First Transit, Inc. *and* Amalgamated Transit Union Local #1433, AFL–CIO. Case 28–CA–023017

April 2, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

On January 26, 2011, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions with a supporting brief, and the General Counsel filed an answering brief. In addition, the General Counsel filed cross-exceptions with a supporting brief, and the Respondent filed a brief opposing the cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] except as modified below, and to adopt the recommended Order as modified and set forth in full below.[3] We shall substitute a new notice to conform to the Order as modified.

The Oral Access Restrictions

As more fully detailed in the judge's decision, the Union sought to organize the bus mechanics at the Respondent's Phoenix facility in February 2010. The Union already represented the Respondent's busdrivers, fuelers, and cleaners at the facility. On February 10, the Respondent orally promulgated a rule prohibiting its mechanics from meeting with union representatives anywhere on the facility premises at any time. On February 11, the Respondent terminated a meeting in the busdrivers' breakroom between off-duty mechanics and three union representatives: Robert Bean and Dana Kraiza, who were employed by the Union, and Virginia Mazzone, one of the Respondent's busdrivers and an officer of the Union. The judge found that the Respondent's actions on both dates violated Section 8(a)(1).

As the Respondent argued, and as the General Counsel acknowledged, the Respondent could lawfully limit Bean's and Kraiza's access to the mechanics at its facility. Both were employed by the Union rather than by the Respondent. See generally *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Mazzone, on the other hand, was both an employee of the Respondent and a union representative. Unlike Bean and Kraiza, she was lawfully on the property, consistent with her employment status and security clearance. Accordingly, the Respondent's February 10 oral rule and its February 11 conduct were unlawful because they interfered with the right of the Respondent's employees who were also union representatives to organize on the facility premises at appropriate times and in appropriate places, and the right of the Respondent's other employees to participate in this activity. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 (1945).

The Employee Handbook Rules

The complaint alleges that numerous provisions in the Respondent's employee handbook rules are unlawful. The determinative test of legality regarding each of these complaint allegations is whether employees would reasonably construe the language of the challenged rule to prohibit protected Section 7 activity. See *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).[4] For the reasons stated by the judge, we affirm her conclusions that several of the Respondent's employee handbook rules violate Section 8(a)(1) of the Act,[5] but that

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

The Respondent did not except to the judge's findings that it violated Sec. 8(a)(1) by: (1) its orally promulgated rule prohibiting employees from discussing their wages with other employees; and (2) the third bullet point of the Respondent's handbook rule 11.03, which requires management's authorization for distribution of literature during nonworktime in nonwork areas. We note that, although the judge's discussion of this third bullet point refers to the "second part" and "part two" of this rule, the rule is actually in three parts, and the judge invalidated the third.

[2] In adopting the judge's conclusions regarding rules 10.02, 11.01, and 11.04, we do not rely on *Ashley Furniture Industries*, 353 NLRB 649 (2008), *Crowne Plaza Hotel*, 352 NLRB 382 (2008), or *Tecumseh Packaging Solutions,* 352 NLRB 694 (2008), two–Member Board cases cited by the judge. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010); *Hospital Pavia Perea*, 355 NLRB 1300 fn. 2 (2010) (recognizing that two Board members "lacked authority to issue an order").

[3] We shall modify the judge's recommended Order to conform it to the violations found and to include full explanation of the Respondent's options for compliance with the Order. See *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB 545, 549 and fn. 20 (2013).

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

[5] We agree, for the reasons stated by the judge that the second and third bullet points of rule 11.01 (Disloyalty) are unlawfully overbroad. Those bullet points respectively prohibit participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company." The judge correctly

three others are lawful. However, for the reasons stated below, we reverse the judge's conclusions that two other rules (Stealing/Theft, and Work Rules and Employee Performance) are unlawful. Moreover, we reverse in part the judge's conclusion that another rule (Personal Conduct) is lawful; instead, we find that one bullet point of that rule is unlawful.

1. Stealing/theft (rule 11.01)

The judge found that one clause in this five-bullet-point rule—prohibiting employees from "using Company property for activities not related to work anytime"—is unlawfully overbroad. The judge found that employees would reasonably construe the words "using company property" to encompass a physical presence in nonworking areas where employees could lawfully engage in union and protected activities during nonworking time.

The contested language is embedded in a section of the Respondent's handbook that addresses stealing from the company, employees, or customers; unauthorized removal of property belonging to the company, employees or customers; failing to account for company funds; and inappropriate use of company fuel and parts for personal vehicles. We find that, in context, employees would recognize that the rule's ban on the use of company property for nonwork activities refers to theft or other misappropriation of property, and would not reasonably construe the rule as covering protected activity on the facility premises. The Board has not automatically construed "company property" to refer to real estate,[6] and, as noted above, the rule's other bullet points reference the "unauthorized removal of property" and obtaining "fuel, parts, maintenance, or repairs" for employee vehicles from any "Company operating location." Thus, employees would not reasonably construe the term "Company property" in its widest sense. It would be clear to them that it refers to the same class of things as those specifically mentioned, i.e., something that can be *removed/stolen* from a Company *location*. Notably, throughout the handbook, the term "property" is used to refer to personal property, whereas the term "location" is used to refer to the Respondent's premises.

