facially overbroad and therefore unlawful. *Southern Maryland Hospital*, 293 NLRB 1209 (1989) enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990); see also *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) (prohibition on statements that damage or defame the employer or its reputation unlawfully overbroad); *HTH Corp.*, 356 NLRB No. 182, slip op. at 26, fn. 21 (2011), enfd. 693 F.3d 1051 (9th Cir. 2012) (rule prohibiting derogatory statements about other employees, supervisors, the employer or its parent

⁷ See, e.g., *Lutheran Heritage*, *supra*, slip op. at 1. But see *Flamingo Hilton-Laughlin*, *supra*, where the Board found unlawful a rule that prohibited, among other things, "loud, abusive or foul language" because the rule did not define its terms and could therefore be reasonably construed as "barring lawful union organizing propaganda."

corporation unlawful); *Krist Oil Co.*, 328 NLRB 825, 849 (1999) (rule prohibiting derogatory statements about the employer, its managers, employees, or customers violated 8(a)(1)). The Board has also recognized that rules prohibiting negative or derogatory language interfere with employees' right to communicate with the public about labor disputes. See, e.g., *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007).

Like the unlawful rules cited above, Respondent's rule violates Section 8(a)(1) because, on its face, it is overbroad and ambiguous. See, e.g., *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011) (rule requiring employees to work harmoniously with one another "patently ambiguous and so imprecise that employees would reasonably construe the rule as prohibiting discussions and disagreements between employees that related to protected Section 7 activities).

Respondent, citing *Tradesmen International*, 338 NLRB 460 (2002) and other cases, contends that the prohibition against derogatory language is lawful when considered in context, i.e., it appears in the same sentence as the lawful prohibition on "abusive and threatening" language, and in the same list as many other lawful prohibitions that are outside the Act's protection. But the same is true with regard to the rule in *Southern Maryland Hospital* prohibiting "derogatory attacks" on employees, yet the Board found that rule unlawful. Moreover, in contrast to *Tradesmen International*, the list of other prohibited conduct in the instant case is not restricted to "egregious" conduct. To the contrary, that list includes several relatively benign matters such as rudeness to customers, release of confidential information, and unauthorized use of company equipment, each of which could, in the appropriate circumstances, be applied

to restrict protected Section 7 activity. Accordingly, the Board should find that, to the extent that it prohibits “derogatory language,” Respondent’s policy violates Section 8(a)(1).

IV. REMEDIAL ISSUES

If the Board determines that Respondent’s maintenance of these rules violates the Act, Respondent should be ordered to, inter alia: (1) cease from maintaining a mandatory Dispute Resolution Policy that explicitly limits, or which employees reasonably would believe limits, employee’s rights to exercise their Section 7 rights to commence and prosecute employment-related legal actions in concert with other employees in any judicial forum; (2) cease from maintaining a Tape Recording Policy that would reasonably be interpreted to prevent employees from recording statements or conversations that involve Section 7 activities such as picketing or recording evidence to be presented in administrative or judicial forums in employment related matters; (3) cease from maintaining a Derogatory Language Policy which employees could reasonably interpret as prohibiting Section 7 activity; (4) rescind the Dispute Resolution Policy, the Tape Recording Policy and the Derogatory Language Policy from its Employee Handbook and Policies and Procedures; (5) notify all current and former employees who did not opt out of the Dispute Resolution Policy that the policy has been rescinded or revised and, if revised, provide them with a copy of the revised policy; and, (6) post copies of the remedial Board notice at all its facilities nationwide where any of the above-described policies are in effect. In this regard, the Board has “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

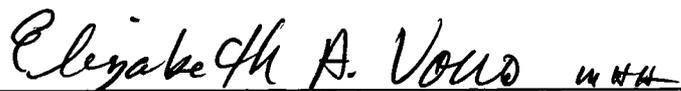
where the unlawful policy *has been or is in effect.*" *Guardsmark, LLC*, 344 NLRB 809 (2005) (emphasis added), citing, e.g. *Albertson's, Inc.*, 300 NLRB 1013 fn. 2 (1990), enf. denied on other grounds, *NLRB v. Albertson's Inc.*, 17 F.3d 395 (9th Cir. 1994).⁸ In addition to the physical posting of notices, distribute notices electronically, such as by email, posting on an intranet or internet site, or other electronic means, if Respondent customarily communicates with its employees by such means.

V. CONCLUSION

Based upon the foregoing, Counsel for the General Counsel respectfully submits that the record supports the Complaint allegations, and urges the Board to make appropriate conclusions of law and to issue the requisite remedial order. As part of the remedy, Respondent should be ordered to cease and desist from maintaining its unlawful policies, and to take certain affirmative action designed to effectuate the purposes of the Act, including, but not limited to, posting appropriate notices in its facilities nationwide for the reasons described in Section IV, above.

Dated: December 15, 2014

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⁸ Respondent takes the position that a nationwide remedy is inappropriate because it revised its Derogatory Language Policy at all locations except Durham, Connecticut in February 2013. However, the remaining policies are in effect at all of Respondent's facilities, rendering it appropriate to post the Board's remedial order nationwide. Moreover, even if the Board concludes that only the Derogatory Language Policy is unlawful, a nationwide remedy is appropriate, given the Board's language in *Guardsmark*, italicized above.

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CERTIFICATE OF SERVICE

I hereby certify that I served copies of Brief to the Board on Behalf of Counsel for the General Counsel on the parties listed below, by electronic mail, on this date.

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