

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION

and

Case 08-CA-090132

THE UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75

**GENERAL COUNSEL'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

Counsel for the General Counsel (General Counsel) respectfully submits this Response to the Notice to Show Cause issued by the National Labor Relations Board (Board) on October 2, 2018. For the reasons explained below, the General Counsel does not oppose the remand to the Administrative Law Judge for further proceedings consistent with the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017) of the "personal use" rule. The remaining rules at issue are prima facie lawful under *Boeing*, and the General Counsel respectfully requests that the Board dismiss those allegations.

I. Procedural Background

The United Food and Commercial Workers Union, Local 75 (the Union) alleged in the charge that the American Red Cross Blood Services, Western Lake Erie Region (the Employer) violated Section 8(a)(1) of the Act by maintaining certain unlawful rules.¹ (Exh. A). A Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing issued on November 30, 2012. (Exh. B). A hearing was held on February 4, 2013 in Toledo, Ohio, before Administrative Law Judge Mark Carissimi. ALJ Carissimi rendered his decision on June 4, 2013 in JD-38-13, finding that some, but not all, of the alleged rules were unlawful. (Exh. C).

¹ The original charge was filed on September 27, 2012. The charge was amended on November 29, 2012.

On August 2, 2013, Counsel for the Acting General Counsel filed Exceptions to the ALJD. (Exh. D). The Respondent also filed Exceptions, which Counsel for the Acting General Counsel Answered on August 16, 2013. (Exhs. E and F).

While the Exceptions have been pending before the Board, the Board issued its decision in *Boeing Co.*, overruling the “reasonably construe” test in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). The instant Notice to Show Cause issued on October 2, 2018.

II. The Board Should Remand the Respondent’s “Personal Use” Rule, the Confidentiality Rules, the “Unlawful Litigation” rule and the “Communication Systems Policy” to the ALJ for Further Processing

The General Counsel excepted to the ALJ’s dismissal of the “Personal Use” rule under *Lutheran Heritage Village – Livonia*, which states:

Code of Business and Ethics. No employee or volunteer shall engage in the following actions:

[a.] Personal use. Authorize the use of or use for the benefit or advantage of any person, the name, emblem, endorsement, service or property of the American Red Cross, except in conformance with American Red Cross Policy. (Amended Consolidated Complaint paragraph 8(A)(i)[a.]).

The General Counsel does not oppose the remand to the ALJ of this work rule for further processing consistent with the decision in *Boeing*. Under *Boeing*, work rules prohibiting the use of employer logos and trademarks by employees are category 1 rules and are lawful. However, this rule also prohibits the use of the Employer’s name, which falls into category 2 and thus requires individualized scrutiny. The General Counsel submits that the negative impact of this rule upon employees’ Section 7 rights is apparent, or alternatively outweighs any business justification the Respondent may advance in support of a contrary finding. Therefore, the General Counsel does not oppose that this rule identified at Amended Consolidated Complaint

paragraph 8(A)(i)[a] should be remanded to the ALJ for further processing consistent with the Board's decision in *Boeing*.

Respondent excepted to ALJ Carissimi's decision finding the Employer's various confidentiality rules, which includes its "Communication System Policy" and its "litigation" rule to be unlawful. The rules, alleged in the Amended Consolidated Complaint at paragraphs 6, 7, 8(A)(i)(d), 8(A)(iv)(3), 8(A)(vi) are as follows:

2005 Confidential Information and Intellectual Property Agreement (CIIPA):

"Confidential information shall include but not be limited to: information relating to Red Cross' . . . (i) personnel . . . (ii) employees ... [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross' agents.

Employee Handbook and Code of Conduct:

[No employee shall] "Disclose any confidential American Red Cross information that is available solely as a result of an employee's . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.

[Prohibiting the release of] "Confidential employee information without authorization."

Communication Systems Policy:

3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization."

1993 confidentiality agreement:

"[A]ll information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked "confidential"; and All Financial Information."

2002 CIIPA:

“I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross . . . benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee.”

Counsel for the General Counsel does not oppose the remand to the ALJ of these confidentiality rules for further processing. The Employer’s confidentiality policies include prohibitions that warrant individualized scrutiny, as well as portions of the policies that are unlawful to maintain as the rules prohibit the disclosure of employees’ personnel records, financial information, benefits and compensation. These rules should be remanded to the ALJ for consideration under *Boeing*.

III. The Board Should Dismiss the “Best Interest” Rule, the “Conflict of Interest” Rule and the “Unsatisfactory Conduct” Rule Pursuant to *Boeing*

The General Counsel contended in its Exceptions that the ALJ erred in finding the Employer’s “best interest” rule, “conflict of interest” rule, and “unsatisfactory conduct” rule to be lawful under *Lutheran Heritage Village – Livonia*. The rules, contained in the Employer’s handbook, are as follows:

Code of Business and Ethics. No employee or volunteer shall engage in the following actions:

[h.] Contrary to the Best Interest of the Red Cross. Operate or act in any manner that is contrary to the best interest of the American Red Cross. (Amended Consolidated Complaint paragraph 8(A)(i)[h.]).

Respondent’s work rules. Violation of the work rules may result in discipline which may include termination of employment. Behaviors that constitute an infraction, . . . , are as follows:

*Willfully allowing a “conflict of interest,” such as financial, personal or otherwise. (Amended Consolidated Complaint paragraph 8(A)(vi)).

Respondent's work rules. Violation of the work rules may result in discipline which may include termination of employment. Behaviors that constitute an infraction,, are as follows:

*Unsatisfactory conduct. (Amended Consolidated Complaint paragraph 8(A)(vi)).

Counsel for the General Counsel respectively requests that the Board dismiss these work rule allegations as under *Boeing*, the rules are category 1 rules and are prima facie lawful. Accordingly, remanding these work rule allegations to the ALJ would expend unnecessary time and resources. Each of these rules, when considered under “reasonable interpretation” standard as set forth in *Boeing*, would not prohibit or interfere with the exercise of employees’ rights under Section 7 of the Act and/or the potential adverse impact on protected rights is outweighed by apparent business justifications associated with the rules. The General Counsel requests that the Board dismiss paragraphs 8(A)(i)[h.] and 8(A)(vi) of the Amended Consolidated Complaint in lieu of remanding the work rules for further consideration by the ALJ.²

IV. Conclusion

For the reasons stated above, the General Counsel does not oppose the remand of the “personal use” rule as alleged in the Amended Consolidated Complaint at paragraph 8(A)(i)(a) and the confidentiality rules at paragraphs 6, 7, 8(A)(i)(d), 8(A)(iv)(3), and 8(A)(vi) and also respectfully requests that the Board dismiss the allegations at paragraphs 8(A)(i)[h.] and 8(A)(vi) pleading the “best interest” rule, “conflict of interest” rule, and “unsatisfactory conduct” rule to be unlawful.

Dated at Cleveland, Ohio this 16th day of October 2018.

/s/ Gregory M. Gleine

² The General Counsel does not argue that the following additional work rules contained within paragraph 8(A)(vi) should be dismissed: *Release of, . . . , client or employee information without authorization; and * Participating in a deliberate slowdown or work stoppage.

GREGORY M. GLEINE
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 8
1240 E 9TH ST, ROOM 1695
CLEVELAND, OH 44199-2086

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 16th day of October, 2018:

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Jroca@Gallonlaw.com

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General Counsel
UFCW Local 75
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Form NLRB - 501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
08-CA-090132	9/27/12

INSTRUCTIONS:

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1 EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer AMERICAN RED CROSS BLOOD SERVICES, WESTERN LAKE ERIE REGION		b. Tel. No. (419)380-1143
d. Address (street, city, state ZIP code) 1111 RESEARCH DR, TOLEDO, OH 43614-2798		c. Cell No.
e. Employer Representative JUDY LEECH		f. Fax No. (419)754-2255
		g. e-Mail
		h. Dispute Location (City and State) Toledo, OH
i. Type of Establishment (factory, nursing home, hotel) Blood Service Provider	j. Principal Product or Service Process blood product	k. Number of workers at dispute location 50
1. The above-named employer has engaged in and is engaging unfair labor practices within the meaning of section 8(b), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) The above-named Employer has maintained an overly broad Employee Handbook, Policies and Employee Handbook for Union Employees, Confidential Information and Intellectual Property Agreement, Confidentiality Policy and American Red Cross Code of Conduct that, by their terms, prohibit employees from engaging in activity protected by Section 7 of the Act. (see attached)		
3. Full name of party filing charge (if labor organization, give full name, including local name and number) UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75		
4a. Address (street and number, city, state, and ZIP code) 7250 POE AVENUE SUITE 400 DAYTON, OH 45414		4b. Tel. No. 937-665-0075
		4c. Cell No.
		4d. Fax No. 037-665-0600
		4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. 937-665-1923
By: 	PAMELA M. NEWPORT, COUNSEL	Office, if any, Cell No.
(signature of representative or person making charge)	Print Name and Title	Fax No. 937-665-0600
Address: 7250 POE AVENUE SUITE 400 DAYTON, OH 45414	Date: SEPT. 27 2012	e-Mail pamela.nowport@ufcw75.org

RECEIVED
SEP 27 2012
NLRB
REGION 8

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

GC Ex A

GC EX

Attachment to Charge

Employee Handbook Effective April 30, 2010

CONDUCT POLICIES

- Actions Prohibited by the Code of Business and Ethics--Paragraph a (personal use); Paragraph d (confidentiality); and Paragraph h (contrary to the best interest of the American Red Cross)
- Investigations, Compliance and Ethics-Formal Dispute Resolution
- Progressive Discipline
- Red Cross Communication Systems, Paragraph 3
- Non-Solicitation/Distribution of Literature
- Work Rules--Participating in a deliberate slowdown or work stoppage
- Western Lake Erie Specific Work Rules—Authorized placement or posting of information in break rooms, or in common areas.

Personnel Policies and Employee Handbook for Union Employees, January 2007

- Code of Conduct Guidelines, Paragraphs 4 and 5
- Confidential Information and Intellectual Property
- Red Cross Communication Systems, Paragraph 1, Bullet Points 3 (solicitation) and 7 (distribution)
- Solicitations
- Work Rules--Paragraph 6 (postings); Paragraph 27 (removal of documents or property); Paragraph 44 (discussions)

Confidential Information and Intellectual Property Agreement, Revised July 2002

(employees required to sign)

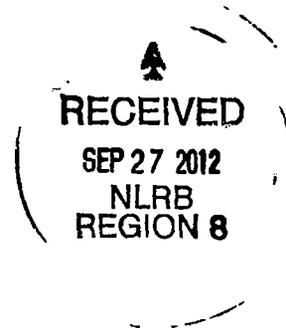
- Paragraphs 2 and 7

Confidentiality Policy, Revised July 1993

(employees required to sign)

American Red Cross Code of Conduct

(employees required to sign)



Form NLRB - 501 (2-08)

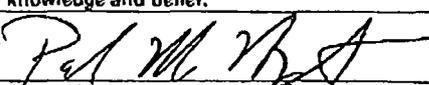
UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
08-CA-090132	11/29/12

FIRST AMENDED INSTRUCTIONS:

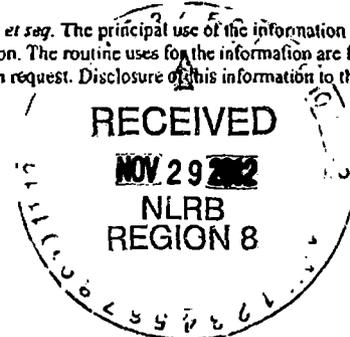
File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer AMERICAN RED CROSS BLOOD SERVICES, WESTERN LAKE ERIE REGION		b. Tel. No. (419)380-1143
d. Address (street, city, state ZIP code) 1111 RESEARCH DR, TOLEDO, OH 43614-2798		c. Cell No.
e. Employer Representative JUDY LEECH		f. Fax No. (419)754-2255
		g. e-Mail
		h. Dispute Location (City and State) Toledo, OH
i. Type of Establishment (factory, nursing home, hotel) Blood Service Provider	j. Principal Product or Service Process blood product	k. Number of workers at dispute location 50
1. The above-named employer has engaged in and is engaging unfair labor practices within the meaning of section 8(a), subsections (1) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.		
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) The above-named Employer has maintained an overly broad Employee Handbook, Policies and Employee Handbook for Union Employees, Confidential Information and Intellectual Property Agreement, Confidentiality Policy and American Red Cross Code of Conduct that, by their terms, prohibit employees from engaging in activity protected by Section 7 of the Act. <i>(see attached)</i>		
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		4c. Cell No.
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5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization) UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. 937-665-1923
By: 	PAMELA M. NEWPORT, COUNSEL	Office, if any, Cell No.
(signature of representative or person making charge)	Print Name and Title	Fax No. 937-665-0600
Address: 7250 POE AVENUE SUITE 400 DAYTON, OH 45414	Date:	e-Mail pamela.newport@ufcw75.org

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Attachment to Charge

Employee Handbook Effective April 30, 2010

CONDUCT POLICIES

- Actions Prohibited by the Code of Business and Ethics--Paragraph a (personal use); Paragraph d (confidentiality); and Paragraph h (contrary to the best interest of the American Red Cross)
- Investigations, Compliance and Ethics-Formal Dispute Resolution
- Progressive Discipline
- Red Cross Communication Systems, Paragraph 3
- Non-Solicitation/Distribution of Literature
- Work Rules--Participating in a deliberate slowdown or work stoppage
- Western Lake Erie Specific Work Rules—Authorized placement or posting of information in break rooms, or in common areas.

Confidential Information and Intellectual Property Agreement, Revised July 2002

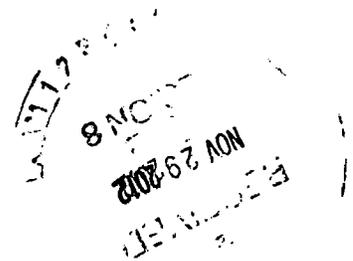
(employees required to sign)

Confidentiality Policy, Revised July 1993

(employees required to sign)

American Red Cross Code of Conduct Certification

(employees required to sign)



**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-086902

HEIDI COUTCHURE, AN INDIVIDUAL

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-086929

AMANDA LAURSEN, AN INDIVIDUAL

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-090132

**THE UNITED FOOD AND COMCERICAL WORKERS
UNION, LOCAL 75**

**SECOND ORDER CONSOLIDATING CASES,
AMENDED CONSOLIDATED COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 08-CA-090132 filed by the United Food and Commercial Workers Union, Local 75 (Union) against the American Red Cross Blood Services, Western Lake Erie Region (Respondent) is consolidated with Case 08-CA-086902, filed by Heidi Coutchure (Coutchure), an Individual and

GC Ex B

Case 08-CA-086929, filed by Amanda Laursen (Laursen), an Individual in which an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on October 24, 2012.

This Second Order Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 151 et seq. (the Act) and Section 102.15 of the Board's Rules and Regulations, and alleges that Respondent has violated the Act as described below:

1. The charges in the above cases were filed by the respective Charging Parties, as set forth in the following table, and served upon the Respondent by mail on the dates indicated:

<i>Case No.</i>	<i>Amendment</i>	<i>Charging Party</i>	<i>Respondent</i>	<i>Date Filed</i>	<i>Date Served</i>
08-CA-086902		Heidi Coutchure, an Individual	Employer	August 9, 2012	August 9, 2012
08-CA-086929		Amanda Laursen, an Individual	Employer	August 9, 2012	August 9, 2012
08-CA-090132		Union	Employer	September 27, 2012	September 28, 2012
08-CA-090132	Amended	Union	Employer	November 29, 2012	November 30, 2012

2. (A) At all material times, Respondent has been an unincorporated chartered unit of the American National Red Cross, a federally chartered corporation, with an office and facility located in Toledo, Ohio where it is engaged in the collection, processing and distribution of blood and blood-related materials.

(B) Annually, Respondent, in conducting its business operations described above in paragraph 2(A) derives revenues in excess of \$250,000 and purchases and receives products valued in excess of \$50,000 directly from points located outside the State of Ohio.

3. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

4. At all material times, the United Food and Commercial Workers Union, Local 75 (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

5. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Judy Leech	Human Resources Manager
Kathy Smith	Collections Director

6. (A) Since at least March 28, 2012, Respondent has maintained a Confidentiality Policy. It reads in relevant part:

All information obtained by virtue of employment with the American Red Cross Blood Services is to be held in the strictest confidence. This includes all information in donor, patient, personnel, and financial records...Any unwarranted disclosure will result in disciplinary action up to and including termination according to the personnel policy and/or collective bargaining agreement between ARCBS and UFCW...

The following are some examples of confidential information:

- *All information on litigation
- *All documents marked "Confidential"
- *All financial information

(B) Respondent requires employees to sign and comply with the Confidentiality Policy as set forth above in paragraph 6(A).

(C) Since at least about March 28, 2012, Respondent's maintenance of the rule described above in paragraphs 6(A) and 6(B) has discouraged its employees from forming, joining, and assisting the Union or engaging in other concerted activities.

7. (A) Since at least March 28, 2012, Respondent has maintained a Confidential Information and Intellectual Property Agreement. It reads, in relevant part:

I will not during and after [m]y Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential, proprietary, and/or a trade secret, including, but not limited to, (i) information relating to Red Cross financial, regulatory, operational, benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross clients, customers, beneficiaries, suppliers, donors, employees, volunteers or donor sponsors unless authorized...

(B) Respondent requires employees to sign and comply with the Confidentiality Policy Information and Intellectual Property Agreement as set forth above in paragraph 7(A).

(C) Since about March 28, 2012, Respondent's maintenance and enforcement of the rules described above in paragraphs 7(A) and (B) has discouraged its employees from forming, joining, and assisting the Union or engaging in other concerted activities.

