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**Essendant Co. and Teamsters Local Union No. 570
affiliated with The International Brotherhood of
Teamsters.** Case 5–CA–170845

March 16, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS
PEARCE AND MCFERRAN

On October 18, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions, a supporting brief, and a reply brief. The Respondent filed an answering brief. The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings,¹ findings, and conclusions and to adopt the recommended Order.²

¹ The General Counsel excepts, in part, to the judge’s failure to rule on his motion to strike portions of the Respondent’s brief to the judge, which cited a Wikipedia page and an online abstract, because they were not part of the stipulated record. We find it unnecessary to pass on that exception because the judge did not rely on those portions of the Respondent’s brief and, in any event, the cited material would not affect the result in this case.

² Acting Chairman Miscimarra joins his colleagues in dismissing the complaint, which alleged that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting “distribution or posting of advertising material, handbills or printed or written literature . . . at any time in work areas.” In finding the Respondent’s rule lawful, Acting Chairman Miscimarra relies on *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (holding that employers may lawfully prohibit distribution of written material in work areas during both working and nonworking time). He also believes that an employer may lawfully prohibit the posting of written materials anywhere on its property, provided the rule—like the rule at issue here—is nondiscriminatory. See *Fleming Hilton-Laughlin*, 330 NLRB 287 (1999) (dismissing allegation that employer violated Sec. 8(a)(1) by maintaining a “policy requiring prior management approval before any employee posts a written notice on the hotel’s premises”). In dismissing the 8(a)(1) allegation, Acting Chairman Miscimarra does not rely on the judge’s application of the “reasonably construe” standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), a standard he believes should be overruled by the Board or repudiated by the courts for the reasons set forth in his separate opinion in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part). Moreover, even if he were to apply the “reasonably construe” standard here, and even if—as the General Counsel contends—employees would reasonably construe the Respondent’s rule to interfere with the electronic distribution of materials for Section 7 purposes during nonworking time to computers in work areas, Acting Chairman Miscimarra would find the rule lawful. See *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 18–28 (Member Miscimarra, dissenting) (setting forth then-Member Miscimarra’s rationale for adhering to the holding of *Register Guard*, 351 NLRB 1110 (2007),

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. March 16, 2017

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Andrew Andela, Esq., for the General Counsel.
Joseph E. Tilson, Esq. (Cozen O’Connor), of Chicago, Illinois,
for the Respondent.

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A.)*, of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was submitted to me on a stipulated record. Teamsters Local 570 filed the initial charge in this matter on February 29, 2016. The General Counsel issued a complaint on June 30, 2016. The stipulation was finalized on August 21, 2016, and the General Counsel and Respondent filed briefs on October 3, 2016.

Respondent has offices in Hanover and Elkton, Maryland. It provides wholesale office supplies. In the 12-month period ending May 31, 2016, Respondent sold and shipped goods from its Maryland facilities directly to points outside of Maryland valued in excess of \$50,000. Respondent admits that it is an employer engaged in commerce pursuant to Sections 2(2), (6), and (7) of the Act. It also admits that the Charging Party Union, Teamsters Local 570 is a labor organization within the meaning of Section 2(5) of the Act.

On January 12, 2016, Respondent issued an employee handbook to employees at all its U.S. facilities, including employees in a bargaining unit represented by the Charging Party Union. The handbook contains the following rule which the General Counsel alleges violates Section 8(a)(1) of the Act.

The Company believes that associates should not be disturbed or disrupted in the performance of their job duties. For this reason, solicitation of any kind by one associate of another associate is prohibited while either associate is on his or her

that employers may lawfully limit the use of their email systems to business purposes).

working time. In addition, distribution or posting of advertising material, handbills or printed or written literature **of any kind** is prohibited at any time in work areas. (emphasis added).

Analysis

Applicable Legal Principles

The Board has long recognized the principle that working time is for work and has permitted employers to adopt and enforce rules prohibiting solicitation during working time, absent evidence that the rule was adopted for a discriminatory purpose, *Peyton Packing Co., Inc.*, 49 NLRB 828, 843 (1943). However, an employer cannot generally prohibit solicitation by employees in nonwork areas during nonworking time.

In *Stoddard-Quirk Mfg. Co.* 138 NLRB 615 (1962), the Board drew a distinction between work rules prohibiting oral solicitation and those prohibiting distribution of written materials. The Board noted that written material, because of the potential for litter, raises a hazard to production regardless of whether it occurs on working time or nonworking time. Thus, it held that an employer could prohibit the distribution of written material in work areas during nonworking time.

On the other hand, the Board has also held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true, a violation is established by a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) that the rule was promulgated in response to protected activity; or (3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board stated that a rule would not violate the Act merely because it *could* be read to prohibit protected activity.

In *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), the Board held that there is a presumption that employees with access to their employer's email system are entitled to use the system to engage in protected activity via that email system while on nonworking time.¹

The General Counsel contends that Respondent's handbook rule violates Section 8(a)(1) solely because employees would reasonably construe it to prohibit employees from distributing electronic material during nonwork time to computers in work areas. More specifically, the General Counsel in this case argues that by including the phrase "of any kind," Respondent's rule violates the Act. At page 1 of his brief, the General Counsel states:

By employing the phrase "of any kind," Respondent has left employees no choice but to believe that they are prohibited from engaging in electronic posting and distribution.

Again at page 8, the General Counsel states:

Here Respondent's inclusion of the phrase "of any kind" created a rule so vast in scope that employees in today's workplace should not be expected to conclude it prohibits only the narrow definition that the Board has traditionally ascribed to "distribution of literature," i.e., *the physical distribution of paper*.

However, at page 10 of his brief, the General Counsel appears to vacillate as to whether Respondent's rule would violate the Act even without the words "of any kind."

In light of the technological changes recognized throughout *Purple Communications*, it is not plausible to assume that employees today consider "printed or written" and "electronic" to be mutually exclusive. How for instance, does one send a text message without first "writing" it?

... who could expect employees to reasonably conclude that the word "posting" involves only thumbtacks or a stapler, and not, for example, complaining about wages in a Facebook post? Employees confronted with determining what Respondent means by "of any kind" are likely to decide that it is safest just to avoid finding out.

I conclude that the phrase "of any kind" refers to the kind of literature that may be posted, i.e., charitable, political, commercial, rather than to method of posting. Moreover, the modifier "of any kind" cannot be reasonably read in any other way. Finally, the phrase "of any kind" makes no difference as to whether Respondent's rule violates the Act. Below is the rule with this phrase excised:

The Company believes that associates should not be disturbed or disrupted in the performance of their job duties. For this reason, solicitation of any kind by one associate of another associate is prohibited while either associate is on his or her working time. In addition, distribution or posting of advertising material, handbills or printed or written literature is prohibited at any time in work areas.

One could just as easily argue that without the phrase "of any kind," the prohibition of "distribution or posting" written literature is equally violative if it reasonably would be read to prohibit email messages sent on nonwork time to a computer located in a work area. I find that Respondent's rule cannot be reasonably read to prohibit email messaging on nonworking time to a computer in a work area in either case.

The complaint is dismissed.

¹ The stipulation in this case is silent as to whether Essendant employees have access to the company's email system.