2. Work rules and employee performance (rule 11.04)

The third bullet point of this four-bullet-point rule prohibits "Poor work habits including loafing, wasting time, loitering, or excessive visiting." The judge, citing cases involving no-loitering rules, found this rule unlawfully overbroad because employees could interpret it as prohibiting protected activities during nonworktime in nonwork areas. Contrary to the judge, we find that employees would reasonably construe "poor work habits" to refer to a failure to perform job duties when an employee is expected to be working productively. This construction is consistent with the rule's heading, the other listed examples in the contested bullet point, and the proscriptions bookending it (proscribing neglect of job duties and incompetence). In our view, the General Counsel's isolation of the word "loitering" from its context is an unpersuasive attempt to align this rule with Board cases involving rules both broader in scope or more ambiguous in meaning; indeed, most of the no-loitering cases cited by the judge are distinguishable because they explicitly prohibited loitering outside of employees' working hours.[7]

3. Personal conduct (rule 11.02)

The first bullet point of this three-bullet-point rule prohibits "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct during working hours." The second bullet point prohibits "[p]rofane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious." While the complaint alleged that each of these bullet points violated the Act, the judge, not distinguishing between the two, found the

distinguished *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 fn. 2 1291–1292 (2001), and *Lafayette Park Hotel*, 326 NLRB 824, 825–827 (1998), where, unlike the present case, the Board found lawful rules that, in context, employees reasonably would understand as focused on uncooperative, improper, unlawful or otherwise unprotected employee misconduct. *Albertson's Inc.*, 351 NLRB 254, 258–259 (2007), and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–289 (1999), cited by our dissenting colleague, are similarly distinguishable. See also *Costco Wholesale Corp.*, 358 NLRB 1100, 1100–1101 (2012).

Member Johnson disagrees that employees would reasonably read these rules to proscribe Sec. 7 activity and finds these rules similar to other rules that the Board has found lawful. See *Albertson's Inc.*, 351 NLRB at 258, 374 ("Off the job conduct which could have a negative effect on the Company's reputation or operations"); *Flamingo Hilton-Laughlin*, 330 NLRB at 288 ("off-duty misconduct that . . . tends to bring discredit to the Hotel"); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 ("Participating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on . . . the Company"); *Lafayette Park Hotel*, 326 NLRB at 825 ("Being uncooperative with supervisors, employees, guests . . . or otherwise engaging in conduct that does not support the [Employer's] goals and objectives"). The judge distinguished *Lafayette* and *Ark* on the basis that the rules in those cases were contextually limited to intrinsically improper and unprotected conduct. However, Member Johnson notes that the Board, in finding *Ark's* broad prohibition on "any conduct" lawful, relied on *Lafayette's* "largely identical" lawful rule, without drawing the contextual distinction suggested by the judge.

[6] See *Johnson Technology, Inc.*, 345 NLRB 762, 763 (2005) ("not unlawful for an employer to caution employees to restrict the use of company property [paper] to business purposes").

[7] Cf. *Palms Hotel & Casino*, 344 NLRB 1363, 1363 fn. 3 (2005) (striking down rule prohibiting employees from loitering on company premises before or after working hours).

rule lawful. Citing *Palms Hotel & Casino*, 344 NLRB at 1368, the judge found that employees would not read this rule as restricting their Section 7 rights, but only as conveying the Respondent's expectation that "they comport themselves with general notions of civility and decorum."

In agreement with the General Counsel's cross-exceptions, we find that the first bullet point is unlawfully overbroad.[8] This bullet point is similar to a rule prohibiting the "inability or unwillingness to work harmoniously with other employees" struck down by the Board in *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011), which issued after the judge's decision. The Board found this rule in *2 Sisters* "sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7." Id. at 1817. Here, as in *2 Sisters*, faced with the "patent ambiguity" in the phrase "inappropriate attitude or behavior . . . to other employees," employees "would reasonably construe the rule" as limiting their communications concerning employment. Id. That distinguishes this rule from the rules found lawful in *Palms Hotel & Casino* that "were more clearly directed at unprotected conduct." 357 NLRB 1816, 1817. This distinction is equally applicable concerning the lawful rules in *Flamingo Hilton-Laughlin* and *Hyundai America Shipping Co.*, above, cited by our dissenting colleague.