8. (A) Since about March 28, 2012, Respondent has maintained an Employee Handbook, Revised April 30, 2010, which contains, in relevant part, the following rules.

(i) Code of Business and Ethics. No employee or volunteer shall engage in the following actions:

[a.] Personal Use. Authorize the use of or use for the benefit or advantage of any person, the name, emblem, endorsement, service or property of the American Red Cross, except in conformance with American Red Cross Policy.

[d.] Confidentiality. Disclose any confidential American Red Cross information that is available solely as a result of the employee's or volunteer's affiliation with the American Red Cross to any person not authorized to receive such information, or to use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.

[h.] Contrary to the Best Interest of the Red Cross. Operate or act in any manner that is contrary to the best interest of the American Red Cross.

(ii) Investigations, Compliance and Ethics-Formal Dispute Resolution. Distinguishing from the actions of the ombudsman, the Office of the General Counsel and the Office of Investigations, Compliance and Ethics (IC&E) conduct formal investigations into allegations of fraud, waste, abuse, Red Cross Policy violations, illegal or unethical conduct or other improprieties regarding the Red Cross. Usually, the allegations rise from whistleblower complaints of Red Cross employees and volunteers, seeking formal review or investigations of their allegations of wrongdoing.

(iii) Progressive Discipline. The Western Lake Erie Region has adopted rules and standards to ensure productive, harmonious operations. Although Western Lake Erie Region employees are employed at-will, the best interest of the Western Lake Erie Region lies in ensuring fair treatment of all employees and in making certain that discipline is prompt, fair, and uniform.

The Western Lake Erie Region endorses a philosophy of progressive discipline in which it attempts to provide employees with notice of deficiencies and an opportunity to improve whenever practical or reasonable. Employees' performance and conduct is evaluated on an ongoing basis, with feedback provided when necessary. Informal discussions may be used to ensure that employees know and follow rules and standards. These discussions should focus on clarifying expectations, providing appropriate training and development and coaching employees and volunteers.

On some cases, formal discipline is necessary. Progressive discipline steps may include, but are not limited to, verbal warnings, written warnings, and termination of employment. The Western Lake Erie Region retains the right to administer discipline in any manner it deems suitable and any of the steps listed above may be skipped. Termination of employment may also occur at any time without any progressive disciplinary steps having been taken, as the Progressive Discipline policy does not alter the employees' at-will employment status.

(iv) Red Cross Communication Systems. Employees must be mindful that their association with Western Lake Erie Region and the Red Cross will be visible to any recipient of an electronic communication, and assure that their communications are consistent with the Red Cross mission and accepted community standards. Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

3. Distributing sensitive, proprietary, confidential, or private information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.

(v) Non-Solicitation/Distribution of Literature. Approaching fellow employees in the workplace regarding personal activities, organizations or causes, regardless of how worthwhile, important or benevolent, can create unnecessary apprehension and pressures for fellow colleagues.

In the interest of maintaining a proper business environment and preventing interference with work and inconvenience to others, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause in the workplace during working time. The workplace includes Western Lake Erie Region offices, vehicles, the laboratory and production area, the distribution area, the loading dock and any other space where work is performed, such as blood collection operations in the facility of another organization. This policy prohibits solicitations via the Western Lake Erie Region E-mail and other telephonic communication systems. Solicitation or distribution by non-staff is prohibited on any Western Lake Erie Region property, including buildings and surround parking, patio, and driveway areas. Any requests from outside persons or organizations to sell merchandise, solicit contributions, distribute literature, arrange displays or utilize Western Lake Erie Region facilities are to be referred to the Human Resources Department.

(vi) Respondent's work rules. Violation of the work rules may result in discipline which may include termination of employment. Behaviors that constitute an infraction,..., are as follows:

- *Release of,..., client or employee information without authorization.
- *Willfully allowing a "conflict of interest," such as financial, personal or otherwise
- *Unsatisfactory conduct
- * Participating in a deliberate slowdown or work stoppage.

(vii) The Western Lake Erie Specific Work Rules. Unauthorized placement or posting of information in break rooms, or in common areas.

(B) Since about March 28, 2012, Respondent's maintenance of the rules described above in paragraphs 8(A)(i) and 8(A)(vii) has discouraged its employees from forming, joining, and assisting the Union or engaging in other concerted activities.

9. (A) Since at least March 28, 2012, Respondent has maintained the following Code of Conduct Certification:

I affirm that, except as listed below, I have no financial interest or affiliation with any organization which may have interests that conflict with, or appear to conflict with, the best interests of the American Red Cross. Should such conflicts or apparent conflicts of interest arise in connection with the affiliations listed below, I agree to refrain from participating in any deliberations, decisions or voting related to the matter.

I also agree, during the term of my affiliation with the American Red Cross, to report promptly to the Chairman of my unit, or his/her designee, any future situation that involves, or might appear to involve, me in any conflict with the best interests of the American Red Cross.

(B) Since at least about March 28, 2012, Respondent's maintenance of the rule described above in paragraph 9(A) has discouraged its employees from forming, joining, and assisting the Union or engaging in other concerted activities.

10. (A) About the dates set forth opposite their names, Respondent, by letter, discharged the employees named below:

Names	Dates
Heidi Coutchure	May 24, 2012
Amanda Laursen	May 24, 2012

(B) Respondent terminated the employment of Heidi Coutchure and Amanda Laursen by enforcement of the overbroad and unlawful rules set forth above in paragraphs 6 through 9.

(C) Respondent engaged in the conduct described above in paragraph 10(A) because Respondent believed the named employees of Respondent formed, joined and assisted the Union, engaged in concerted activities, and to discourage employees from engaging in these activities.

11. By the conduct described above in paragraphs 6 through 10, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

12. By the conduct described above in paragraph 10, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraph 10, the Acting General Counsel seeks an Order requiring that Respondent preserve and, within 14 days of a request, provide at the office designated by the Board or its agents, a copy of all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order. If requested, the originals of such records shall be provided to the Board or its agents in the same manner.

As part of the remedy for the unfair labor practices alleged above in paragraph 10, the Acting General Counsel seeks an Order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination.

The Acting General Counsel further seeks, as part of the remedy for the allegations in paragraph 10, that Respondent be required to submit the appropriate documentation to the Social

Security Administration so that when backpay is paid, it will be allocated to the appropriate periods.

The Acting General Counsel further seeks all other relief as may be appropriate to remedy the unfair labor practices alleged.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before December 14, 2012, or postmarked on or before December 13, 2012.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a

complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on the 4th day of February 2013, at 1:00 p.m., in a hearing room of the Lucas County Domestic Relations Court, 429 N. Michigan Street, Toledo, Ohio, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated at Cleveland, Ohio this 30th day of November 2012.

/s/ Frederick J. Calatrello

FREDERICK J. CALATRELLO
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 8
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Cases 08-CA-086902, 086929 & 090132

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The attorney or examiner assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end. An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing.

However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds thereafter must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; *and*
- (5) Copies must be simultaneously served on all other parties (*listed below*), and That fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION

and

Case 08-CA-090132.

THE UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75

Gina Fraternali, Esq.,
for the Acting General Counsel.
Steven Suflas, Esq.,
for the Respondent.
John Roca, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Toledo, Ohio, on February 4, 2013. The United Food and Commercial Workers Union, Local 75 (the Union), filed the charge on September 27, 2012, and an amended charge on November 29, 2012. The Acting General Counsel issued the complaint on November 30, 2012.¹ The complaint alleges that the Respondent has violated Section 8(a)(1) of the Act by maintaining various rules and policies which will be discussed in detail herein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel,² the Respondent, and the Union, I make the following

¹ On November 30, 2012, the Acting General Counsel issued a second order consolidating cases, amended consolidated complaint and notice of hearing (the complaint) in Cases 08-CA-086902, 08-CA-086929 and 08-CA-090132. Afterwards, Cases 08-CA-086902 and 08-CA-086929 were settled. On February 1, 2013, the Regional Director for Region 8 issued an order severing those cases and withdrawing the portions of the complaint relating to those cases from the complaint. Accordingly, only the allegations in the complaint relating to Case 08-CA-090132 went to trial.

² Although at the trial I indicated that I expected the brief filed by the Acting General Counsel, as the proponent of the complaint, to set forth a recommended order and notice for my consideration (Tr. 170), the brief that was filed did not contain such a provision.

argument that the Board lacks the authority to decide this case and will proceed to issue a decision in this matter.

The Amendments to the Complaint

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At the commencement of the trial, counsel for the Acting General Counsel moved to amend the complaint to allege that portions of a brochure maintained by the Respondent entitled “You Request Our Mission . . . Please Respect Our Trademark” (GC Exh. 16) violates Section 8(a)(1) of the Act. Counsel for the Acting General Counsel also moved to amend the complaint to allege that portions of the Respondent’s current “Code of Business Ethics and Conduct” (the code of conduct), promulgated in 2007 (GC Exh. 18) and its current “Confidential Information and Intellectual Property Agreement” (CIIPA), promulgated in 2005 (GC Exh. 19) also violated Section 8(a)(1). Counsel for the Acting General Counsel indicated she had received these documents from the Respondent the evening before or the morning of the trial. The Respondent opposed the complaint amendments.

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At the trial I granted the amendments to the complaint. As noted by the Acting General Counsel, the complaint amendment with respect to the Respondent’s trademark brochure (GC Exh. 16) is related to the existing complaint allegation in paragraph 8(a)(i)[a] which alleges that a provision of the Respondent’s “The American Red Cross Employee Handbook for Western Lake Erie Region (the employee handbook), effective April 30, 2010, regarding the personal use of the Red Cross emblem was a violation of Section 8(a)(1). Similarly, the amendment based on GC Exh. 18, the Respondent’s current version of its code of conduct is obviously related to the current employee handbook’s reference to the code of conduct in paragraph 8 of the complaint. The complaint amendment based on, the current version of the Respondent’s CIIPA, GC Exh. 19, is directly related to paragraph 7 of the complaint that alleges that certain aspects of the previous 2002 version of the Respondent’s CIIPA is violative of Section 8(a)(1).

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Section 102.17 of the Board’s Rules and Regulations permits complaint amendments upon terms that may be just. The amendments to the complaint sought by the Acting General Counsel were made at the commencement of the hearing and are sufficiently related to the existing allegations so that the Respondent was not prejudiced by permitting the amendments. I specifically indicated that the hearing when I granted the Acting General Counsel’s motion that I would give the Respondent’s counsel additional time to prepare to respond to these allegations if necessary. I find that it is the Board’s policy to permit complaint amendments under these circumstances. See *Payless Drug Stores*, 313 NLRB 1220 (1994).

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The Respondent’s Due Process Claim

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The Respondent contends that it was denied due process because the Acting General Counsel has not provided adequate notice of the unfair labor practices alleged to have been committed in this case.

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The complaint alleges in paragraphs 6 through 9 that since at least March 28, 2012, the Respondent has maintained specifically identified rules and policies, which are alleged to violate Section 8(a)(1) of the Act. The amendments to the complaint made at trial also make specific reference to newly discovered evidence of rules and policies maintained by the Respondent

during the period noted above, which the Acting General Counsel alleges to violate Section 8(a)(1) of the Act.

5 Section 102.15 of the Board's Rules and Regulations requires that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or their representatives by whom committed." In *Artesia Ready Concrete, Inc.* 339 NLRB 1224 (2003), the Board noted that it has long held, with court approval, that the only requisite of a complaint is that it contain a plain statement of the acts constituting an unfair labor practice sufficient to allow a respondent an opportunity to present a defense. The Board specifically noted that the complaint did not need to include a legal theory or plead matters of evidence. *Id.* at 1226 fn. 3.

15 Despite the clear sufficiency of the complaint and its amendments, the Respondent nonetheless claims that it was denied due process because counsel for the Acting General Counsel declined at the hearing to shed additional light on the Acting General Counsel's theory regarding the allegations of the complaint. Counsel for the Acting General Counsel indicated that the complaint clearly stated that the rules and policies, on their face, violated Section 8(a)(1) of the Act and that the specific legal theories relied on to support the allegations of the complaint would be set forth in a brief.

25 I do not find, under the circumstances of this case, that the Respondent was denied due process. At the commencement of the hearing, the Respondent's counsel indicated his familiarity with *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) and *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54 (2013), recent Board decisions involving the lawfulness of work rules. (Tr. 11.) In its 41-page brief, the Respondent fully and cogently addresses all of the issues raised by the complaint. The circumstances present in this case are far different from those present in *Lamar Advertising of Hartford*, 343 NLRB 261 (2004), which the Respondent relies on to support its position.³ In *Lamar Advertising*, an administrative law judge dismissed the portion of the complaint alleging that the employer violated Section 8(a)(4) and (1) of the Act by discharging an employee. The General Counsel argued in his exceptions to the Board a theory of an alleged violation of Section 8(a)(4) and (1) beyond what was alleged in the complaint and litigated at the hearing. The Board indicated that to find a violation based on that theory at that advanced point in the proceeding would violate due process. *Id.* at 265. As noted above, in the instant case, the complaint allegations are clear and the Respondent's counsel was aware of the legal issues presented by the complaint at the time of the hearing and expanded on those issues in his brief. The Respondent clearly had an opportunity to fully and fairly defend itself against the complaint allegations. Accordingly, I do not agree with the Respondent's argument that the complaint should be dismissed because it was denied due process.

³ The Respondent also relies on *New York Post.*, 353 NLRB 343 (2008) in support of its position. In that case the Board's decision was issued by a two-Member panel. In *New Process Steel, L. P. v. NLRB*, 130 S. Ct. 2635 (2010) the Supreme Court held that the two-Member Board lacked the authority to issue its decision in that case. Accordingly, based on the Supreme Court's decision in *New Process Steel* and *Sheraton Anchorage*, 359 NLRB No. 95 slip op. at 3 fn. 8 (2013), I do not accord precedential value to *New York Post.*, *supra*.

Whether the Respondent Maintains Rules that Violate Section 8(a)(1) of the Act
The Confidentiality Rules and Policies

5 It is undisputed that the Respondent has maintained during the 10(b) period⁴ rules and policies that address the issue of confidentiality in its CIIPA issued in 2005 (GC Exh. 19), the current employee handbook (GC Exh. 8), and the code of conduct (GC Exh. 18). The Acting General Counsel and the Charging Party contend that specifically identified rules and policies contained within those documents are overbroad and facially violative of Section 8(a)(1) of the Act. The Respondent contends that all of its challenged policies are facially lawful.

10 The Acting General Counsel also alleges that the Respondent maintained, during the 10(b) period, a confidentiality policy issued in July 1993 (GC Exh. 3) and a 2002 version of the CIIPA (GC Exh. 5). The Respondent contends, however, that the 1993 confidentiality policy and the 2002 CIIPA were not maintained during the 10(b) period.

15 I will first address the confidentiality policies and rules which were undisputedly maintained during the 10(b) period. In March 2005, the Respondent promulgated a CIIPA (GC Exh. 19), which all employees hired after that date are required to execute. This document provides in relevant part:

20 I desire to be employed or to continue to be employed by Red Cross. I acknowledge that I may, in the course of my employment with Red Cross (“Employment”), have access to or create (alone or with others) confidential and/or proprietary information and intellectual property that is of value to Red Cross. I understand that this makes my position one of trust and confidence. I understand Red Cross’ need to limit disclosure and use of confidential and/or proprietary information and intellectual property. I understand that all restrictions are for the purpose of enabling Red Cross to fill its humanitarian mission, to maintain donors, customers and clients, to develop and maintain new or unique products and processes, to protect the integrity and future of the Red Cross and to protect the employment opportunities of my fellow employees. THEREFORE, I agree to the following:

25 Confidential information shall include but not be limited to:

30 (i) information relating to Red Cross’ financial, regulatory, personnel or operational matters,

35 (ii) information relating to Red Cross clients, customers, beneficiaries, suppliers, donors (blood and financial), employees, volunteers, sponsors or business associates and partners,

⁴ Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing and service of a charge. The charge in this case was filed on September 27, 2012, and served on the Respondent on September 28, 2012. Accordingly, the 10(b) period in this case began on March 28, 2012.

(v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, or electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross' agents.

5

Obligation of confidentiality. Except as may be required for the performance of my duties during Employment, unless specifically authorized in writing by Red Cross, I shall not use or disclose, for my or others benefit, either during or after Employment any Confidential Information. I acknowledge and agree that this Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining.

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Survival of Obligations and Enforcement. The obligations that I have under this Agreement shall survive the termination of Employment, regardless of the reasons for methods of termination. I agree that Red Cross shall be entitled to recover from me all the attorneys fees incurred in enforcing Red Cross' rights under this Agreement.

20

The Respondent's current employee handbook became effective on April 30, 2012 (GC Exh. 8). All employees receive the handbook when they are hired and must sign an acknowledgment form indicating they are bound by the terms and conditions set forth in it. The Respondent reaffirmed the code of conduct and the 2005 CIIPA during the 10(b) period. In this connection, the unit employees were on strike from the end of March 2012 until approximately June 26, 2012. When striking employees returned to work the Respondent held a reorientation meeting with them. At this meeting, Smith read the March 2005 CIIPA and the code of conduct to employees and the employees were required to sign both documents.

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Both the employee handbook and the code of conduct contain identical language with respect to confidentiality generally (GC Exhs. 18 and 8, p. 36). Both documents provide that no employee shall:

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Disclose any confidential American Red Cross information that is available solely as a result of an employee's or volunteer's affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.

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The employee handbook, however, also contains a specific work rule that prohibits the "Release of confidential . . . employee information without authorization." (GC Exh. 8, p. 47.)

