

Lily Transportation Corporation and Robert Suchar.
Case 01–CA–108618

March 30, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

On April 22, 2014, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.¹

The General Counsel issued a complaint in this case on September 30, 2013, alleging that the Respondent maintained three work rules that interfered with employees' rights under the Act. With the hearing set for December 17, the Respondent, on December 6, hand distributed a revised handbook from which the three challenged rules were deleted, without comment or explanation to employees. The judge found that the rules were unlawful and that the revisions to the handbook did not constitute effective repudiation of the unfair labor practices.² We

¹ The complaint alleges that the Respondent unlawfully maintained three overly broad work rules in its employee handbook. The judge found the violations as alleged. However, without explanation, the judge ordered the Respondent to cease and desist from *promulgating* or maintaining the unlawful provisions. Although there are no specific exceptions concerning this issue, it is well settled that the Board may address remedial matters even in the absence of exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996). Accordingly, we shall modify the Order to conform to the violations found and to the Board's standard remedial language, as well as for the additional reasons discussed in text below. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

² In finding that the Respondent maintained an unlawful confidentiality rule, the judge relied on *Quicken Loans, Inc.*, 359 NLRB 1201 (2013), and *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012); and in finding that the Respondent did not effectively repudiate its unlawful rules, the judge relied on *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545 (2013). All of these cases were decided by panels that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). However, a properly constituted Board has since reaffirmed the decision in *Quicken Loans*. See 361 NLRB 904 (2014). In addition, prior to the issuance of *Noel Canning*, the United States Court of Appeals for the Fifth Circuit enforced the Board's Order in *Flex Frac*, see 746 F.3d 205 (5th Cir. 2014), and there is no question regarding the validity of the court's judgment. In agreeing that the rule against disclosing confidential information was overbroad, we also rely on *MCPc, Inc.*, 360 NLRB

agree on both counts, for the reasons stated by the judge.³

216, 216 (2014), and *Hyundai America Shipping Agency*, 357 NLRB 860, 871 (2011).

In affirming the judge's finding that the Respondent did not effectively repudiate the unlawful rules, we find it unnecessary to rely on *DirecTV* because Board law concerning repudiation is well established. See, e.g., *Fresh & Easy Neighborhood Market*, 356 NLRB 546, 554–555 (2011), *enfd.* 468 Fed. Appx. 1 (D.C. Cir. 2012); *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

The judge also relied on *NLS Group*, 352 NLRB 744 (2008), and *Brighton Retail, Inc.*, 354 NLRB 441 (2009), both of which were issued by a two-member Board and later invalidated by the Supreme Court. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010). However, the decision in *NLS Group* was reaffirmed by a three-member panel of the Board, 355 NLRB 1154 (2010), *enfd.* 645 F.3d 475 (1st Cir. 2011). We find it unnecessary to rely on *Brighton Retail*; instead, we rely on the text of Sec. 8(a)(1) of the Act.

³ As indicated, we agree with the judge's finding that the Respondent unlawfully maintained a handbook provision prohibiting the disclosure of "confidential information," which the provision defined as including "employee information maintained in confidential personnel files," because employees would reasonably conclude that this language barred them from disclosing information about wages and other terms and conditions of employment. See, e.g., *Cintas Corp.*, 344 NLRB 943, 943 (2005) (rule barring employees from releasing any information regarding their coworkers found unlawfully overbroad), *enfd.* in relevant part 482 F.3d 463, 469 (D.C. Cir. 2007); *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1 (2001). Accord: *Flex Frac Logistics v. NLRB*, 746 F.3d 205 (5th Cir. 2014) (employer rule prohibiting disclosure of confidential information, defined to include "personnel information and documents," was unlawfully overbroad).

Our dissenting colleague points out that the confidentiality provision appeared in a section of the handbook, titled "Inappropriate Conduct," which bans serious acts of misconduct, such as workplace violence, theft, and falsifying company reports. On that view, he concludes that employees would not reasonably have understood the provision to bar mere disclosure of wage and benefit information. But, in fact, the "Inappropriate Conduct" section also swept in seemingly lesser transgressions, including violations of the Respondent's attendance policy, of any efficiency rule, and more broadly of "any of the policies set forth in this Handbook." To the extent the rule was ambiguous in that respect, the burden of that ambiguity must be borne by the Respondent. See *Hyundai America Shipping Agency*, *supra*, 357 NLRB at 871; *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd.* mem. 203 F.3d 52 (D.C. Cir. 1999).