The employee handbook further provides the following regarding the use of the Respondent's communication systems:

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Employees must be mindful that their association with Western Lake Erie Region and the Red Cross will be visible to any recipient of electronic communication, and assure that their communications are consistent with the Red Cross Mission

and accepted community standards. Prohibited uses of Western Lake Erie Region communication systems include, but not limited to:

5 3. Distributing sensitive, proprietary, confidential, or private information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization. (GC Exh. 8, p. 41.)

10 The employee handbook provides for a progressive disciplinary policy, but it reserves the right of the Respondent to immediately terminate employees for violation of its rules (GC Exh. 8, pp. 40-41).

15 The Acting General Counsel contends that the 2005 CIIPA defines confidential information to include “personnel information” without further specifying what “personnel information” includes. The Acting General Counsel contends that employees can reasonably interpret the term “personnel information” to include wages, benefits and other working conditions. The Acting General Counsel argues that, under these circumstances, the rules noted above are facially overbroad, since they do not restrict the definition of confidential information to exclude terms and conditions of employment. In support of his position the Acting General Counsel relies on, inter alia, *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012); *Security Walls, LLC*, 356 NLRB No. 87 (2011); and *University Medical Center*, 335 NLRB No. 87 (2001). The Charging Party similarly argues that the use of the term confidential in the rules noted above, without further definition, is facially overbroad and it would reasonably be read to encompass a prohibition of disclosure of personnel information such as wages and terms and conditions of employment.

25 The Respondent contends that, when the CIIPA, the employee handbook, and the code of conduct are considered in context, the Respondent’s rules and policies regarding confidentiality are not unlawful under the Act. The Respondent asserts that the overall thrust of the CIIPA focuses on the ownership and disclosure of intellectual property. The Respondent further contends that the Board’s decision in *Lafayette Park Hotel*, 326 NLRB 824 (1998), requires that the language of the confidentiality rules be considered as a whole, rather than focusing on certain words or phrases. The Respondent also points to the section in the CIIPA that indicates that it is not intended to deprive employees of rights under the Act.

35 In determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act the Board determines whether it reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, supra, enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board indicated that if a rule explicitly restricts Section 7 rights, it is unlawful. The Board further noted that if it does not, “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.” Id. at 647. In *Lutheran Heritage Village*, the Board further indicated that in determining whether a challenged rule is unlawful it must give the rule a reasonable reading. Id. at 646. The Board has also held; however, that “ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Acts’ goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or

not that is the intent of the employer-instead of waiting until the chill is manifest, when the Board must undertake the difficult task of dispelling it.” *Flex Frac Logistics, LLC*, 358 NLRB No. 127 slip op. at 2 (2012).

5 In the instant case, the confidentiality rules and policies referred to above do not explicitly restrict Section 7 rights, nor is there evidence that they were promulgated in response to union activity or were applied to restrict the exercise of Section 7 rights. Thus, the issue here is whether employees would reasonably construe the language of the rules and policies noted above to prohibit Section 7 activity. A fair reading of the CIIPA provides that confidential
10 information includes information relating to the Respondent’s “personnel” or “employees” and that such information cannot be disclosed either during or after an employee’s employment. The CIIPA indicates that the Respondent is entitled to recover from an employee attorney’s fees incurred in enforcing the agreement. In addition, both the code of conduct and the employee handbook prohibit the disclosure of confidential information without the authorization of the
15 Respondent. As noted above, the employee handbook provides for discipline, up to and including discharge, for a violation of the provisions of the handbook. By defining confidential information as including information regarding “personnel” and “employees” the CIIPA would be reasonably understood by employees to prohibit the disclosure of information including wages and terms of conditions of employment to other employees or to nonemployees, such as union representatives.
20 It is, of course, clearly established that employees have a Section 7 right to discuss wages and terms and conditions of employment among themselves and with individuals outside of their employer. *Flex Frac Logistics, LLC*, supra, slip op. at 1.

25 The Board has consistently held that broadly defined confidentiality rules prohibiting the dissemination of information similar to the rules involved here violate Section 8(a)(1) of the Act. In *Costco*, supra, the Board found that the employer’s rule prohibiting employees from discussing “private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, Worker’s Compensation injuries, personal health information, etc.” to be overbroad and violative of
30 Section 8(a)(1). The Board found that the “private matters” referred to in the rule are terms and conditions of employment and that the prohibition of employees discussing these matters with anyone, which would include other employees and union representatives, was overbroad and unlawful. 358 NLRB No. 106, slip op. at 10.⁵

35 The Board also found in *Costco* that the employer’s rule in its “Electronic Communications and Technology Policy” that provided “[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or

⁵In support of its position that the Respondent’s communication systems policy, which prohibits the distribution of “confidential and private” information “without appropriate authorization,” does not violate the Act, the Respondent relies on *Windstream Corp.*, 352 NLRB 510 (2008) (Respondent’s brief, pp. 28-30) a decision issued by a two-Member panel. As I have indicated earlier in fn. 2 of this decision, such decisions are not accorded precedential value. *New Process Steel, L. P. v. NLRB*, supra, and *Sheraton Anchorage*, supra. In addition, in *Windstream Corp.*, supra, no exceptions were filed to the administrative law judge’s findings with respect to the complaint allegations. *Id.* at fn. 2. When the Board adopts a portion of an administrative law judge’s decision to which no exceptions were filed, that portion of the decision is not binding precedent. *California Gas Transportation, Inc.*, 352 NLRB 246 fn. 3 (2008). Accordingly, I have not accorded precedential value to *Windstream Corp.*

employee personal health information may not be shared, transmitted or stored for personal or public use without prior management approval” to be similarly overbroad and violative of Section 8(a)(1). The Board determined that employees would construe the rule as prohibiting the sharing of payroll information with other employees or a union. In so finding, the Board
 5 addressed the employer’s argument that considering the rule in its entirety establishes that Section 7 rights are not restricted by the rule’s prohibition on any discussion regarding payroll. The Board noted that while the rule referred to certain items that do not involve Section 7 rights such as “confidential financial,” “credit card numbers,” “social security numbers,” or “employee personal health” in the same sentence as “payroll,” when the rule was considered as a whole,
 10 employees would reasonably construe the reference to “payroll” as prohibiting Section 7 activity such as sharing wage information among employees and between employees and the union. In this connection, the Board noted that any ambiguity in the rule must be construed against its promulgator, the employer. *Id.* slip op. at 12, fn. 19.

15 Finally, in *Costco*, the Board also found a rule prohibiting employees “from sharing ‘confidential information’ such as employees’ names, addresses, telephone numbers and email addresses” as violative of Section 8(a)(1). The Board noted that employees are permitted to use for organizational purposes information that comes to their attention in the normal course of their work duties but are not entitled to their employer’s private records. The Board found that the
 20 employer’s rule was overbroad since it did not distinguish between information obtained by employees from discussions with other employees and information obtained from the employer’s files. *Id.* slip op. at 15.

In *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54 (2013), the employer’s
 25 handbook contained a provision entitled “confidentiality” which instructed employees to “[n]ever discuss details about your job, company business or work projects with anyone outside the company” and “[n]ever give out information about customers or DIRECTV employees.” In addition, the rule included “employee records” as one of the categories of “company information” that must be held confidential. In finding that the rule violated Section 8(a)(1), the
 30 Board noted “the explicit prohibition on releasing information concerning the ‘job’ or fellow ‘DIRECTV employees’ as well as ‘employee records’ would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment.” The Board also found that “because the rule does not exempt protected communications with third parties such as union representatives, Board agents, or other governmental agencies
 35 concerned with workplace matters, employees would reasonably interpret the rule as prohibiting such communications, making the rule unlawful for that reason as well.” *Id.*, slip. op. at 3.

Further examples of confidentiality rules similar to those in the instant case that the Board has found to be facially overbroad and violative of Section 8(a)(1) are found in *Sheraton Anchorage*, 359 NLRB No. 59, slip op. at 3-4 (2013) (finding a rule unlawful as facially
 40 overbroad that provided “[a]ssociates are not to disclose any [] confidential or proprietary information except as required solely for the benefit of the Company in the course of performing duties as an associate of the Company . . . examples of confidential and proprietary information include . . . personnel file information . . . [and] labor relations [information] . . .”; *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 12 (2011) (finding a rule unlawful that prohibited “[a]ny unauthorized disclosure from an employee’s personnel file”); *Cintas Corp.*, 344 NLRB 943 (2005) enfd. 42 F.3d 463 (D.C. Cir. 2007) (unlawful rule required

employees to maintain “confidentiality of any information concerning the Company, its business plans, its partners (employees), new business efforts, customers, accounting and financial matters.”); *IRIS U.S.A. Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding a rule unlawful that stated all information about “employees is strictly confidential” and defined “personnel records” as confidential); *University Medical Center*, 335 NLRB 1318 (2001) (finding unlawful a rule prohibiting “release or disclosure of confidential information concerning patients or employees.”); and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding unlawful a code of conduct that prohibited employees from revealing confidential information about customers, hotel business, or “fellow employees.”)

On the basis of the foregoing, I find that the confidentiality provision of the Respondent’s 2005 CIPAA to be facially overbroad. I find the confidentiality policy in the instant case distinguishable from the code of conduct found lawful in *Lafayette Park Hotel*, supra. In that case, the employer’s statement of conduct prohibited employees from “[d]ivulging Hotel-private information) but contained no provision concerning the disclosure of information about fellow employees. I also find the instant case to be distinguishable from *Super K-Mart*, 330 NLRB 263 (1999). In that case, the employer’s provided “company business and documents are confidential. Disclosure of such information is prohibited.” As in *Lafayette Park*, the rule in *Super K-Mart* contained no provision regarding disclosure of information about fellow employees.

I do not agree with the Respondent’s argument that the 2005 CIIPA cannot reasonably be read to restrict Section 7 activity because of the language contained in it that provides: “[T]his Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining.” As the Charging Party correctly noted in its brief, under Board law, such a disclaimer does not make lawful the content of a provision that unlawfully prohibits Section 7 activity. As I have found above, a fair reading of the language of the CIIPA unlawfully restricts the right of employees to discuss information regarding wages and other terms and conditions of employment with other employees and union representatives. The “savings clause” noted above arguably would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer. I find that employees would decide to comply with the Respondent’s unlawfully broad restriction on their Section 7 rights, rather than undertaking the task of determining the exact nature of those rights and then attempting to assert those rights under the savings clause. In *Allied Mechanical*, 349 NLRB 1077, 1084 (2007), the Board found “an employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law.” Accord *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979). On the basis of all of the foregoing, I find that the Respondent violated Section 8(a)(1) of the Act by maintaining the facially overbroad confidentiality provisions discussed above in the 2005 CIIPA.

As noted above, in arguing that the identical general confidentiality provision contained in the code of conduct and the employee handbook is not facially unlawful, the Respondent correctly notes that there is no mention of “employees” or “personnel” in that provision. It is clear, however, that the 2005 CIIPA, the code of conduct and employee handbook are

overlapping in that all three govern the disclosure of “confidential” information and that the 2005 CIIPA defines the nature of what the Respondent considers to be confidential information. The code of conduct and employee handbook do not further explain or limit the term “confidential.” Thus, employees who read the three documents would understand that the handbook and code of conduct prohibit the disclosure of information regarding personnel or employees. Therefore, the general confidentiality provision in the code of conduct and employee handbook, since it does not define confidential differently than the CIIPA, is also facially overbroad. To the extent there is any ambiguity in the general confidentiality provision contained in the code of conduct and the employee handbook, the Board has recognized that “employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition.” *DIRECTV*, supra, slip op. at 3; *Hyundai America Shipping Agency*, supra, slip op. at 12. Accordingly, I find that the general confidentiality provision contained in the code of conduct in the employee handbook is facially overbroad and violates Section 8(a)(1) of the Act.

The specific employee handbook provision that prohibits the release of confidential employee information without authorization is clearly facially overbroad, based on the cases cited above, in that such a rule would reasonably be understood by employees to prohibit the disclosure of information regarding wages and terms and conditions of employment to other employees or to union representatives.

With respect to the 1993 confidentiality policy, employee Amanda Lucinici signed a copy of that policy on September 10, 2001 (GC Exh. 3).⁶ Smith testified that the 1993 confidentiality policy was superseded by later policies but that the 1993 confidentiality policy was not rescinded (Tr. 38). Laursen was terminated on May 24, 2012, for violating the “American Red Cross Code of Business Ethics and Conduct”; “Confidentiality Policy”; and “Confidential Information and Intellectual Property Agreement” (GC Exh. 21).⁷ The record does not contain any other confidentiality policy signed by Laursen, other than the 1993 policy. On this record, the evidence establishes that the Respondent maintained the 1993 confidentiality policy during the 10(b) period by making reference to it as a basis for the discharge of Laursen on May 24, 2012.

The 1993 confidentiality policy provides, in relevant part:

All information obtained by virtue of employment with the American Red Cross Blood Services is to be held in the strictest confidence. This includes all information in donor, patient, personnel, and financial records.

The following are some examples of confidential information:

Donor/patient health history
Donor Patient test results (blood type, anti-body screening and viral and other testings)

⁶ Lucinici later married and took the last name Laursen.

⁷ The allegations in the complaint regarding Laursen’s discharge, pursuant to the charge that she filed in Case 08-CA-086929, were withdrawn prior to the trial on the basis of the non-Board settlement between Laursen and the Respondent (GC Exh. 1G).

5 All donor referral information
 All call “look-back” information
 All information on investigation of transfusion transmissible diseases
 All information on litigation
 All documents marked “Confidential”
 All Financial Information

10 According to the 1993 confidentiality policy, a violation of its terms subjects an employee to disciplinary action up to discharge.

15 Consistent with the analysis set forth above, I find that the 1993 confidentiality policy is overbroad in that it prohibits the disclosure of all information in personnel records, all information on litigation and all financial information. It is clear, based on the cases noted above, that prohibiting the disclosure of all personnel and financial information unlawfully restricts employees from discussing with other employees and the union information about terms and conditions of employment, including wage information that an employee gained in the normal course of their duties or from discussions with other employees. I also find that the prohibition against disclosing all information regarding litigation is overbroad and restrains Section 7 rights. On its face, this prohibition would preclude employees from discussing NLRB and EEOC
 20 litigation and arbitrations and thus is an overly broad restriction on Section 7 rights. The Respondent did not produce any evidence to establish that there was a legitimate business justification for the prohibition of disclosing all information on litigation. In *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), the Board found that an employer’s rule prohibiting employees from discussing ongoing investigations of employee misconduct violated Section 8(a)(1) of the Act. There, the Board found that in order to justify such a prohibition on employee discussion of ongoing investigations, an employer had to establish a legitimate business justification that outweighs employees Section 7 rights. *Id.* slip op. at 2. See also *All American Gourmet*, 292 NLRB 1111, 1129-1130 (1989). I find that the Board’s policy regarding internal investigations would apply with equal force to matters that are at the litigation stage.
 25 Accordingly, for the reasons expressed above, I find that the Respondent’s 1993 confidentiality policy is overbroad and violates Section 8(a)(1) of the Act.

30 On September 26, 2002, employee Heidi Coutchure signed the Respondent’s 2002 CIIPA (GC Exh. 5). On May 24, 2012, Coutchure was discharged for violating the Respondent’s “Confidential Information and Intellectual Property Agreement,” confidentiality policy, and code of conduct.⁸ The Respondent never rescinded the 2002 CIIPA. There is no evidence that Coutchure ever signed the 2005 CIIPA agreement and Smith testified that only employees hired after 2005 signed that agreement. Again, on the basis of the record evidence, it appears that the Respondent maintained the 2002 confidentiality agreement during the 10(b) period by making
 35 reference to it in Coutchure’s discharge in May 2012.

40 The Respondent’s 2002 CIIPA prohibits employees from disclosing to persons outside of the Red Cross any information that the Red Cross considers “confidential, proprietary, and/or a

⁸ The allegations in the complaint regarding Coutchure’s discharge, pursuant to the charge that she filed in Case 08-CA-086902, were withdrawn prior to the trial on the basis of an informal settlement agreement between the parties (GC Exh. 1G).

trade secret, including, but not limited to, (i) information relating to Red Cross financial, regulatory, operational, benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross clients, customers, beneficiaries, suppliers, donors, employees, volunteers or donor sponsors unless authorized . . . by the President of the Red Cross or his/her designee.”

Again consistent with the analysis and cases set forth above, I find that by prohibiting employees from disclosing to “persons outside of the Red Cross,” i.e. union representatives, any information relating to “benefits, compensation equal employment opportunity matters or employees,” unless authorized, the 2002 CIIPA is an overly broad restriction of employees Section 7 rights. On the basis of the foregoing I find that by maintaining, during the 10(b) period, the 2002 CIIPA the Respondent has violated Section 8(a)(1) of the Act.

The No-Solicitation/Distribution Rule and Work Rule Regarding the Posting of Information

Paragraphs 8(A)(v) and (B) of the complaint allege that the Respondent’s maintenance of the following rule in the employee handbook (GC Exh. 8, p. 44) violates Section 8(a)(1) of the Act:

Non-Solicitation/Distribution of Literature

Approaching fellow employees in the workplace regarding personal activities, organizations or causes, regardless of how worthwhile, important or benevolent, can create unnecessary apprehension and pressures for fellow colleagues.

In the interest of maintaining a proper business environment and preventing interference with work and inconvenience to others, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause in the workplace during working time. The workplace includes Western Lake Erie Region offices, vehicles, the laboratory and production area, the distribution area, the loading dock and any space where work is performed, such as blood collection operations in the facility of another organization. This policy prohibits solicitations via the Western Lake Erie Region E-mail and other telephonic communication systems.

Solicitation and distribution by non-staff is prohibited on any Western Lake Erie Region property, including buildings and surrounding parking, patio, and driveway areas. Any requests from outside persons or organizations to sell merchandise, solicit contributions, distribute literature, arrange displays or utilize Western Lake Erie Region facilities are to be referred to the Human Resources Department.

The complaint also alleges in paragraphs 8(A)(vii) and (B) that the following rule in the employee handbook (GC Exh. 8, p. 48) violates Section 8(a)(1) of the Act:

Western Lake Erie Specific Work Rules

Unauthorized placement or posting of information in break rooms, or in common areas.

5 With respect to the work rule, the Respondent's handbook provides that a violation of a work rule may result in discipline, which can include termination (GC Exh. 8, p. 47).

10 I will first address the complaint allegation regarding the Respondent's maintenance of its no-solicitation/distribution rule. The Acting General Counsel and the Charging Party contend that the rule is overbroad, while the Respondent contends it is facially lawful. The Respondent's rule prohibits solicitation and distribution in "the workplace during working time" and defines "workplace" as the Respondent's offices, vehicles, the laboratory and production area, the distribution area, the loading dock and any space where work is performed, such as blood collection operations in the facility of another organization." There is no evidence in the manner
15 in which the Respondent enforced this rule.

20 *Our Way, Inc.*, 268 NLRB 394 (1983), indicates "[T]he Board has held that rules prohibiting solicitation during working time are presumptively lawful because such rules imply that solicitation is permitted during nonworking time, a term that refers to the employees' own time." In addition, it is equally well established that an employer may lawfully prohibit employees from distributing literature in work areas. *United Parcel Service*, 327 NLRB 295 (1998); *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962). Thus, it is clear that the Respondent's solicitation and distribution rule is facially valid and I will dismiss this allegation in the
25 complaint.

30 Turning to the work rule regarding the unauthorized posting of information, the Acting General Counsel and the Charging Party allege that the provision is overly broad and restricts Section 7 activity. In support of their position, they rely on the Board's decision in *Costco*, supra. The Respondent contends, however, that the handbook provision must be read in conjunction with the collective-bargaining agreement between the Respondent and the Union. The current collective bargaining agreement, which is effective by its terms from June 26, 2012, to June 25, 2015, provides in article 24B (GC Exh. 14, pp. 29-30) that the Respondent "will provide union bulletin boards at each of its locations for the posting of notices pertaining to union business in connection with employees covered by this agreement." The bulletin board notices are subject to
35 review by the Respondent but "Approval will not be withheld without good cause . . ." There is no evidence that any grievances were filed under this contract provision. The Respondent contends that, given these circumstances, its policies regarding the posting of information do not infringe upon the Section 7 rights of employees.

40 On its face, the Respondent's work rule prohibits the unauthorized posting of information in break rooms or common areas. A break room by definition is not a work area. The Board has long held that rules prohibiting the distribution of literature in nonwork areas are unlawful. *Costco*, supra, slip op. at 9; *Stoddard Quirk*, supra. In *Mid-Mountain Foods, Inc.*, 332 NLRB 229 (2000), the Board succinctly stated "Simply put, employees have the right to distribute literature
45 in nonworking areas." See also *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456 (2003). Since the Respondent's rule also is not limited to prohibiting distribution only during working time, it is also facially invalid under *Our Way*, supra. While there is no evidence

5 establishing what a “common area” is, that is not important considering the other impairments on the face of the Respondent’s rule. The Board has indicated that when an employer’s rule “. . . is presumptively unlawful on its face, the employer has the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit distribution in nonworking areas during nonworking time.” *Costco*, supra, slip op. at 9.

10 I do not think that the right to post union related material set forth in the collective bargaining agreement and the fact that that no grievances have been filed over this contract provision establishes that the Respondent has met that burden. An employee reading the Respondent’s work rule would reasonably conclude that he or she is not permitted to post information regarding union or protected concerted activity in employee break rooms. The fact that there is a provision in the collective-bargaining agreement providing for a limited right to post union related material on designated bulletin boards, with the Respondent’s approval, does not ameliorate the unlawful effect of the Respondent’s work rule prohibiting the clear right to post information regarding union and protected concerted activities in break rooms. Accordingly, I find that by maintaining an overly broad work rule prohibiting the posting of information in break rooms and common areas the Respondent has violated Section 8(a)(1) of the Act.

20 The Conflict of Interest and Unsatisfactory Conduct Allegations

Paragraph 8 of the complaint alleges that the Respondent has maintained the following rules in its employee handbook in violation of Section 8(a)(1) of the Act:

25 Code of Business and Ethics. No employee or volunteer shall engage in the following actions:

Operate or act in any manner that is contrary to the best interest of the American Red Cross.

30 Respondent’s work rules. Violation of the work rules may result in discipline which may include termination of employment. Behaviors that constitute an infraction, are as follows:

35 Willfully allowing a “conflict of interest,” such as financial, personal or otherwise.

Unsatisfactory conduct.

40 Paragraph 9 of the complaint alleges that the Respondent has maintained the following code of conduct certification in violation of Section 8(a)(1) of the Act:

45 I affirm that, except as listed below, I have no financial interest or affiliation with any organization which may have an interest that conflicts with, or appears to conflict with, the best interests of the American Red Cross. Should such conflict or apparent conflicts of interest arise in connection with the affiliations listed below, I agree to refrain from participating in any deliberations, decisions or voting related to the matter.

I also agree, during the term of my affiliation with the American Red Cross, to report promptly to the Chairman of my unit, or his/her designee, any future situation involves, or might appear to involve, me in any conflict with the best interests of the American Red Cross.

The Acting General Counsel also amended the complaint at the trial to allege the following provisions of the Respondent's code of conduct (GC Exh. 18) violates Section 8(a)(1):

c. Red Cross Affiliation. Publicly use any American Red Cross affiliation in connection with promotion of partisan politics, religious matters or positions on any issue not in conformity with the official position of the Red Cross.

e. Improper Influence. Knowingly take any action or make any statement intended to influence the conduct of the American Red Cross in such a way as to confer any financial benefit on the person, corporation or entity in which the individual has a significant interest or affiliation.

f. Conflict of Interest. Operate or act in a manner that creates a conflict or appears to create a conflict with the interests of the American Red Cross and any organization in which the individual has a personal, business or financial interest. In the event there is a conflict, the American Red Cross has a structured conflict of interest process. First, the individual shall disclose such conflict of interest to the chairman of the board or the chief executive officer of the individual's Red Cross unit or the General Counsel of the American Red Cross, as applicable. Next, a decision will be made about the conflict of interest, and, where required, the individual may be required to recuse or absent himself or herself during deliberations, decisions and/or voting in connection with the matter.

The Acting General Counsel and the Charging Party contend that the rules and policies set forth above are unlawfully overbroad because employees would reasonably construe them to prohibit protected criticism of the Respondent's labor policies or treatment of employees. They also argue that the broad and indistinct language used could mean that discussions with other employees or the union could be considered unsatisfactory conduct, a conflict of interest or conduct contrary to the best interest of the Red Cross.

The Respondent contends that neutrality is a fundamental principle of the international Red Cross movement and is vital to the ability of the Red Cross to provide assistance in often volatile areas. The Respondent contends that the complaint allegations regarding the above provisions must be considered in the context of the entire document in which they appear and with awareness of the circumstances surrounding the Respondent's mission. The Respondent asserts that the mere maintenance of these provisions would not reasonably chill employees in the exercise of Section 7 rights.

As set forth above in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), in determining whether the code of conduct and handbook policies referred to in this section of the decision are unlawful, I must consider

whether they would reasonably tend to chill employees in the exercise of their Section 7 rights. In making this determination, however, I must give the rule a reasonable reading, and refrain from reading particular phrases in isolation or presuming interference with employee rights. *Lutheran Heritage Village*, supra at 646.

5

I first consider the complaint allegations referring to the prohibition on acting in a manner contrary to the best interests of the Red Cross and “willfully allowing a ‘conflict of interest,’ such as financial, personal or otherwise.”

10

The first paragraph of the Respondent’s code of conduct (GC Exh. 18) indicates that the Red Cross has “traditionally demanded and received the highest ethical performance from its employees and volunteers.” It further indicates that Respondent operates under the code of conduct in order to “maintain the high standard of conduct expected and deserved by the American public” As further evidence of the context in which the rules and policies set forth in the complaint are maintained, the Respondent points to its compliance and ethics handbook. This document contains the following information in further explanation of the Respondent’s position on this issue (R. Exh. 7, pp. 17-18);

15

20

Conflicts of Interest. It is your responsibility to be aware of situations where your personal interests, or the interests of a family member, may compete with the Red Cross’s interests. A conflict of interest arises when an employee or volunteer has a personal, business or financial interest in conflict with the interest of the Red Cross. A conflict of interest may also arise when employees or volunteers use their position for personal gain or compete with the Red Cross directly or indirectly without prior Red Cross approval.

25

The following are examples of types of conflicts of interest:

30

Personal or family relationships-if any member of your immediate family or anyone else with whom you have a close relationship owns or works for a competitor, vendor contractor, partner or supplier of the Red Cross, you should be particularly careful with security, confidentiality and potential conflicts of interest.

35

Financial interests or investments-Owning financial interest in a company that does business with the Red Cross may create a conflict of interest.

40

Affiliation with businesses or organizations doing business with the Red Cross-Serving as a director or officer of an organization that is a supplier, purchaser or competitor of the Red Cross may create potential conflicts of interest.

45

Working with a spouse, partner or family member-You may not supervise or be in a position to influence the hiring, work assignments or assessment of someone in your family or with whom you have a close personal relationship.

Many conflicts of interest can be resolved in a simple mutually acceptable way. For example, you own a business that sells equipment to the Red Cross, you may

not be involved in the decision to purchase equipment or negotiate a contract for the purchase of equipment, and you must not pressure or influence anyone in the Red Cross to purchase equipment from your company.

5 When the complaint allegations regarding the Respondent's rules and policies regarding conflicts of interest and acting in a manner contrary to the Red Cross are considered in context, and not in isolation, I find that employees would not reasonably construe the challenged language to refer to union or protected concerted activity. The illustrative examples contained in the Respondent's compliance and ethics handbook establish that the Respondent is directing its
10 employees to avoid conflicts of interest involving possible personal or financial gain. It also cautions employees against acting in competition with the interests of the Respondent.

 Further evidence of the fact that the maintenance of these provisions does not restrict Section 7 rights is the approximately 40-year history of collective bargaining at the Respondent's
15 facility. In addition, the Respondent has a labor liaison representative who coordinates the Respondent's activities with that of the labor community to engage in blood drives and other aspects of the Respondent's humanitarian mission. Given the Respondent's long history of collective bargaining with the Union and its cooperative efforts with the labor community in the Toledo area, it is very unlikely that employees would perceive the challenged provisions as
20 interfering with their Section 7 rights.

 I find that the Board's decision in *Lafayette Park Hotel*, supra, is supportive of my decision in this case. In that case the Board found lawful the employer's rule providing that the
25 following conduct is unacceptable:

Being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives.

30 The Board found that the mere maintenance of this rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. The Board noted that the rule provided that it is unacceptable for employees to engage in conduct that did not support the employer's "goals and objectives" and addressed legitimate business concerns. The Board found there was no ambiguity in the rule and that any ambiguity arose only by viewing the phrase "goals and
35 objectives" in isolation and attributing to the employer in intent to interfere with employee rights. The Board found such a construction to be strained and found that employees would not reasonably conclude that the rule prohibited Section 7 activity. Id. at 825.

40 In the instant case, the challenged policies and rules merely direct employees to avoid conflicts of interests and to not act contrary to the best interests of the Red Cross, clearly legitimate concerns. The context in which these policies and rules are set forth make it even clearer that they serve a legitimate business interest and do not interfere with Section 7 rights.

45 I find that the instant case is distinguishable from *Costco*, supra, which is relied on by the Acting General Counsel in support of his position. In that case, the Board found that the employer's rule prohibiting statements that "damage the Company, defame any individual or damage any person's reputation" violated Section 8(a)(1). In so finding the Board noted that

there was “nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule.” *Id.* slip op at 2.

5 In the instant case, when the challenged rules and policies are considered in context, it is clear that they are directed to legitimate business-related concerns and would not chill Section 7 rights. As noted above, the Respondent has a long history of collective-bargaining with the Union and has engaged in cooperative ventures with labor organizations. Its compliance and ethics handbook gives specific examples of what the Respondent considers to be a conflict of interest. Under the circumstances present here, I do not believe that a reasonable employee
10 reading the challenged provisions would conclude that they prohibited his or her right to engage in union or protected concerted activity.

It is for the same reason that I find that the instant case to be distinguishable from *Roomstore*, 357 NLRB No. 143 (2011), relied on by the Charging Party. There, the Board found
15 that the employer’s maintenance and enforcement of its handbook rule prohibiting “[a]ny type of negative energy or attitudes” violated Section 8(a)(1). The Board emphasized that in the context of the employer’s repeated warnings linking “negativity” to the employee’s protected discussions concerning commission discounts, employees would reasonably interpret the “negativity” rule as applying to protected activity. *Id.*, slip op. at 1 fn. 2. In the instant case there is no evidence
20 indicating the manner in which the Respondent has applied the challenged rules and policies.

On the basis of the foregoing, I find that the Acting General Counsel has not met his burden of showing that the maintenance of the rules and policies regarding conflicts of interest and not acting in the best interest of the Red Cross would reasonably chill employees in the
25 exercise of their Section 7 rights. Accordingly, I find that the Respondent’s maintenance of these policies and rules does not violate Section 8(a)(1) of the Act and I shall dismiss these allegations in the complaint.

As noted above, the Acting General Counsel contends that the Respondent’s maintenance
30 of a rule in its employee handbook providing that employees may be disciplined for “unsatisfactory conduct,” is overly broad and violative of Section 8(a)(1). Relying on *Lutheran Heritage Village*, supra, the Respondent contends that such a rule does not restrain employees in the exercise of Section 7 rights.

35 In *Lutheran Heritage Village*, the Board found that the mere maintenance of rules prohibiting “abusive or profane language” and “harassment” to be lawful. The Board concluded that “work rules are necessarily general in nature and are typically drafted by and for laymen, not experts in the field of labor law. We will not require employers to anticipate and catalogue in the work rules every instance in which, for example the use of abusive or profane language might
40 conceivably be protected by (or exempted from the protection of) Section 7.” *Id.* at 648. This analysis applies to the instant case. There is no evidence in this case to indicate that the Respondent has disciplined employees for “unsatisfactory conduct” in order to restrain the Section 7 rights of employees. In addition, the collective-bargaining agreement between the Respondent and the Union provides that the employer must have “just cause” to discharge or
45 suspend an employee, and contains a grievance-arbitration provision to ensure that employee’s rights under the collective-bargaining agreement are protected. Under these circumstances, I find that a reasonable employee would not read the handbook provision providing for discipline for

“unsatisfactory conduct” to chill Section 7 rights. Accordingly, I shall dismiss this allegation in the complaint.

The Allegations Regarding the Red Cross Trademark

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As amended at the trial, the complaint alleges that the following provisions of the Respondent’s trademark brochure (GC Exh. 16) violate Section 8(a)(1):

Who May Use the Red Cross Symbol?

10

We often see the Red Cross symbol used as a decorative symbol on signs, in advertising or to indicate first-aid stations, ambulances, emergency, health care or medical products, services or personnel. Using the Red Cross symbol in such a way is wrong-and illegal.

15

Only the American Red Cross and the medical corps of the Armed Forces during times of armed conflict may use the Red Cross emblem in the United States. A few U. S. Companies that were already using the Red Cross symbol before 1905 are entitled to continue using it. One well-known example is Johnson & Johnson. Its use by anyone else is prohibited and unlawful.

20

What Legal Restrictions Exist in the United States?

Congress understood the importance of protecting the Red Cross emblem from unauthorized use and made unauthorized use a crime.

25

Whoever wears or displays the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or agent of the American National Red Cross; or

30

Whoever, whether corporation, association or person, other than the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States, uses the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or the words “Red Cross” or “Geneva Cross” or any combination of these words-

35

Shall be fined under this title or imprisoned not more than 6 months, or both. (18 U.S.C. Section 706)

40

Please note that while the first paragraph of the statute requires fraudulent intent, the second paragraph does not. In addition, the statute prohibits red crosses on white backgrounds or any sign or insignia made or colored in imitation thereof. An imitation of the Red Cross emblem, such as a Red Cross on any color background, is considered illegal

45

The Red Cross emblem is also a famous trademark and service mark. The U.S. Patent and Trademark Office recognizes the extraordinary rights of the American Red Cross in the red cross symbol (Trademark Manual of Examining Procedure, section 1205.01). The Red Cross emblem is aggressively protected just like any other famous trademark. In addition to violating federal criminal law, unauthorized use of the red cross symbol violates federal and state trademark law, anti-dilution law and unfair competition law.

You would not use The Golden Arches Logo without obtaining permission from McDonald's Corporation, and you would not use the Olympic Symbol (Olympic Rings) without obtaining permission from the International Olympic Committee. Please do not use the Red Cross symbol without permission from the American Red Cross.

What Is a Misuse?

A "misuse" is another word for "infringement," and it describes instances in which an unauthorized party is using the Red Cross emblem without permission from the American Red Cross. Often misuses occurred when people incorrectly treat the Red Cross emblem as a generic symbol for first-aid stations, ambulances, emergency, health care or medical products, services or personnel. A misuse can occur when an authorized party uses the Red Cross emblem incorrectly. A misuse or infringement of the Red Cross emblem is any cross of equal or substantially equal vertical and horizontal "legs" that are colored red or a shade of red. Misuses include red Crosses that are:

Slanted or italicized

Thin or thick

Outlined in the color other than red

On a background other than white

Included with a figure, symbol or word superimposed on it

Included as an element of a logo

No misuse is too small to mention, because its timely correction may literally save a life. To report a misuse of the Red Cross emblem, please email us at *Trademarks @ USA. Red Cross.org*.