Last, our colleague's reliance on *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), is misplaced. There, the nondisclosure provision at issue targeted "Proprietary Information," and expressly referenced "employee information" only as a component of "[i]ntellectual property." Based on those limitations, the Board found that employees would reasonably understand that the provision concerned disclosure of proprietary business information, not employees' terms and conditions of employment. *Id.* at 279. The Respondent's "Inappropriate Conduct" clearly is not so limited. See *Flex Frac Logistics*, *supra*, 746 F.3d at 210 (distinguishing *Mediaone* from employer's policy barring disclosure of "personnel information and documents").

Member Miscimarra does not agree with the current Board standard regarding alleged overly broad rules and policies set forth as the first prong of *Lutheran Heritage Village-Livonia*, under which policies are found unlawful even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where "employees would reasonably construe the language to prohibit

To remedy the unfair labor practices, the judge ordered the Respondent to rescind the unlawful work rules and to distribute inserts for the employee handbook informing employees that the unlawful provisions had been rescinded.⁴ As explained below, we have revised the Order and notice to more accurately reflect the particular facts of this case.

First, we find it unnecessary to order rescission of the overly broad rules. The parties have stipulated, and the judge found, that the Respondent has already removed the unlawful rules from its handbook.

Second, in most cases involving unlawful work rules, the rules are still in effect when the Board issues its order; accordingly, in such cases the notice states that the employer *will* rescind the unlawful rules. Here, where the rules have already been rescinded, it will help clarify

Section 7 activity.” See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). Member Miscimarra would reexamine this standard in an appropriate future case. Even under *Lutheran Heritage*, however, he would dismiss the complaint allegation that the Respondent’s handbook rule against “[d]isclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” was unlawful on its face. In Member Miscimarra’s view, the term “confidential” appears both in the general prohibition (“confidential information”) and in the example (“confidential personnel files”), which suggests the term is a catch-all phrase similar to lawful “just cause” provisions contained in countless collective-bargaining agreements. See *Triple Play Sports Bar*, 361 NLRB 308, 318 (2014) (Member Miscimarra, dissenting in part). Moreover, the prohibition appears alongside others in the employee handbook under the heading “Inappropriate Conduct,” and most of the listed prohibitions address serious acts of misconduct, including “violence or threats of violence,” “sale, use, possession or transfer of illegal drugs,” “theft,” “[g]iving false information in connection with any Company report,” “insubordination,” “possession of firearms or weapons while at work,” “[v]iolation of the Company’s Harassment or EEO policies,” and “[v]erbal or physical abuse of other employees,” and nowhere does the handbook expressly prohibit employees from discussing wages, benefits, or other terms and conditions of employment. For these reasons, Member Miscimarra believes employees would reasonably understand the challenged confidentiality rule, in context, to prohibit serious acts of misconduct, such as misappropriating confidential personnel files and disclosing undisputedly confidential information, such as an employee’s medical records or social security number. Employees would not have reasonably construed the challenged rule, juxtaposed as it was with bans on major transgressions, to prohibit discussions of wages and benefits merely because a personnel file might contain such nonconfidential information, or because a few lesser types of misconduct were also in the listed prohibitions. Cf. *Mediaone of Greater Florida, Inc.*, 340 NLRB at 278–279 (finding lawful a rule prohibiting disclosure of “employee information, including organizational charts and databases,” where context indicated that rule was limited to disclosure of employer’s private business information). Member Miscimarra joins his colleagues in the remainder of their findings.

⁴ The judge also ordered the Respondent to post the remedial notice at all facilities where the unlawful work rules were in effect. We agree with the judge that nationwide notice posting is appropriate. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As explained in text, however, we find that the wording of the notice should be modified.

to employees the status of the unlawful rules if the notice reflects that the rules *have been* rescinded, along with the circumstances surrounding the rescission. We have revised the notice accordingly.

Finally, we do not order the Respondent to provide inserts for the handbook advising employees that the unlawful rules have been rescinded. We do not think that distributing an insert simply stating that the rules have been rescinded would enlighten employees and remedy the violation. Rather than ordering the distribution of inserts, we have modified the notice to inform employees of the background circumstances surrounding the distribution of the modified handbook.