The Acting General Counsel and the Charging Party contend that the Respondent's policy regarding the use of the Red Cross emblem and trademark are facially overbroad and violate Section 8(a)(1) of the Act. The Acting General Counsel concedes that the Respondent has the ability to restrict its trademark use for commercial purposes and to preclude individuals, including employees, from misusing the emblem, such as falsely identifying themselves as relief

workers during a disaster. The Acting General Counsel and the Charging Party contend, however, that employees have the right to use their employer's name and logo in conjunction with protected concerted activity and that the Respondent's rule interferes with this Section 7 right.

5

The Respondent contends, in the first instance, that the trademark policy informs individuals, including employees, that it is a crime to display the insignia or use the words "Red Cross" to fraudulently create the appearance of an endorsement by the American Red Cross and that the Acting General Counsel is unwarranted in claiming that informing employees of this chills Section 7 rights and violates Section 8(a)(1).

10

The Respondent further contends that its prohibition on the unauthorized use of the Red Cross emblem and trademark is supported by legitimate business justifications. Respondent notes its failure to properly limit the use of the American Red Cross trademark would contravene the "Regulations on the use of the Emblem of the Red Cross or the Red Crescent by the National Societies," issued in 1991 by the International Red Cross (GC Exh. 17). In addition, the Respondent asserts the policy helps ensure that competitors in the blood collection business do not make it appear that they are actually performing a Red Cross blood drive. Given the well-known mission of the Red Cross, the Respondent contends that no reasonable employee would fail to understand the legitimate reasons for the Red Cross trademark policies.

15

20

As I have previously indicated, when the issue is whether the mere maintenance of a policy violates Section 8(a)(1), the Board instructs that I must give the policy a reasonable reading, and refrain from reading particular phrases in isolation or presuming interference with employee rights. *Lutheran Village Heritage*, supra at 646.

25

I find that when the Respondent's trademark policy is read as whole, employees would reasonably understand that it is designed to protect the Respondent's legitimate right to safeguard one of the most famous symbols in the world, rather than to interfere with Section 7 rights. There is no evidence in the record to indicate that the Respondent's trademark policy has been applied, in any way, to limit the rights of employees to engage in union or protected concerted activity. Under the circumstances present here, I do not find that the mere maintenance of the trademark policy chills the Section 7 rights of employees.

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I find the cases relied on by the Acting General Counsel and the Charging Party in support of their position to be distinguishable.⁹ In *Pepsi-Cola Bottling Co.*, 301 NLRB 1008 (1991), the union resumed an organizing campaign to represent the employer's employees on February 16, 1986. In late February or early March 1986, the employer, for the first time, posted regulations regarding the wearing of uniforms bearing product logos and trademarks. A portion of the regulation prohibited employees from wearing uniforms bearing logos and trademarks of

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⁹ I find the Acting General Counsel's reliance on *Local 248, Meat & Allied Workers (Milwaukee Independent Meat Packers Assn.)*, 230 NLRB 189 (1977) to be misplaced as that case is inapposite to the present one. There, the principal issue involved the Board's finding that the respondent union's picketing violated Section 8(b)(4)(ii)(B) of the Act because the signs used did not adequately identify the struck product or the primary employer.

the employer's products while engaging in union activity during nonworking time, outside the plant. In finding that the employer's rule was an "excessive impediment to employee union activity" and that the promulgation of this rule violated Section 8(a)(1). The Board found that the employer had not provided any business reason that would outweigh the Section 7 right of employees to engage in union activity in a uniform bearing product identification. In *Pepsi-Cola*, it is clear that the rule was promulgated in response to the union activity of employees and was specifically designed to restrict their Section 7 rights. As I have indicated above, there is no such evidence in the instant case. Rather, in the instant case the issue is the facial validity of the trademark policy in the context of a 40-year history of collective bargaining.

In *Boise Cascade Corp.*, 300 NLRB 80 (1990), a case relied on by the Charging Party, the employer prohibited an employee from wearing a "slashed IP" pin that was obtained from a sister local which was on strike against International Paper, another paper manufacturer located near the employer. The employer also prohibited employees from wearing T-shirts protesting the subcontractors who were utilized by International Paper during the strike. The T-shirts had the name of the offending employers on them. The Board found that the employer violated Section 8(a)(1) by banning the wearing of the T-shirts and the pins. In so finding, the Board found that the employer had not shown special circumstances sufficient to support the ban. The instant case is clearly distinguishable in that the issue here is whether the Respondent's trademark policy is facially unlawful. *Boise Cascade* dealt with an employer's reactive prohibition of employees wearing insignia identifying other employers with whom a sister local was involved in a labor dispute and did not involve the facial validity of a rule similar to the one at issue here.

On the basis of the foregoing, I find that the Respondent's maintenance of its trademark policy does not violate Section 8(a)(1) of the Act and I shall dismiss that allegation in the complaint.

The Respondent's Work Stoppage Rule

Paragraphs 8(A)(vi) and (B) of the complaint allege that the Respondent violated Section 8(a)(1) by maintaining a work rule in its employee handbook prohibiting employees from "participating in a deliberate slowdown or work stoppage." (GC Exh. 8, p. 48)

The Respondent contends that the collective-bargaining agreement between the Respondent and the Union contains a no-strike clause and that the work rule is in accordance with the collective-bargaining agreement and therefore does not have a chilling effect on Section 7 rights. The Acting General Counsel and the Charging Party contend that the rule is overbroad in that it explicitly restricts employees from engaging in a work stoppage, a protected Section 7 right. The Acting General Counsel contends that the existence of a no-strike clause in a collective-bargaining agreement does not govern the matter as that provision of the collective-bargaining agreement would not be in existence during the period after the contract has expired and a new one has not yet succeeded it. The Charging Party contends that the provisions of the handbook would apply to the nonunit employees employed by the Respondent at all times.

The current collective-bargaining agreement between the parties contains a no-strike clause in article 9 (GC Exh. 14, p. 9) providing, in relevant part:

A. During the life of this Agreement, the Union will not condone or permit its members to cause nor shall any employee participate in any strikes, picketing, work stoppages, disruption of work or other concerted activity for any reason. The Union agrees to take reasonable means to prevent or terminate any such activity. There shall be no lockout by the Employer.

B. While the Union shall take every reasonable means to induce such employees to return to their jobs during any such activity described in paragraph A, it is specifically understood and agreed that any employee engaged in such activity shall be subject to discipline up to and including discharge

The Board held in *Odyssey Capital Group, L.P., III*, 337 NLRB 1110, 1111 (2002) “it is well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions, including unsafe or unhealthy workplace conditions are engaged in ‘concerted activities’ for ‘mutual aid or protection’ within the meaning of Section 7 of the Act.” In addition, Section 13 of the Act establishes a statutory right for employees to engage in a strike. There are, however, limitations on the exercise of that statutory right. Broad no-strike clauses such as the one contained in the collective-bargaining agreement between the parties are generally given effect by the Board and the courts. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Molders & Allied Workers Local 164 (Pacific Steel Casting Company)*, 270 NLRB 1105 (1984), enf. 765 F. 2d 858, (9th Cir. 1985). There are, however, exceptions to that policy as the Board has found a broad no strike clause did not bar a strike over serious unfair labor practices *Dow Chemical Co.*, 244 NLRB 1060 (1979), enf. denied 636 F.2d 1352 (3d Cir. 1980); or because the waiver of the right to strike over a particular subject was not established by evidence establishing a clear and unmistakable waiver. *Pacemaker Yacht Co.* 253 NLRB 828 (1980 enf. denied 663 F. 2d 455 (3d Cir. 1981).

With regard to the portion of the Respondent’s rule prohibiting “slowdowns,” it well settled that “employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so are engaged in activities not protected by the Act and that discipline for such activity does not violate the Act.” *Daimler Chrysler Corp.* 344 NLRB 1324, 1325 (2005).

As these principles apply to the Respondent’s work stoppage rule contained in its handbook, the portion of the rule precluding employees from engaging in a “deliberate slowdown” is a lawful restriction. However, the provision prohibiting a work stoppage is a more complicated matter. During the term of the contract in the instant case, the no-strike clause generally constitutes a waiver by the Union on behalf of unit employees of the statutory right to engage in a strike. As the Acting General Counsel contends, however, the no-strike clause is only effective during the term of the agreement. Thus, to the extent that the handbook precludes employees from engaging in a “work stoppage” without limiting it to the term of the collective bargaining agreement’s no-strike clause, it is an overbroad restriction of employees’ statutory right to engage in a strike. As noted above, in certain limited instances even a strike occurring during the term of a collective-bargaining agreement with a broad no-strike clause may be protected. In addition, the record establishes that the Respondent employs nonunit employees, although there is no indication as to the number of such employees. (Tr. 112; 128.) Nonunit employees would, of course, not be subject to the no-strike provisions in the collective bargaining agreement. In this connection, Smith testified that the work stoppage provision in the

handbook applied to the nonunit employees (Tr. 112). Thus, the Respondent's work stoppage rule contained in the handbook prohibits employees from engaging in a work stoppage at times when they have a statutory right to do so.

5 In *Labor Ready, Inc.* 331 NLRB 1656 (2000) the Board found that the employer's rule stating that "employees who walk off the job will be discharged" was an overbroad restriction of the Section 7 rights of employees and violated Section 8(a)(1) of the Act. *Id.*, at 1656 fn. 1, 1657. On the basis of the foregoing, I find that the Respondent's handbook rule, to the extent it provides that employees can be disciplined for engaging in a "work stoppage", without further
10 limitation, is an overbroad restriction on employees' Section 7 rights and violates Section 8(a)(1).

The Allegations Regarding the Respondent's Enforcement Policies

15 Paragraphs 8(A)(ii) and (B) allege that the following provision of the Respondent's handbook violates Section 8(a)(1) of the Act:

Investigations, Compliance and Ethics-Formal Dispute Resolution.

20 Distinguishing from the actions of the ombudsman, the Office of the General Counsel and the Office of Investigations, Compliance and Ethics (IC&E) conduct formal investigations into allegations of fraud, waste, abuse, Red Cross policy violations, illegal or unethical conduct or other improprieties regarding the Red Cross. Usually the allegations arise from whistleblower complaints of Red Cross
25 employees and volunteers seeking formal review or investigations of the allegations of wrongdoing.

30 Paragraphs 8(A (iii) and (B) allege that the Respondent's progressive discipline policy contained in the handbook and the code of conduct also violates Section 8(a)(1) of the Act. At the trial, the Acting General Counsel amended the complaint to also allege that the following provision in the code of conduct violates Section 8(a)(1) of the Act:

35 **Whistleblower Hotline Programs.** If an employee or volunteer suspects or knows about misappropriation, fraud, waste, abuse, Red Cross policy violations, illegal or unethical conduct, unsafe conduct or any other misconduct by the organization or its employees or volunteers, that individual should alert his or her supervisor or other member of local management. In those cases where an employee or volunteer is not comfortable telling his or her supervisor or local management, the employer volunteer may contact the Concern Connection Line
40 at 1-888-309-9679.

45 The Acting General Counsel and Charging Party contend, in essence, that by using the enforcement policies to enforce the previously discussed policies which they contend to be overbroad and unlawful, the enforcement policies themselves are facially violative of Section 8(a)(1).

The Acting General Counsel and the Charging Party argue that the enforcement provisions are facially coercive because they contain an implied threat of investigation or discipline for what could be protected concerted activity. The Respondent asserts that the challenged enforcement policies are facially neutral and there is no evidence that any of them were designed or utilized in a way to restrict Section 7 rights. Accordingly, the Respondent contends they are lawful policies.

In relevant part, the investigation, compliance, and ethics provision of the code of conduct and handbook provides that the Respondent will conduct formal investigations into “allegations of fraud, waste, abuse, Red Cross policy violations, illegal or unethical conduct, unsafe conduct or any other misconduct by the organization or its employees or volunteers.” The whistleblower hot line provision merely encourages employees to report to management instances of such misconduct. The progressive disciplinary policy maintained by the Respondent in the handbook is typical of such policies in that it provides for a series of disciplinary steps progressing from verbal warning to termination, but reserving the right to discipline as appropriate.

On their face, these policies do not in any way explicitly touch upon Section 7 activity. There is no evidence to indicate that these policies were designed to restrict Section 7 activity or that they were, in any way, applied to do so. Certainly, there are legitimate business reasons to conduct formal investigations into misconduct, to encourage employees to report misconduct, and to utilize a progressive disciplinary system with regard to misconduct. The theory of the Acting General Counsel and the Charging Party is that because some of the Respondent’s rules and policies are overbroad and violate Section 8(a)(1), the enforcement policies could be used to enforce those policies and thus interfere with Section 7 rights. I do not agree with this theory. As the Board noted in *Palms Hotel & Casino* 344 NLRB 1363, 1368 (2005) when a rule does not address explicitly restrict Section 7 activity the mere fact that it could be read in such a fashion does not establish its illegality.

As noted above, I have found some of the Respondent’s rules and policies to be facially unlawful and violate Section 8(a)(1). The remedy I will provide for those violations prohibits the Respondent from enforcing those unlawful rules and policies and requires it to rescind them. With regard to the contention that I should find the enforcement policies overbroad and facially unlawful, certainly the Respondent has a right to encourage employees to report misconduct, to formally investigate misconduct and to apply a progressive disciplinary policy to misconduct. To find the enforcement policies to be facially unlawful would, in my view, require attributing to the Respondent an intent to interfere with employee rights by the use of those policies, without there being any evidence that is the case. As noted above, *Lutheran Heritage Village* precludes such an analysis. Accordingly, on the basis of the foregoing, I find that the Respondent has not violated Section 8(a)(1) of the Act by maintaining its enforcement policies and I shall dismiss those allegations in the complaint.

CONCLUSIONS OF LAW

1. The Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Maintaining the provisions in its 2005 Confidential Information and Intellectual

Property Agreement (CIIPA) that provide “Confidential information shall include but not be limited to: information relating to Red Cross’ . . . (i) personnel . . . (ii) employees . . . [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross’ agents.”

(b) Maintaining the provision in the employee handbook and code of conduct that provides that no employee shall: “Disclose any confidential American Red Cross information that is available solely as a result of an employee’s . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.”

(c) Maintaining the provision in the employee handbook that provides: “Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.”

(d) Maintaining the provision in the employee handbook that prohibits the release of confidential employee information without authorization.

(e) Maintaining the provision in the 1993 confidentiality agreement that provides that “all information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked “confidential”; and All Financial Information.”

(f) Maintaining the provision in the 2002 CIIPA that provides: “I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross . . . benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee.”

(g) Maintaining the provision in the employee handbook that prohibits the “Unauthorized placement or posting of information in break rooms, or in common areas.”

(h) Maintaining the provision in the employee handbook that prohibits employees from participating in a work stoppage.

2. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Respondent has not otherwise violated the Act.

REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

10 The standard remedy for an unlawful work rule is immediate rescission of the rule as this insures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 5 (2013); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant to *DirectTV U.S.* and *Guardsmark*, supra, the Respondent may comply with the order of rescission by rescinding the unlawful provisions in the applicable documents and republishing those documents without them. In recognition of the fact, however, that republishing the documents could be costly, the Respondent may supply the employees either with inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until the Respondent publishes the applicable documents without the unlawful provisions. Any copies of the applicable documents that include the unlawful rules must include the inserts before being distributed to employees.

20 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

ORDER

25 The Respondent, American Red Cross Blood Services, Western Lake Erie Region, Toledo, Ohio, its officers, agents, successors, and assigns, shall

30 1. Cease and desist from

35 (a) Maintaining the provisions in its 2005 Confidential Information and Intellectual Property Agreement (CIIPA) that provide “Confidential information shall include but not be limited to: information relating to Red Cross’ . . . (i) personnel . . . (ii) employees . . . [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross’ agents.”

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Maintaining the provision in the employee handbook and code of conduct that provides that no employee shall: “Disclose any confidential American Red Cross information that is available solely as a result of an employee’s . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.”

(c) Maintaining the provision in the employee handbook that provides: “Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.”

(d) Maintaining the provision in the employee handbook that prohibits the release of confidential employee information without authorization.

(e) Maintaining the provision in the 1993 confidentiality agreement that provides that “all information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked “confidential”; and All Financial Information.”

(f) Maintaining the provision in the 2002 CIIPA that provides: “I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including; but not limited to (i) information relating to Red Cross . . . benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee.”

(g) Maintaining the provision in the employee handbook that prohibits the “Unauthorized placement or posting of information in break rooms, or in common areas.”

(h) Maintaining the provision in the employee handbook that prohibits employees from participating in a work stoppage.

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

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

(a) Within 14 days of the Board’s order rescind the following provisions:

(1) The provisions in its 2005 Confidential Information and Intellectual Property Agreement (CIIPA) that provide “Confidential information shall include but not be limited to: information relating to Red Cross’ . . . (i) personnel . . . (ii) employees . . . [and] (v) all information not generally known outside of Red Cross regarding Red Cross

and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross' agents."

5 (2) The provision in the employee handbook and code of conduct that provides that no employee shall: "Disclose any confidential American Red Cross information that is available solely as a result of an employee's . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red
10 Cross."

(3) The provision in the employee handbook that provides: "Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

15 3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization."

(4) The provision in the employee handbook that prohibits the release of confidential employee information without authorization.

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(5) The provision in the 1993 confidentiality agreement that provides that "all information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all
25 documents marked "confidential"; and All Financial Information."