ORDER

The National Labor Relations Board orders that the Respondent, Lily Transportation Corporation, Cheshire, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

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

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

(a) Within 14 days after service by the Region, post at all of Respondent's facilities nationwide copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to 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 any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 5, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 1 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.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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.

In December 2013, we distributed to you a new employee handbook. That new handbook revised the previous em-

ployee handbook to eliminate three rules that were alleged to violate Federal labor law. The National Labor Relations Board has now found that those rules were unlawful.

WE WILL NOT maintain a provision in our employee handbook entitled "Personal Appearance and Demeanor" that contains the following language: "No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp."

WE WILL NOT maintain a provision in our employee handbook entitled "Inappropriate Conduct" that contains the following language: "Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files."

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

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE HAVE rescinded the foregoing rules and have deleted them from the employee handbook distributed to employees on or about December 6, 2013.

LILY TRANSPORTATION CORPORATION

The Board's decision can be found at www.nlr.gov/case/01-CA-108618 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



Thomas E. Quigley, Esq., for the General Counsel.
Katherine D. Clark, Esq. (Stoneman, Chandler & Miller LLP),
of Boston, Massachusetts, for the Respondent,

DECISION

STATEMENT OF THE CASE

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

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

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

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Lily Transportation, a corporation, is a dedicated logistics carrier that delivers goods from a Whole Foods distribution center in Cheshire, Connecticut.

¹ All dates are in 2013, unless otherwise indicated.

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

cut, to other Whole Food facilities throughout the New England States. During a representative 1-year period, Respondent performed services valued in excess of \$250,000 and purchased and received at its Cheshire facility, goods valued in excess of \$5000 directly from points outside the State of Connecticut. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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

A. Applicable Legal Standards

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

In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

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

Section 7 of the Act guarantees employees the right “to self-organization, to form, join, or assist labor organizations, to

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

The test for evaluating if the employer’s rule violate Section 8(a)(1) is “whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities.” *Hills & Dales General Hospital*, 360 NLRB 611, 615 (2014). As with all alleged 8(a)(1) violations, the judge’s task is to “determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances.” *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

B. The Dress Code Rule

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

I. PERSONAL APPEARANCE AND DEMEANOR

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

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

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

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

Analysis and Discussion

Under Section 7 of the Act, employees have the right to wear and display union insignia while at work. *Republic Aviation*

Corp. v. NLRB, 324 U.S. 793, 801–803 (1945). In particular, “the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and the respondent’s curtailment of that right is clearly violative of the Act.” *Republic Aviation Corp.*, above at 802 fn. 7. The test is whether the insignia prohibition reasonably tends to interfere with the free exercise of employee rights under the Act.” *St. Luke’s Hospital*, 314 NLRB 434 fn. 4 (1994); *Albis Plastics*, 335 NLRB 923, 924 (2001). Absent “special circumstances” justifying restrictions on union insignias or apparel, the promulgation or enforcement of a rule prohibiting the wearing of such insignia violates Section 8(a)(1) of the Act. “[T]he Board has found special circumstances justifying proscription of union insignia and apparel when their display may jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, as part of its business plan, through appearance rules for its employees.” *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982); *Smithfield Packing Co.*, 344 NLRB 1 fn. 20 (2004); *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1086 (2003); and *W San Diego*, 348 NLRB 372 (2006).

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

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

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

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

The Respondent also argues that the dress code allows employees to seek permission to wear clothing insignias or logos and maintains that the General Counsel has not presented evidence that employees have sought such permission. While true, I find nevertheless that the mere fact that employees would have to seek approval to wear clothing insignias or logos demonstrates that the rule is unlawfully overbroad and restrictive because the employees would still reasonably read the rule as prohibiting the wearing of any union insignia and to seek permission would chill their Section 7 rights. See *Lafayette Park Hotel*, above at 825 (holding that maintaining rules that are likely to chill Sec. 7 rights “is an unfair labor practice, even absent evidence of enforcement”).

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

C. The Confidential Information Rule

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

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

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

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

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

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

Analysis and Discussion

The issue is whether a particular portion of the confidentiality rule is unlawfully overbroad because employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, above. First, there does not appear to be any dispute over the validity of the portion of the rule that prohibit employees from disclosing acquired confidential or proprietary information about the Respondent and its clients and not to discuss with outsiders such information since that portion is “. . . designed to protect the confidentiality of the [the Company’s] proprietary business information.” See *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003); also *Super K-Mart*, 330 NLRB 263 (1999) (affirming the employer’s “legitimate interest in maintaining the confidentiality of its private business information”).