(6) The provision in the 2002 CIIPA that provides: "I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross . . .
30 benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee."

(7) The provision in the employee handbook that prohibits the "Unauthorized placement
35 or posting of information in break rooms, or in common areas."

(8) The provision in the employee handbook that prohibits employees from participating in a work stoppage.

40 (b) As more fully set out in the Remedy, furnish all employees with (1) inserts for the applicable documents that advise that the unlawful rules have been rescinded; or (2) the language of lawful rules upon adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute the applicable documents that do not contain the unlawful rules.

5 (c) Within 14 days after service by the Region, post at its facility in Toledo, Ohio, copies
of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the
Regional Director for Region 8, after being signed by the Respondent's authorized
representative, shall be posted by the Respondent and maintained for 60 consecutive days in
conspicuous places including all places where notices to employees are customarily posted. In
10 addition to physical posting of paper notices, the 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. In the event that, during the pendency of these proceedings, the Respondent
15 has gone out of business or closed the facility involved in these proceedings, the Respondent
shall duplicate and mail, at its own expense, a copy of the notice to all current employees and
former employees employed by the Respondent at any time since March 28, 2012.

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

20 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges
violations of the Act not specifically found.

Dated, Washington, D.C., June 4, 2013.

25 _____
Mark Carissimi
Administrative Law Judge

¹¹ 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."

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.

WE WILL NOT maintain the following provisions in the applicable documents:

(1) The provisions in our 2005 Confidential Information and Intellectual Property Agreement (CIIPA) that provide “Confidential information shall include but not be limited to: information relating to Red Cross’ . . . (i) personnel . . . (ii) employees . . . [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross’ agents.”

(2) The provision in the American Red Cross Employee Handbook for Western Lake Erie Region (the employee handbook) and Code of Business Ethics and Conduct (the code of conduct) that provides that no employee shall: “Disclose any confidential American Red Cross information that is available solely as a result of an employee’s . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross.”

(3) The provision in the employee handbook that provides: “Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.”

(4) The provision in the employee handbook that prohibits the release of confidential employee information without authorization.

(5) The provision in the 1993 confidentiality agreement that provides that “all information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked “confidential”; and All Financial Information.”

(6) The provision in the 2002 CIIPA that provides: “I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross . . . benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee.”

(7) The provision in the employee handbook that prohibits the “Unauthorized placement or posting of information in break rooms, or in common areas.”

(8) The provision in the employee handbook that prohibits employees from participating in a work stoppage.

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

WE WILL rescind the following provisions in the applicable documents:

(1) The provisions in the 2005 Confidential Information and Intellectual Property Agreement (CIIPA) that provide “Confidential information shall include but not be limited to: information relating to Red Cross’ . . . (i) personnel . . . (ii) employees . . . [and] (v) all information not generally known outside of Red Cross regarding Red Cross and its business, regardless of whether such information is written, oral, electronic, digital or other form and regardless of whether the information originates from Red Cross or Red Cross’ agents.”

(2) The provision in the American Red Cross Employee Handbook for Western Lake Erie Region (the employee handbook) and Code of Business Ethics and Conduct (the code of conduct) that provides that no employee shall: “Disclose any confidential American Red Cross information that is available solely as a result of an employee’s . . . affiliation with the American Red Cross to any person not authorized to receive such information, or use to the disadvantage of the American Red Cross any such confidential information, without the express authorization of the American Red Cross

(3) The provision in the employee handbook that provides: “Prohibited uses of Western Lake Erie Region communication systems include, but are not limited to:

3. Distributing . . . confidential . . . information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.”

(4) The provision in the employee handbook that prohibits the release of confidential employee information without authorization.

(5) The provision in the 1993 confidentiality agreement that provides that "all information obtained by virtue of employment with the American Red Cross is to be held in the strictest confidence. This includes all information in . . . personnel and financial records. The following are some examples of confidential information: All information on litigation; all documents marked "confidential"; and All Financial Information."

(6) The provision in the 2002 CIIPA that provides: "I will not during or after my Red Cross affiliation disclose to persons outside of the Red Cross information that the Red Cross considers confidential . . . including, but not limited to (i) information relating to Red Cross . . . benefits, compensation, equal employment opportunity matters, or (ii) information relating to Red Cross . . . employees . . . unless authorized by the President of the Red Cross or his/her designee."

(7) The provision in the employee handbook that prohibits the "Unauthorized placement or posting of information in break rooms, or in common areas."

(8) The provision in the employee handbook that prohibits employees from participating in a work stoppage.

WE WILL furnish all of you with (1) inserts for the applicable documents that advise you that the unlawful rules have been rescinded; or (2) the language of lawful rules upon adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute to all of you revised documents that do not contain the unlawful rules.

AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086

(216) 522-3715, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, (216) 522-3740.

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-090132

**THE UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE MARK CARISSIMI'S DECISION AND BRIEF IN
SUPPORT OF EXCEPTIONS**

EXCEPTIONS

Counsel for the Acting General Counsel Gina Fraternali excepts to the following findings of facts and conclusions of law by Administrative Law Judge Mark Carissimi in his Decision and Order which issued on June 4, 2013 (JD-38-13).¹

First, the ALJ erred by failing to reach a Conclusion of Law that Respondent violated Section 8(a)(1) of the Act and to issue an appropriate remedial order with respect Respondent's promulgation and maintenance of Conflict of Interest and Unsatisfactory Conduct work rules and policies. (ALJD, pp. 15-20)

Second, the ALJ also erred by failing to draw appropriate conclusions of law and to recommend the appropriate remedy for the maintenance of its rules prohibiting employees from using the name and emblem of the American Red Cross as set forth in Complaint paragraph 8(A)(i)[a.] and Paragraph (a) of General Counsel's Exhibit 18, which was amended to the

¹ Judge Carissimi will be referred to as "ALJ". ALJD p. __: __ will indicate the page and line numbers in the ALJ's Decision, JD-38-13.

complaint at trial. These rules prohibiting the use of Respondent's name and emblem are independent Section 8(a)(1) violations that are fully established by the record facts and evidence.

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS

I. **EXCEPTION 1: RESPONDENT'S CONFLICT OF INTEREST AND UNSATISFACTORY CONDUCT WORK RULES AND POLICIES VIOLATE SECTION 8(A)(1) OF THE ACT**

The ALJ erred in his conclusion that Respondent's rules prohibiting conduct contrary to the Respondent's best interests, prohibiting employees from "conflicts of interests" and prohibiting "unsatisfactory conduct" do not violate Section 8(a)(1) as overly broad and unlawful rules. (ALJD, p. 17:2-8; p. 19:46-48, p. 20:1-2) In making his erroneous finding, the ALJ found that when these unlawful rules are read in the context of Respondent's compliance and ethics handbook, the rules are not overbroad. The ALJ also found that the history Respondent's "goodwill" to organized labor and the satisfactory relationship between the Respondent and the Union had some probative value in finding these rules to be lawful.

The ALJ's findings with regard to these rules must be overruled. The record evidence does not support the ALJ's finding that these rules are read by employees in the context of this independent compliance and ethics handbook. Furthermore, the suggested "goodwill" and benevolent relationship between the Respondent and the Union, which the record shows is not the reality, has little probative value in finding these rules to be lawful.

The ALJ found that the "illustrative examples contained in the Respondent's compliance and ethics handbook establish that the Respondent is directing its employees to avoid conflicts of interest involving possible personal or financial gain. It also cautions employees against acting in competition with the interests of the Respondent." (ALJD, p. 18:8-11)

It is uncontroverted that Respondent, in its normal course of business, fails to notify employees of its compliance and ethics handbook. (R. 7) The compliance and ethics handbook is not referenced in any of Respondent's other policies or handbooks which are issued to employees. The employee handbook (GC 8), American Red Cross Code of Business Ethics and Conduct (GC 18) and new hire checklist (R. 9) are bereft of any reference to it. Notably, Respondent's employee handbook states that it contains the information for employees about essential policies and makes reference to other handbooks and policies, including EEOC and Diversity, Affirmative Action, Sexual Harassment, Telework Program, Outside Employment, and Military Leave. (GC 8, at p. 5, 8) Furthermore, none of Respondent's new employee training programs and new employee orientation sessions provides any instruction, guidance or even mention of this compliance and ethics handbook. (R. 9)

The record clearly shows that Respondent requires that employees are aware of and informed about some of its policies. It requires that employees sign a document to confirm that they have read specific policies. (R. 9 at 1, 18) Those policies include Respondent's Employee Handbook, employment eligibility verification, Code of Conduct, Confidential and Intellectual Property agreement, employee emergency contact information, voluntary medical form, union contract and membership form, tax forms, and signature forms. (R. 9 at 1) However, the Respondent does not require employees to confirm that they have read its compliance and ethics handbook. (R. 7)

The new hire checklist includes a signature block for employees to certify that they were provided with an overview of the following policies: dress code, harassment-free work environment, drug and alcohol policy, violence free work environment, workplace safety and security, performance management payroll, recognition, HR Direct, clock in procedures, absence

notification, benefits, human resource, payroll and employment verification information. (R. 9 at 1)

There is no record evidence to show that employees are aware of the compliance and ethics handbook. In this connection, when Respondent discharged two employees for allegedly violating Respondent's ethics, code of conduct and confidentiality policies, their termination letters did not mention the compliance and ethics handbook. (GC. 20, 21)

Thus, the record does not support the ALJ's finding that "employees would not reasonably construe the challenged language to refer to union or protected concerted activity" because employees would read the language in the context of the compliance and ethics handbook. (ALJD, 18: 7-8) Respondent failed to meet its burden to show that its rules are lawful.

The ALJ also found that given Respondent's "long history of collective bargaining with the Union and its cooperative efforts with the labor community in the Toledo area, it is very unlikely that employees would perceive the challenged provisions as interfering with their Section 7 rights." (ALJD, p. 18:17-20) The relationship between the Union and the Respondent in collective bargaining and in the community has no probative value in analyzing whether Respondent's work rules restrict Section 7 rights. Indeed, improper motive is not a necessary element of an 8(a)(1) violation. See, Tenneco Automotive, Inc., 357 NLRB No. 84 slip op. at 7 (2011); Windsor Convalescent Center of North Long Beach, 351 NLRB 957, 987 (2007).

The ALJ gives undue weight to Respondent's Vice President of Human Resources and Labor Relations Keith Sherman testimony that Respondent and the Union have had a 40-year history of collective bargaining and that 25% of the American Red Cross' rank-and-file

employees are unionized. (Tr. 150-152; ALJD, p.18:13-15) The ALJ stated, “[r]espondent has a labor liaison representative who coordinates the Respondent’s activities with that of the labor community to engage in blood drives.” (Tr. 151; ALJD, p. 18:15-18) It is unclear how this shows that “a reasonable employee reading the challenged provisions would conclude that [Respondent] prohibited his or right to engage in union or protected activity.” (ALJD, p. 19:6-11)

It should be noted that while the ALJ credited Sherman’s testimony pertaining to the relationship between the Union and the Respondent, he failed to take notice from the record that Respondent and the Union had been without a contract since January 2010. (Tr. 130) The employees went on strike on March 27, 2012. (Tr. 83) This belies the notion that the Respondent and labor organizations have “cooperative ventures”. (ALJD, p. 19:7) With regard to the blood drives, Respondent is in a competitive market and it profits from its blood drives. It is not surprising that it would reach out to labor organizations and its members to participate in blood drives. Significantly, there is nothing in the record to show that Respondent’s employees have any knowledge about the 40 year bargaining history between Respondent and the Union or about Respondent’s relationships with other labor organizations across the nation. There is no evidence to show that employees know that Respondent has a labor liaison or that the liaison reaches out to labor organizations to arrange blood drives and disaster relief. For the ALJ to consider these factors to sustain his finding that, in context, the Respondent’s rules do not infringe on employees’ Section 7 rights is unsupported by Board law.

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) instructs that in determining whether a challenged rule is unlawful it must give the rule a reasonable reading in the proper context. However, the ALJ’s reliance on the Respondent’s compliance and ethics handbook to

give context to the rules contained in the employee handbook and Respondent's code of conduct is misplaced and his consideration of the employer-union relationship and outreach efforts for blood drives is wholly unsupported by Board precedent. (ALJD, pp. 16-20:2) These rules are unlawful and violate Section 8(a)(1).

Respondent maintains in its employee handbook the rules prohibiting employees from: operating or acting "in any manner that is contrary to the best interest of the American Red Cross", "willfully allowing a 'conflict of interest,' such as financial, personal or otherwise" and engaging in "unsatisfactory conduct." (G.C. 8) The Board found in Costco Wholesale Corp., 358 NLRB No. 106 (2012) that a rule prohibiting employees from making statements that "damage the company, defame any individual or damage any person's reputation" was unlawful because there was nothing in the rule that "even arguably suggests that protected communications are excluded from the broad parameters of the rule." Id. at *4-5. The ALJ incorrectly found Costco to be distinguishable because of his finding that Respondent met its burden by showing that its ethics and compliance handbook, its labor relations history and its outreach efforts for blood drives put the challenged rules in sufficient context. (ALJD, p. 18:45-47, p.19:4-11)

Respondent's conduct rules are overly broad and violate the Act. In Claremont Resort & Spa, 344 NLRB 832 (2005), the Board found that a rule prohibiting "negative conversations about associates and/or managers" violated the employer's standard of conduct was overbroad because a reasonable employee could interpret it to be a prohibition on voicing complaints. The rules here are far more vague than the rule in Claremont Resort. While the ALJ compares Respondent's rules to Lutheran Heritage Village's "abuse or profane language" and "harassment" rules that the Board found to be lawful, Respondent's conduct rules have no specificity about the type of conduct they are prohibiting. In Costco, Claremont and Lutheran

Heritage Village , the rules at the very least prohibited employees from defaming the company, talking about managers, abusive language and harassment. Here, Respondent's rules when given a reasonable reading do not define what is prohibited. Respondent bears the burden to show that the rule is unambiguous and that burden has not been met here. Norris/O'Bannon, Dover Resources Co., 307 NLRB 1236, 1245 (1992).

The ALJ also found Respondent's unsatisfactory conduct rules lawful, on grounds that there "is no evidence in this case to indicate that Respondent has disciplined employees for 'unsatisfactory conduct' in order to restrain Section 7 rights of employees." The ALJ also reasoned that the "just cause" article in collective bargaining agreement protects employees from discipline and a reasonable employee would not read a rule threatening discipline for unsatisfactory conduct to infringe on employees' Section 7 rights. (ALJD, p. 19:41-47, p. 20:1-2) It is well-established Board law that promulgation and/or maintenance of an unlawful rule violates Section 8(a)(1). There is no requirement that employees must be disciplined for violating a bad rule for the rule to violate the statute. See, Lafayette Park Hotel, 326 NLRB 824 (1998), *citing Republic Aviation v. NLRB*, 324 U.S. 793, 797-798 (1945) in which the Board held that the mere maintenance of an unlawful work rule, even in the absence of enforcement, violates Section 8(a)(1).

II. EXCEPTION 2: RESPONDENT'S PROHIBITIONS ON THE USE OF ITS NAME AND EMBLEM VIOLATE SECTION 8(A)(1) OF THE ACT

In Paragraph 8(A)(i)[a.] of the Second Amended Complaint (GC 1(l) and Paragraph (a) of Acting General Counsel's Exhibit 18, which was amended to the complaint at trial, Counsel for the Acting General Counsel alleged that Respondent violated Section 8(a)(1) by maintaining

the following prohibitive policy in its Employee Handbook (GC 8) and the American Red Cross Code of Business and Ethics and Conduct (GG 18):

Personal Use. Authorize the use of or use for the benefit of advantage of any person, the name, emblem, endorsement, services or property of the American Red Cross, except in conformance with the American Red Cross policy.

The ALJ erred in failing to draw appropriate conclusions of law that this policy, as maintained in the employee handbook and the code of business and ethics and conduct, violates Section 8(a)(1). It should be noted that this allegation is separate and distinct from the allegation concerning the American Red Cross Trademark pamphlet, GC 16, which the ALJ concluded was lawful.² However, the ALJ failed to make a finding with regard to the rule prohibiting employees from using Respondent's name and emblem. (ALJD, pp. 20-23)

It is undisputed that the rules prohibiting employees from using Respondent's name and emblem are distributed to employees. Indeed, employees are required to verify that they have read both the Employee Handbook and Code of Business and Ethics and Conduct. The Trademark pamphlet, similar to the Compliance and Ethics Handbook, is a separate document and is not referenced in any of Respondent's policies. (GC 8, at p. 5, 8; R. 9) Again, similar to the Compliance and Ethics Handbook, the Trademark pamphlet is not distributed to employees nor explained to employees during the normal course of their employment. (R.9 at 1) The Trademark pamphlet is separate and distinct from the rules pertaining to use of Respondent's name and emblem contained in the employee handbook and the code of business and ethics and conduct. The ALJ erred when he failed to make a finding with regard to these rules.

² Acting General Counsel does not take exception to this finding.