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

There is no exception to the confidentiality rule which would permit employees to discuss wages, compensation or any other specific terms and conditions of employment. While I find that the Respondent apparently sought to prevent the disclosure of proprietary and financial information, I also find that the Respondent went on to include “personnel files,” which would mean that disclosure of various kinds of information about employees, such as wages, would also be prohibited. In *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), affd. in relevant part 746 F.3d 205 (5th Cir. 2014), the Board restated established precedent that “. . . nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act,” citing *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011) (finding rule unlawful that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”); and *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that

stated all information about “employees is strictly confidential” and defined “personnel records” as confidential).

Here, the Respondent’s confidentiality rule does not present accompanying language that would tend to restrict its application. It therefore allows employees to reasonably assume that it pertains to—among other things—certain protected concerted activities, such as communications that are critical of the Respondent’s treatment of its employees. By including nondisclosure of “employee information in confidential personnel files,” in its confidential policy, the Respondent leaves to the employees the task of determining what is permissible and “. . . speculate what kind of information disclose may trigger their discharge.” *Flex Frac*, above at 1140. In trying to comply with this restriction, employees would reasonably believe they would not be permitted to discuss with other employees or union representatives, their wages, benefits and other terms and conditions of employment. *MCPc, Inc.*, 360 NLRB 216 (2014) (the Board held that an employee handbook stating that “dissemination of confidential information, such as personal or financial information, etc., will subject the responsible employee to disciplinary action or possible termination” as an overly broad confidentiality rule and violated Section 8(a)(1) because employees would construe the rule to prohibit discussion of wages and other terms and conditions of employment with their coworkers, an activity protected by Section 7 of the Act).³

The Respondent argues that the portion found to be offensive by the General Counsel must be read in its entire context. As noted, in finding that the maintenance of a rule did not violate Section 8(a)(1), the Board’s analysis followed the dictates of *Lutheran Heritage*, which require that the rule be considered in context. 343 NLRB at 647 fn. 6. The problem with the Respondent’s argument is that we are not dealing with the lawfulness of the “Confidentiality of Information” policy in the handbook at pages 8, 9 but rather with the facial challenge of the single sentence under the “Inappropriate Conduct” provision in the handbook at pages 23, 24.

The “disclosure of confidential information, including Company, customer information, and employee information maintained in confidential personnel files” resulting in potential discipline does not reference the confidentiality of information policy located towards the front of the handbook. Employees would not necessarily understand that the inappropriate conduct statement refers to the confidential policy statement. The inappropriate conduct statement does not refer to or reproduces the confidentiality of information policy statement. Employees would reasonably assume that the “disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” standing alone could result in discipline. It is unlikely that employees reading this sentence would also search the handbook and derive a narrower interpretation of the prohibited disclosure of information by reading the two separate provisions together, especially in light of the fact, that the confiden-

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

tiality statement is located at the front of the handbook while the violation for disclosing of employee information is one of numerous conduct violations printed near the end of the handbook. See *Boulder City Hospital, Inc.*, 355 NLRB 1247, 1248 (2010).

Accordingly, I find that the Respondent’s maintenance of a rule that prohibits employees from disclosing employee information maintained in a confidential personnel files has a reasonable tendency to inhibit employees’ protected activity and, as such, violates Section 8(a)(1). *NLS Group*, 352 NLRB 744, 745 (2008); *Security Walls, LLC*, 356 NLRB 596 (2011); and *Quicken Loans, Inc.*, 359 NLRB 1201 (2013).

D. The Information Posting Rule

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

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

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

Analysis and Discussion

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

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

In determining whether an employer’s maintenance of a work rule reasonably tends to chill employees in the exercise of Section 7 rights, the Board will give the work rule a reasona-

ble reading and refrain from reading particular phrases in isolation.

I find that a reasonable reading of this work rule restricts employees' rights to engage in protected activity. The posting on the internet is not restricted to confidential or even company information. This provision prohibits the posting of *any information* without the approval of the Respondent. The rule does not distinguish between disclosing information about customers or company business, which is conceivably lawful,⁴ and any information, which is inherently overbroad. In *Lafayette Park*, above, the employer maintained a rule prohibiting employees from making "false, vicious, profane or malicious statements" regarding the employer, the Board held that the rule reasonably tended to chill employee exercise of Section 7 rights. In *Claremont Resorts & Spa*, 344 NLRB 832 (2005), the employer issued a "Top Ten List" of prohibited conduct to include "Negative conversations about associates and/or managers are in violation of our Standards of Conduct" that may result in disciplinary action, the Board held that the rule would ". . . reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaged in protected activities." In *Hills & Dales General Hospital*, 360 NLRB 611 (2014), the employer maintained a rule that prohibited employees from making "negative comments about our fellow team members," including coworkers and managers, the Board held that the negative comments and negativity language was unlawful.

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

E. Repudiation of the Work Rules

In November 2013, the Respondent revised the employee handbook and in doing so, removed the offending three rules cited in the complaint. The confidentiality of information rule no longer makes any references regarding potential discipline of an employee for disclosing employee information contained in confidential personnel records. The revised rule speaks only of confidential information relating to such items as customer lists, transactions, characteristics of customers and suppliers, pricing policies, negotiating strategies, and financial information. The revised dress code no longer prohibits the wearing logos or insignias on the employee uniform. The posting of comments on the internet rule no longer holds employees re-

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

⁵ Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer." *Flex Frac*, above at 1132.

sponsible for making disparaging, negative, false, or misleading information or comments about Lily or Lily's employees (Jt. Exh. 2).

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

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

Analysis and Discussion

Under *Passavant Memorial Area Hospital* and its progeny, *Rivers Casino*, 356 NLRB 1151, 1152 (2011); *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003); and *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB 545 (2013), the Board held that:

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

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

I find that the Respondent's purported repudiation was not timely. In *Passavant*, supra at 139, the Board held that the

⁶ In *Claremont Resort & Spa*, 344 NLRB 832, two of the three Board members stated that they "do not necessarily endorse all the elements of *Passavant*." However, *Passavant* remains good law as recent as 2013 under *DirectTV*, above. Additionally, unlike *Claremont*, here, the Respondent failed repudiation of its work rules *under all the elements of Passavant* except arguably the element that there were no proscribed conduct on the employer's part after publication.

employer was not timely after disavowal “. . . until nearly the eve of the issuance of the complaint. . . .” In *DirecTV*, 359 NLRB 545, 549, the employer did not post its disclaimers until nearly a full year after it promulgated the rules and waited until after the complaint had issued. In the present case, the Respondent did not repudiate the three work rules more than 2 months after the complaint was filed. See *Fresh & Easy Neighborhood Market v. NLRB*, 468 Fed. Appx. 1 (D.C. Cir. 2012) (upholding the Board’s conclusion that repudiation after the complaint was issued was untimely and follows logically from the holding in *Passavant*). In addition to acting in an untimely manner, “. . . the Respondent did not effectively repudiate its misconduct because it did not admit wrongdoing.” *DirecTV*, supra at 549. In revising the handbook and eliminating the three work rules at issue, the Respondent never disclaimed the inappropriateness of the language and more significantly, the Respondent never acknowledged its unlawful conduct. *Branch International Services*, 310 NLRB 1092, 1105 (1993). Equally as significant, the Respondent failed to publish its repudiation of the offending work rules to its employees. The Board held in *DirecTV*, supra at 549, above that “. . . by failing to publish the repudiation, never provided assurances to employees that, going forward, the employer will not interfere with the exercise of their Section 7 Rights.” See *Intermet Stevensville*, 350 NLRB 1349, 1350 fn. 6, 1383 (2007) (no effective repudiation in part because employer “did not admit any wrongdoing, it simply informed employees that it was clarifying its policy”). Under these circumstances, Respondent has fallen far short of meeting its burden under *Passavant* of establishing an effective repudiation of its conduct.

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

CONCLUSIONS OF LAW

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

2. During a representative 1-year period, the Respondent performed services valued in excess of \$250,000 and purchased and received at its Cheshire facility, goods valued in excess of \$5000 directly from points outside the State of Connecticut.

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

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

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

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

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

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by engaging in certain unfair labor practices, I find that the Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining unlawful overly broad work rules, I find that the Respondent be ordered to (1) rescind or revise those rules found to be unlawful from the employee handbook, (2) post “. . . an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.” *Guardsmark, LLC*, 344 NLRB 809, 812 (2005); and *DirecTV*, above at 550, and (3) provide disclaimer inserts in the employee handbook that the unlawful provisions have been rescinded or revised.⁷

[Recommended Order omitted from publications.]

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