In Pepsi-Cola Bottling Co., the Board found the employer's policy prohibiting employees from wearing or using the company's logo while engaging in protected concerted activity was unlawful. The Board found that the company had not provided a business reason outweighing the Section 7 rights of employees. While the ALJ finds this case to be distinguishable because the rule in Pepsi-Cola was promulgated in response to protected activity, the ALJ erred by not considering the other factors set forth in Lutheran Heritage Village-Livonia in making his determination. Those factors include whether employees would reasonably construe the rule to prohibit Section 7 activity and whether the rule has been applied to restrict the exercise of Section 7 rights. A reasonable reading of the rules prohibiting employees from using Respondent's name and emblem would limit employees from using the Respondent's name and logo in concerted protected communications, including leaflets, picket signs, banners, etc. While the ALJ distinguishes the Acting General Counsel's reliance on Meat & Allied Food Workers Local 248, 230 NLRB 189 (1977) because that case involved allegations of unlawful picketing in violation of Section 8(b)(4)(ii)(B), the Board's finding, in dicta, that employees have a Section 7 right to use an employer's name or logo in conjunction with protected concerted activity should not be so summarily discounted. Additionally, there is no record evidence of any business or safety concerns Respondent might have regarding the use of its name and emblem. These prohibitions restrict employees and chill their Section 7 activities and should be found to violate Section 8(a)(1).

CONCLUSION

Accordingly, it is respectfully requested that the Board reverse the ALJ and find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining its conflict of interest and unsatisfactory conduct Work Rules and Policies. Additionally, it is respectfully

requested that the Board find that Respondent violated Section 8(a)(1) of the Act by promulgating and maintain work rules that prohibit employees from using Respondent's name and emblem.

It is further requested that the Board order the Respondent to cease and desist from engaging in such conduct. The Acting General Counsel requests that the Board Revise the ALJ's recommended Order and Notice to conform to the exceptions above.

Dated at Cleveland, Ohio this 2nd day of August, 2013.

Respectfully submitted,

/s/ Gina Fraternali

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 2nd day of August 2013

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**AMERICAN RED CROSS BLOOD
SERVICES, WESTERN LAKE ERIE
REGION,**

Respondent,

Case No. 08-CA-090132

and

**THE UNITED FOOD AND
COMMERCIAL WORKERS UNION,
LOCAL 75,**

Charging Party.

**EXCEPTIONS OF RESPONDENT,
AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION,
TO THE DECISION OF ADMINISTRATIVE LAW JUDGE
MARK CARISSIMI**

Pursuant to the Rules and Regulations of the National Labor Relations Board, as amended, Respondent, the American Red Cross Blood Services, Western Lake Erie Region (the "Region" or "Respondent"), by the undersigned counsel, respectfully files the following Exceptions to the Decision and Recommended Order of Administrative Law Judge Mark Carissimi ("Decision") in the above-captioned case. Separately, the Region is also simultaneously filing with the NLRB a Brief in support of these Exceptions:

GC Ex. E

Exception No. 1. Respondent excepts to the Decision's finding that the NLRB has the authority to decide the instant matter and that the Administrative Law Judge had the authority to issue the Decision in this matter. ALJD 2:46-3:2.¹

Exception No. 2. Respondent excepts to the Decision's conclusion that amendments to the Complaint sought by the Acting General Counsel were sufficiently related to the existing allegations, that the amendments should be granted, and that the Respondent was not prejudiced by permitting the amendments. ALJD 3:17; 3:30-36.

Exception No. 3. Respondent excepts to the Decision's finding that the Complaint and its amendments were clearly sufficient for due process purposes. ALJD 4:14-15.

Exception No. 4. Respondent excepts to the Decision's conclusion that under the circumstances of the instant matter, the Region was not denied due process. ALJD 4:22-23.

Exception No. 5. Respondent excepts to the Decision's finding that the circumstances of this matter were "far different" from those present in *Lamar Advertising of Hartford*, 343 NLRB 261 (2004). ALJD 4:27-28.

Exception No. 6. Respondent excepts to the Decision's findings: that the Complaint allegations in the instant matter were clear; that Respondent was aware of the legal issues presented by the Complaint at the time of hearing and expanded on those issues in its brief; and that Respondent "clearly had an opportunity to fully and fairly defend itself" against the Complaint's allegations. ALJD 4:34-39.

¹ Throughout these Exceptions, references to the Decision will be designated as follows: ALJD (followed by page and line numbers).

Exception No. 7. Respondent excepts to the Decision's conclusion that the Complaint should not be dismissed because the Respondent was not denied due process. ALJD 4:38-39.

Exception No. 8: Respondent excepts to the Decision's characterization that the Acting General Counsel and/or the Charging Party "specifically identified rules and policies" that were alleged to violate the NLRA. ALJD 5:8-9.

Exception No. 9. Respondent excepts to the Decision's finding that a "fair reading" of the Region's 2005 Confidential Information and Intellectual Property Agreement ("CIIPA") provides that confidential information includes information relating to the Region's personnel or employees and that such information cannot be disclosed either during or after an employee's employment. ALJD 8:9-11.

Exception No. 10. Respondent excepts to the Decision's finding that confidential information as utilized in the 2005 CIIPA includes information regarding personnel and employees. ALJD 8:16-17.

Exception No. 11. Respondent excepts to the Decision's conclusion that the 2005 CIIPA would be reasonably understood by employees to prohibit the disclosure of information, including wages and terms and conditions of employment, to other employees or to non-employees such as Union representatives. ALJD 8:17-19.

Exception No. 12. The Respondent excepts to the Decision's reliance upon *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (2012). ALJD 8:2-3; 8:20-22.

Exception No. 13. Respondent excepts to the Decision's reliance upon *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012). ALJD 8:24-9:22.

Exception No. 14. Respondent excepts to the Decision's failure to properly analyze the Region's "Communications System" policy. ALJD 8: 39-48, n.5

Exception No. 15. Respondent excepts to the Decision's reliance upon *DirectTV US DirectTV Holdings, LLC*, 359 NLRB No. 54 (2003). ALJD 9:24-36.

Exception No. 16. Respondent excepts to the Decision's reliance upon *Sheraton Anchorage*, 359 NLRB No. 95 (2013); *Hyundai America Shipping Agency, Inc.*, 357 NLRB 80 (2011); *Cintas Corp.*, 344 NLRB 943 (2005) *enf'd.* 42 F.3d 463 (D.C. Cir. 2007); *IRIS U.S.A. Inc.*, 336 NLRB 1013 (2001); *University Medical Center, Inc.*, 335 NLRB 1318 (2001); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). ALJD 9:38-10:9.

Exception No. 17. Respondent excepts to the Decision's conclusion that the confidentiality provision of the Region's 2005 CIIPA is facially overbroad. ALJD 10:12-12.

Exception No. 18. Respondent excepts to the Decision's finding that the Region's confidentiality policy in the instant matter is distinguishable from the "code of conduct" found lawful in *Lafayette Park Hotel*, 326 NLRB 824 (1998) and *Super K-Mart*, 333 NLRB 263 (1999). ALJD 10:11-20.

Exception No. 19. Respondent excepts to the Decision's failure to conclude that a "savings clause" contained in the Region's 2005 CIIPA does not cure the allegedly unlawful effects of the language in that document. ALJD 10:22-31.

Exception No. 20. Respondent excepts to the Decision's finding that the "savings clause" in the Region's 2005 CIIPA would be effective only if employees are knowledgeable about the National Labor Relations Act ("NLRA") and that employees would instead decide to comply with an unlawfully broad restriction on their Section 7 rights rather

than undertaking the task of determining the exact nature of those rights and then attempting to assert those rights under the savings clause. ALJD 10:31-39.

Exception No. 21. Respondent excepts to the Decision's conclusion that the Region violated Section 8(a)(1) of the NLRA by maintaining a facially overbroad confidentiality provision in the 2005 CIIPA. ALJD 10:40-42.

Exception No. 22. Respondent excepts to the Decision's finding that the Region's 2005 CIIPA, its Code of Conduct, and its Employee Handbook are overlapping, such that all three govern the disclosure of confidential information and that the 2005 CIIPA therefore defines the nature of what the Region considers to be confidential information for purposes of the Code of Conduct and the Employee Handbook. ALJD 10:46-11:2.

Exception No. 23. Respondent excepts to the Decision's finding that employees who read the three documents would understand that the Code of Conduct and the Employee Handbook prohibit the disclosure of information regarding personnel and employees. ALJD 11:4-6.

Exception No. 24. Respondent excepts to the Decision's conclusion that the general confidentiality provision in the Code of Conduct and Employee Handbook are also facially overbroad, because they do not define "confidential" differently than the 2005 CIIPA. ALJD 11:6-8.

Exception No. 25. Respondent excepts to the Decision's finding that any ambiguity in the general confidentiality provision contained in the Code of Conduct and the Employee Handbook must be resolved against the position of the Region. ALJD 11:8-12.

Exception No. 26. Respondent excepts to the Decision's conclusion that the general confidentiality provisions contained in the Code of Conduct and the Employee Handbook are facially overbroad and violate Section 8(a)(1) of the NLRA. ALJD 11:12-13.

Exception No. 27. Respondent excepts to the Decision's finding that the specific Employee Handbook provision relating to the release of confidential employee information without authorization is "clearly facially overbroad" and would reasonably be understood by employees to prohibit the disclosure of information regarding wages and terms and conditions of employment to other employees or to Union representatives. ALJD 11:15-19.

Exception No. 28. Respondent excepts to the Decision's finding that the record evidence establishes that the Region maintained a 1993 confidentiality policy in effect during the Section 10(b) period by making reference to it as a basis for the discharge of Amanda Laursen on May 24, 2012. ALJD 11:26-30.

Exception No. 29. Respondent excepts to the Decision's finding that the 1993 confidentiality policy is overbroad, because it prohibits the disclosure of information in personnel records, litigation and financial information. ALJD 12:11-13.

Exception No. 30. Respondent excepts to the Decision's finding that prohibiting the disclosure of all personnel and financial information unlawfully restricts employees from discussing with others information about terms and conditions of employment, including wage information, that an employee has gained in the normal course of duties and from discussions with other employees. ALJD 12:14-17.

Exception No. 31. Respondent excepts to the Decision's finding that the prohibition against disclosing information regarding litigation is overbroad and restrains Section 7 rights, in that it would preclude employees from discussing NLRB and EEOC litigation and

labor arbitrations and therefore is an overly broad restriction on Section 7 rights. ALJD 12:17-20.

Exception No. 32. Respondent excepts to the Decision's finding that it did not produce evidence to establish a legitimate business justification for a prohibition against disclosing all information regarding litigation. ALJD 12:20-22.

Exception No. 33. Respondent excepts to the Decision's reliance upon *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012). ALJD 12:22-28.

Exception No. 34. Respondent excepts to the Decision's finding that the NLRB's policies regarding internal investigations would apply with equal force to matters that are at the litigation stage. (ALJD 12:28-29).

Exception No. 35. Respondent excepts to the Decision's conclusion that Respondent's 1993 confidentiality policy is overbroad and violates Section 8(a)(1) of the NLRA. ALJD 12:30-31.

Exception No. 36. Respondent excepts to the Decision's finding that the Region never rescinded the 2002 CIIPA. ALJD 12:36.

Exception No. 37. Respondent excepts to the Decision's finding that it "appears" that the Region maintained the 2002 Confidentiality Agreement during the Section 10(b) period by making reference to it in Heidi Coutchure's discharge in May 2012. ALJD 12:38-40.

Exception No. 38. Respondent excepts to the Decision's finding that by prohibiting employees from disclosing to "persons outside of the Red Cross" any information relating to "benefits, compensation, equal employment opportunity matters or employees" unless

authorized, the 2002 CIIPA is an overly broad restriction of employees' Section 7 rights. ALJD 13:7-11.

Exception No. 39. Respondent excepts to the Decision's finding that the 2002 CIIPA was maintained during the Section 10(b) period and that the Region therefore violated Section 8(a)(1) of the NLRA. ALJD 13:11-12.

Exception No. 40. Respondent excepts to the Decision's finding that some of the Region's rules and policies are facially unlawful and violate Section 8(a)(1) of the NLRA. ALJD 26:29-30.

Exception No. 41. Respondent excepts to the Decision's provision of a remedy that prohibits the Region from enforcing allegedly unlawful rules and policies and requiring it to rescind them. ALJD 26:30-31.

Exception No. 42. Respondent excepts to the Decision's failure to provide any findings of fact, conclusions, and reasons or basis therefore, based upon material issues of fact and law presented on the record, with respect to its findings concerning the Region's "Communications Systems" policy.

Exception No. 43. Respondent excepts to the Decision's "Conclusions of Law." ALJD 26:44-27:43.

Exception No. 44. Respondent excepts to the Decision's "Remedy." ALJD 28:3-22.

Exception No. 45. Respondent excepts to the Decision's proposed "Order." ALJD 28:24-31:17.

Exception No. 46. Respondent excepts to the Administrative Law Judge's failure to rule upon its Motion to Correct Transcript which was filed on March 26, 2013 and which was unopposed.

DATED: August 2, 2013

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Steven W. Suflas, hereby certify and state that on August 2, 2013, I caused a true and correct copy of the foregoing Exceptions to the Decision of Administrative Law Judge Mark Carissimi to be served by electronic mail upon the following:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: August 2, 2013



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Counsel for Respondent

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**AMERICAN RED CROSS BLOOD SERVICES,
WESTERN LAKE ERIE REGION**

and

CASE 08-CA-090132

**THE UNITED FOOD AND COMMERCIAL WORKERS
UNION, LOCAL 75**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWER TO
RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE MARK
CARISSIMI'S DECISION**

A. Response to Exception 1: *Noel Canning*

Citing *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), *NLRB v. New Vista Nursing & Rehabilitation*, __ F.3d __, 2013 WL 2099742 (3d Cir. May 16, 2013), *petition for reh'g filed*, Nos. 11-3440, 12-1027, 12-1936 (July 1, 2013), and *NLRB v. Enterprise Leasing Co. Southeast, LLC*, __ F.3d __, 2013 WL 3722388 (4th Cir. July 17, 2013), Respondent challenges the authority of the Board to issue a decision, the Acting General Counsel and Regional Director to investigate and prosecute, and the Administrative Law Judge ("ALJ") to issue a decision in this case. As discussed below, Respondent is incorrect on all fronts.¹

¹ Administrative Law Judge Carissimi will be referred to as "ALJ". ALJD p. __: __ will indicate the page and line numbers in the ALJ's Decision, JD-38-13. Respondent's August 2, 2013, Brief in Support of Exceptions of Respondent will be referred to as "R. Excp. Br."

As an initial matter, the Board now has five fully confirmed members. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). Accordingly, Respondent's argument that the Board lacks authority to act in this case is simply incorrect.

Moreover, regardless of the issue of the Board's composition, the Acting General Counsel has independent authority to issue and prosecute complaints. *Bloomington's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013) (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, contrary to Respondent, both the Acting General Counsel's authority to issue and prosecute the complaint, and, in turn, the Regional Director's authority to do so, are unaffected by any issue concerning the composition of the Board.²

Similarly, any issue regarding the composition of the Board does not affect the Board's longstanding delegation of authority to ALJs. ALJs have possessed the authority to hold hearings on the Board's behalf since 1936. *See* General Rules and Regulations, 1 Fed. Reg. 207, 209 (Apr. 18, 1936) (designating trial examiners (now called ALJs) as agents responsible for hearings); Secs. 102.34-35, Board's Rules and Regulations (designating ALJs as agents

² The General Counsel has delegated the authority to the Regional Directors for issuing complaints. *See United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*, 366 F.3d 776 (2d Cir. 1966).

responsible for hearings). Any assertion that delegees may not exercise delegated authority fails to account for the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit's *Laurel Baye*³ decision, stated that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, three Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), *cert. denied* 132 S.Ct. 1821 (2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011).

B. Response to Exceptions 2 through 8: Complaint Allegations and Due Process

Prior to going on the record in the hearing before the Administrative Law Judge, and in response to the Acting General Counsel's subpoena *duces tecum*, Respondent produced newer versions of policies with work rules prohibiting the same conduct as rules already plead in the Complaint. (Tr. 14-15) The Acting General Counsel made a motion to amend the Complaint to include the newer work rules as violating Section 8(a)(1). The ALJ instructed Acting General Counsel to pinpoint the alleged unlawful rules instead of a policy in its entirety. (Tr. 23) Thus, for each oral amendment, Acting General Counsel stated the new exhibit number, the title of the document, and quoted the portions of the policies or directed attention to the paragraphs of policies that contained unlawful work rules. (Tr. 18-25) Each oral amendment alleged that the

³ *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009).

rules violate Section 8(a)(1) under the same theory as the other rules alleged in the Complaint^{4,5}. It is disingenuous for Respondent to assert its due process rights were denied. The ALJ informed Respondent's counsel that if additional time was required to prepare a defense to the oral amendments, he would grant Respondent as much time as needed. (Tr. 22)

The ALJ properly relied on the Board's Rules and Regulations and *Payless Drug Stores*, 313 NLRB 1220 (1994) in granting oral amendments to the Complaint. (ALJD, p. 3:29-36) Section 102.17 of the Board's Rules and Regulations permits complaint amendments upon terms that may be just. The Board has held that "in determining whether there is a sufficient nexus between the allegations in the charge and the complaint allegations, the Board examines, among other things, whether the two arise from the same factual circumstances and are based on the same legal theory." *Id.* at 1221, citing *Southwest Distributing Co.*, 301 NLRB 954, 955-956 (1991); *Well-Bred Loaf*, 303 NLRB 1016 fn. 1 (1991).

The amendments to the Complaint made on the record are not only closely related to the policies alleged in the Second Order Consolidating Cases and Amended Consolidated Complaint (GC 1(l)), they are more recent versions of the same policies which were plead to be unlawful in the Second Amended Consolidated Complaint paragraphs 6(A) and 7(A). In its Answer to the Second Amended Consolidated Complaint (GC 1(n)), the Respondent admitted that it maintained the policies and denied that they violated Section 8(a)(1) of the Act. Clearly, there is a factual nexus between the amendments made on the record and those already contained in the

⁴ The Second Order Consolidating Cases and Amended Consolidated Complaint and Notice of Hearing, General Counsel Exhibit 1(l), hereinafter referred to as "Complaint".

⁵ Contrary to Respondent's assertion, Acting General Counsel did not allege any rules contained in General Counsels Exhibit 17 to be unlawful. Indeed, she withdrew a proposed oral amendment relating to GC Exhibit 17 after further review of the document. (See R. Excp. Br. at 12; Tr. 22-23 relating to GC 17)

Complaint. Furthermore and more significantly, Respondent failed to make this argument in its Post-Hearing brief to the ALJ. There was no denial of Respondent's due process rights in this regard.

Respondent also asserts that the ALJ denied it due process because it was not on "notice as to what was claimed to be unlawful".⁶ Notably, Respondent failed in any of its Answers to raise this argument as an affirmative defense. In this connection, the Second Order Consolidating Cases and Amended Consolidated Complaint and Notice of Hearing was issued on November 30, 2012.(GC 1(l)) Respondent should have raised due process as an affirmative defense in either its first Answer on December 14, 2012, or its Amended Answer, filed February 4, 2013, the day of the hearing. (GC 1(n); GC 1(s)). It failed to do so.

The ALJ correctly determined that the "[c]omplaint allegations in the instant matter were clear..." (ALJD, p. 4:35-38). The ALJ followed Board precedent that "the only requisite of a complaint is that it contains a plain statement of the acts constituting an unfair labor practice sufficient to allow a respondent an opportunity to present a defense." (ALJD, p. 4:7-12) The ALJ relied on the Board's decision in *Artesia Ready Concrete, Inc.* 339 NLRB 1224 (2003), where the Board specifically noted that the complaint did not need to include a legal theory or plead matters of evidence. *Id.* at 1226 fn. 3. In *Whirlpool Corp.*, 337 NLRB 726, 727 (fn. 4 2002), the Board held an employer's due process rights were not denied because the complaint allegations were sufficient and squarely raised the lawfulness of the conduct. Here, each allegation in the complaint contains a clear, concise statement of each rule alleged to be unlawful and asserts that each rule "has discouraged its employees from forming, joining, and assisting the

⁶ (R. Excp. Br. at 8)

Union or engaging in other concerted activities.” (GC 1(l)).⁷ Respondent’s due process rights were not denied.

The ALJ also properly rejected Respondent’s reliance on *Lamar Advertising of Hartford*, 343 NLRB 261 (2004) in reaching his decision.⁸ The facts in *Lamar Advertising* are inapposite to those in this proceeding. In *Lamar Advertising*, the complaint alleged that the employer violated Section 8(a)(4) by discharging an employee who cooperated with the Board’s subpoena. The complaint failed to allege that retention of legal counsel was also a motivating factor in the employee’s discharge. The Board found that to permit the General Counsel to expand its 8(a)(4) theory to include the retention of legal counsel as a motivating factor would deny the employer due process. *Id.* at 261. In the instant case, the Acting General Counsel sufficiently plead that the Respondent has maintained unlawful rules. The theory has not changed, nor has it been expanded. There is no viable due process argument here.

C. Response to Exceptions 28, 36, 37, and 39: Confidentiality Policies Maintained within the 10(b) Period

While Respondent claims that the 1993 Confidentiality Policy was not maintained within the 10(b) period, the record shows otherwise. The ALJ reached the correct conclusion in determining that the 1993 policy was maintained and enforced within the Section 10(b) period.

⁷ Respondent’s assertion that it was not on notice that the rules in question were facially invalid is plainly untrue. (R. Excp. Br. fn 6 at p. 8) The Second Order Consolidating Cases and Amended Complaint (GC1(l)) at Paragraph 10(B) asserts that Coutchure and Laursen were terminated by enforcement of the “overbroad and unlawful rules set forth above in paragraphs 6 through 9.” While the Parties resolved the termination allegations and the cases were severed, Respondent cannot now say that it had no notice of that the rules were alleged to be overbroad and unlawful.

⁸ The ALJD acknowledged that *New York Post*, 353 NLRB 343 (2008) was issued by a two-Member panel and lacks precedential value. (ALJD 4:fn. 3). Moreover, *Comau, Inc.*, 358 NLRB No. 73 (2012), cited by Respondent, is non-precedential, as it is not a Board decision. (R. Excp. Br. at 8)

Employees hired in 2001 signed Respondent's 1993 "Confidentiality Policy" (GC 3), and the 1993 Confidentiality Policy was never rescinded (Tr. 38; ALJD, p. 11:26-30). On May 24, 2012, employee Amanda Laursen was terminated for violating the 1993 Confidentiality Policy. (Tr. 40-42; GC 21) Respondent's assertion that Laursen's termination letter clearly communicates that the Employer discharged Laursen for violating the Employee Handbook's confidentiality rules is unsupported. The letter makes no reference to the Employee Handbook. (GC 21) Given the substantial record evidence, Respondent's argument lacks merit.

Respondent further argues that its 2002 "Confidential Information and Intellectual Property Agreement" ("2002 CIIPA") was not maintained within the 10(b) period. (GC 5) The record evidence clearly supports the ALJ's correct conclusion that on May 24, 2012, the Employer terminated employee Heidi Coutchure for violating the 2002 CIIPA. In September 2002, employee Coutchure signed the 2002 CIIPA. (GC 5) Employees hired after 2005 were required to sign the 2005 "Confidential Information and Intellectual Property Agreement" ("2005 CIIPA") at new-hire intake meetings. (Tr. 115; GC 19) Respondent admits that Coutchure never signed the 2005 CIIPA. (R. Excp. Br. at 36) Employee Coutchure was terminated for violating the 2002 CIIPA. (GC 20) Respondent argues that the Acting General Counsel bears the burden to demonstrate that the 2002 CIIPA was not superseded by the 2005 CIIPA. Board precedent is clear that Respondent bears the burden to prove that the policy *was not* maintained during the 10(b) period. Respondent failed to meet its burden. The record shows and the ALJ correctly found that Respondent maintained and enforced the 2002 CIIPA in the Section 10(b) period when it terminated Coutchure in May 2012. (ALJD, p. 12:34-40)

D. Response to Exceptions: Confidentiality Policies⁹

⁹ Exceptions 9 -13, 15-18, 21-27, 29-30, 38, 40-41

The Board will find a Section 8(a)(1) violation if it is shown that an employer maintains a rule or policy that “would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 326 RNLB 824, 825 (1998). If a rule “explicitly restricts activity protected by Section 7, the Board will find the rule unlawful. *Lutheran Heritage Village*, 343 NLRB 646 (2004). If the rule does not explicitly restrict such activities, the Board proceeds to ask whether: “(1) employees would reasonably construe the language [of the rule] 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. An affirmative answer to any of these questions will warrant a finding of a Section 8(a)(1) violation. *Id.*

Respondent takes exception to each of the ALJD’s findings regarding the confidentiality policies and the Board precedent the ALJ relied on. Instead, Respondent insists that the Board should rely solely on decisions by the United States Court of Appeals for the District of Columbia.

Established precedent easily dispenses with Respondent’s erroneous claim that the ALJ was required to make a finding that the rules were actually enforced or had a demonstrable chilling effect on employees. (R. Excp. Br. at 14-18) As the Board has explained in rejecting this argument, it is “merely required to determine whether employees would reasonably construe the [challenged] language to prohibit Section 7 activity...and not whether employees have thus construed the rule.” *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) Nor is there any merit to Respondent’s related argument that the Board was required to find that the rules were actually enforced. The Board has explicitly held to the contrary; stating that the mere maintenance of a rule is likely to chill Section 7 activity even absent evidence of enforcement. *Brunswick Corp.*, 282 NLRB 794, 795 (1987) To the extent that the Court of Appeals has

applied a different test in cases including *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), *Adtranz Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001) and *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), the ALJ correctly applied Board precedent. Accordingly, the ALJ appropriately rejected such arguments by Respondent and correctly recognized that a rule does not have to be enforced to be found unlawful.

As noted, the ALJ relied on a plethora of Board law in support of the conclusion that all of the alleged confidentiality policies violate Section 8(a)(1). (ALJD, p. 9:38-47, 10:1-9) These cases are all on point and clearly support the ALJ's findings. Respondent's refusal to acknowledge the precedential value of six recent Board cases only demonstrates how far afield its arguments are.

Respondent further asserts that that a work rule restricts a "reasonable employee's" Section 7 rights only if said employee knows what Section 7 rights are. This argument is circular and goes against every principle of the National Labor Relations Act. The Board has never held that an employee must pass a litmus test on understanding labor law before such employee is protected under the Act. Not surprisingly, Respondent cites no authority for this proposition.

As to the merits of these allegations, the ALJ properly concluded that the rules here are no different than similar rules the Board found unlawful in *IRIS, U.S.A., Inc.*, 336 NLRB 1013 (2001) and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999). The rule in *IRIS* prohibited employees from revealing "information" about "employees." In *Flamingo Hilton*, the rule banned revealing "confidential information" about "fellow employees". The unlawful ban in *Flamingo Hilton* was even less restrictive than Respondent's rules. The rules at issue in this

matter apply to the disclosure of benefits, compensation, and employee information¹⁰ and could reasonably be construed as restricting any discussion about not only other employees, but one's own wages and other terms and conditions of employment. Moreover, contrary to Respondent's assertion, *Cintas Corp.*, 344 NLRB 943 (2005) is applicable to the facts of this case. In *Cintas Corp.*, the Board found unlawful a confidentiality provision prohibiting "the release of 'any information' regarding [employees because it] could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment by their fellow employees and with the Union." *Id.* at 943.

Respondent also attempts to defend its confidentiality policies by asserting that the ALJ improperly read them in isolation and failed to properly consider the Respondent's legitimate business justification. Both arguments fail. As an initial matter, the ALJ did not ignore the context of the rule. To the contrary, the ALJ readily acknowledged Respondent's argument on this point. (ALJD, p. 7:26-33) Nonetheless, consistent with Board law, the ALJ reasonably found that the confidentiality policy language identified in the Complaint goes beyond what is permitted by the Act. The ALJ correctly concluded that the confidentiality work rules in the 1993 Confidentiality Policy, 2002 CIIPA and the 2005 CIIPA are facially invalid or overly broad. The ALJ also concluded that reading the 2005 CIIPA, code of conduct and employee handbook as a whole does not clarify or limit the term "confidential". Thus, even if an employee did review all of Respondent's work rules regarding confidentiality, the employee would still be left with three facially overbroad confidentiality policies. (ALJD, pp. 10: 44-47, 11:1-19)

Importantly, the Board has recognized that employees should not have to jump through such hoops to understand ambiguous work rules--any ambiguity in a rule must be construed

¹⁰ See 2002 CIIPA (GC 5), the Employee Handbook (GC 8) and the Code of Business Ethics and Conduct (GC 18).

against its promulgator. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) Indeed, as the ALJ noted, the Board has held that “employees should not have to decide at their own peril what information is not lawfully subject to such prohibition.” (ALJD, p. 11:8-12 citing *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip. op. at 3 (2013))

Indeed, given the breadth of the Employee Handbook’s¹¹ policy of “any confidential American Red Cross information that is available solely as a result of the employee’s affiliation with the American Red Cross,” and the 2005 CIIPA’s definition of “confidential information” to include financial, personnel, employee, contract, and business information and “all information not generally known outside of Red Cross regarding Red Cross and its business”¹², it is difficult to interpret the rules as not prohibiting employees from discussing their wages, benefits and other terms and conditions of employment.

Respondent complains that the ALJ ignored the legitimate business purpose of its confidentiality policies. It claims these are for the protection of donors, patients and staff, as mandated by law. On their face, however, the rules do not make a distinction between personnel and employee information and that relating to donors and patients. Rather, Respondent’s policies combine facially invalid restrictions on the sharing of personnel and employee information with the disclosure of donor and patient information. (R. Excp. Br. at 20-24) If the company has valid confidentiality concerns regarding the latter, more carefully drafted policies would have been sufficient to meet its mission and business justifications. *See Cintas Corp.*, 482 F.3d at 470 (“A more narrowly tailored rule that does not interfere with the protected employee activity would be

¹¹ (GC 8)

¹² (GC 19)

sufficient to accomplish the Company’s presumed interest in protecting confidential information”).

E. Response to Exceptions 19 and 20: Savings Clause

Respondent’s contention that the ALJ erred in finding the 2005 CIIPA’s savings clause to be an insufficient cure for its unlawful rules is wholly unsupported by the record or precedent. Indeed, Respondent asserts, “[i]t requires a high degree of mental gymnastics to conclude on the one hand that an employee would reasonably comprehend the infringement of NLRB rights under the CIIPA, while simultaneously on the other hand having no understanding of the NLRA protections provided by its savings clause.” (R. Excp. Br. at 30) This again suggests that the Acting General Counsel bears a novel evidentiary burden- that the Acting General Counsel must prove that an employee is knowledgeable enough to know what Section 7 rights are, what the National Labor Relations Act permits employees to discuss, and what provisions of a work rule infringe on those rights. (R. Excp. Br. at 29) Again, there is no Board precedent to support this circular logic. Simply stated, Respondent’s overbroad rules restrict employees from discussing their terms and conditions of employment, conduct that is protected by the statute. A savings clause is not a panacea: the overbroad rule continues to be unlawful.

Further, an effective savings clause would inform employees in plain language that they are permitted to discuss their terms and conditions of work. Respondent’s savings clause is as follows:

[T]his Agreement does not deny any right provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining.

This is the polar opposite of plain language that can be reasonably understood by employees. It is legal jargon. It provides employees with no specifics about what rights they have

under the NLRA and what specific conduct is protected and/or prohibited. As the ALJ correctly summarizes, the “‘savings clause’ ,...,would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside their employer.” (ALJD, p. 10:22-40)

F. Response to Exceptions 31 through 34: Unlawful Litigation Rule

Respondent excepts to the ALJ’s finding that the rule prohibiting employees from sharing “information on litigation” restricts Section 7 rights. In its exceptions, Respondent asserts that this language should be examined under the *Lutheran Heritage* analysis. This is not supported by Board law. The Board has found, as did the ALJ, that rules restricting discussions about litigation are facially invalid and violate Section 8(a)(1). While Respondent attempts to distinguish the phrases “all information on litigation” and “information on all litigation,” the distinction is meaningless. A broad rule prohibiting discussion about “litigation” clearly encompasses employees’ terms and conditions of employment. As noted by the ALJ, in *Banner Estrella Medical Center*, 358 NLRB No. 93 (2012), the Board found a rule prohibiting employees from discussing litigation to be unlawful, unless an employer could establish a litigation business justification that outweighs employee rights to discuss litigation. (ALJD, p. 12:22-25)

Significantly, Respondent fails to cite any legal authority in support of its contention that the rule is not facially invalid. It speculates that employees, considering Respondent’s status as a health care provider, would read the rule knowing that its prohibition was limited to donor, patient or medical information. It suggests that Respondent’s status as a healthcare organization guarantees there is a legitimate business justification that outweighs employees Section 7 rights. (R. Excp. Br. at 35) However, the mere fact that Respondent operates in the medical field cannot

be used as a blanket defense for its overbroad rules. If Respondent intended the rule to prohibit employees from disclosing donor, patient or medical information in litigation or investigations, the rule should be limited to those areas.

Moreover, it was proper for the ALJ to apply Board cases regarding internal investigations to this issue. (ALJD, p. 12:28-29) In *Fresenius United States Mfg.*, 358 NLRB No. 138 (2012), the Board held it was unlawful when the employer, during an investigative meeting, unlawfully directed an employee not to speak with any other employees about the investigation. Investigations, like lawsuits, are inevitably tied to terms and conditions of employment. The ALJ did not err in making such a comparison.

G. Response to Exceptions 14 and 42: Communication Systems Policy

The Communication Systems policy prohibits employees from “distributing sensitive, proprietary, confidential or private information of the Western Lake Erie Region and/or the Red Cross without appropriate authorization.” (GC 8 at p. 41) Respondent asserts that the ALJD does not contain findings of facts or conclusions of law regarding the allegation that its “Communications Systems” policy violates the Act. This is simply not true. The ALJ analyzed the Red Cross Communication Systems policy specifically (ALJD pp. 6:42-43, 7:1-6, 8:35-37, fn. 5, p. 9:1-13), and in concert with his discussion of other confidentiality policies. (ALJD, pp. 6-10) The ALJ concluded that each term in the work rule restricts employees Section 7 Rights.

The ALJ relied on *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012) in concluding that Respondent’s rule prohibiting the distribution of sensitive information and private information is overbroad. The ALJ properly rejected Respondent’s reliance on *Windstream Corp.*, 352 NLRB 510 (2008), as it has no precedential value. (ALJD, p. 8:fn. 5)

In *Costco*, the Board determined that the employer's electronic communication policy that prohibited employees from sharing or transmitting "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information" and its policy prohibiting employees from discussing "private matters" were overbroad and violative of Section 8(a)(1) of the Act. (ALJD, p. 8:26-37, p. 9:1-22 citing *Costco*, slip. op. at 10, 12, fn.19, 15) Respondent's communication systems' rules prohibiting employees from sharing sensitive and private information are even more broad and vague than the rules the Board found unlawful in *Costco*. Furthermore, the ALJ relied on *DirectTV*, *Sheraton Anchorage*, 359 NLRB No. 95 (2013,) and *Cintas Corp.* in concluding that a rule prohibiting employees from disclosing proprietary or confidential information is facially overbroad. (ALJD, p. 9:38-47, 10:1-3) The ALJ properly relied on the same cases previously addressed in response to Respondent's Exceptions regarding other confidentiality policies. See, *supra*.

In sum, the ALJ correctly decided the issues excepted to by Respondent and his findings and conclusions on these issues should be sustained.

Dated at Cleveland, Ohio this 16th day of August, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 16th day of August 2013:

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