However, contrary to the General Counsel's cross-exceptions, we do not find that the words "uncivil" and "insulting" in the second bullet point are so patently ambiguous as to render that bullet point overbroad.[9] The clear thrust of the second bullet point is to prohibit "profane or abusive" language, and the latter clause must be interpreted in the context of the introductory language which makes its overarching purpose clear. The second bullet point is similar to a rule found lawful in *Lutheran Heritage Village-Livonia*, above at 646, 654 ("using abusive or profane language"). See also *Costco Wholesale Corp.*, 358 NLRB 1100 (2012), which issued after the judge's decision, finding lawful a rule requiring employees to use "appropriate business decorum" in communicating with others. As did the judge, we find that reasonable employees would construe the second bullet point as merely requiring that they comport themselves with "general notions of civility and decorum."[10]

The Freedom of Association Policy

In exceptions, the Respondent argues that the judge, in finding certain rules unlawful, erred by failing to consider those rules in the context of the handbook's freedom of association (FOA) policy. The policy states, among other things, that "during union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management." The Respondent argues that this policy informs all of its handbook provisions and precludes us from finding that employees would reasonably read any of the challenged work rules as unlawfully restricting their Section 7 rights.

We agree that an employer's express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule. In our view, however, inclusion of the FOA policy in the handbook under the circumstances presented here does little to ensure that employees would not read otherwise overbroad rules as restricting their Section 7 rights.[11] First, the policy is too

[8] Member Johnson agrees with the judge that *Palms Hotel & Casino*, finding lawful a rule prohibiting "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees," supports dismissal of this allegation. In addition, he finds this bullet point similar to other rules that the Board has found lawful. See *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (rule requiring employees to "maintain in management's sole judgment, satisfactory attitude") and *Hyundai America Shipping Co.*, 357 NLRB 860 (2011) (rule prohibiting "exhibiting a negative attitude toward or losing interest in your work assignment"); the latter also issued after the judge's decision. Chairman Pearce dissented in *Hyundai* and would have found the prohibition against exhibiting a "negative attitude" unlawful for the same reasons that he finds the instant rule unlawful.

[9] Chairman Pearce would find merit in the General Counsel's cross-exception. He finds that the qualifying words "uncivil" and "insulting" are so "sufficiently imprecise that [they] could encompass any disagreements or conflicts among employees," including protected discussions, and that employees would reasonably construe the rule to prohibit such activity. *2 Sisters Food Group, Inc.*, above at 1817. Further, Chairman Pearce finds the second bullet point similar to rules prohibiting "[u]sing loud, abusive or foul language" and "disorderly conduct," including "insulting" and "abusing" others, found unlawful in *Flamingo Hilton-Laughlin*, above. Because the rules in *Flamingo Hilton-Laughlin* did not define abusive or insulting language or conduct, the Board found that they could reasonably be interpreted as barring lawful union organizing propaganda, 330 NLRB at 295.

[10] In disagreement with the Chairman (see fn. 9, above), we find *Flamingo Hilton-Laughlin*, above, distinguishable because the language at issue in the rule here *is* sufficiently defined by its context.

[11] While Member Johnson agrees with his colleagues that, under the instant circumstances, the FOA policy does not insulate the Respondent from liability for the handbook rule violations, he acknowledges the Respondent's good-faith effort to respect and safeguard important individual and employee rights. He notes, moreover, that while the placement of a savings clause in relation to handbook rules may impact its effect, he does not weigh that consideration as heavily as do his colleagues here. Finally, while the policy specifically references protection of employee organizational activity, Member Johnson believes that in some circumstances employees would reasonably view this as signaling the employer's respect for protection of other Sec. 7 rights. That can hardly be the case here, however, where the Respondent's

narrow, focusing solely on union organizational rights. An effective "safe harbor" provision of this kind, also referred to as a "savings clause,"[12] should adequately address the broad panoply of rights protected by Section 7. Second, the policy's placement in the handbook is neither prominent nor proximate to the rules it purports to inform. The 3-page policy begins on page 20 of the 73-page handbook, but the employee personal conduct rules at issue do not begin until page 33. The policy does not expressly reference those rules, and the rules do not expressly reference the policy. Finally, because we find that the Respondent has committed unfair labor practices that contradict the policy—specifically, the overbroad union-solicitation violations discussed above—it follows that the freedom of association policy cannot insulate the Respondent from liability. Certainly, the Respondent's employees, once aware of these violations in response to union organizing, would not reasonably read the policy as a safeguard of their Section 7 rights.

ORDER

The Respondent, First Transit, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad and discriminatory rule prohibiting protected employee/union representative meetings in exterior nonwork areas of the Respondent's facility.

(b) Restricting protected activity by disbanding or otherwise discouraging protected employee meetings during nonworktime and in nonwork areas.

(c) Restricting employees' Section 7 right to discuss wages with other employees.

(d) Maintaining an overly broad rule that prohibits disclosure of "any Company information," including wage and benefit information as contemplated by the cross-referenced Acceptable Use Policy, for any purpose other than to perform job duties or further company-sponsored activities without written authorization.

(e) Maintaining an overly broad rule that prohibits employees from making statements about a work-related accident "to anyone except the police or Company officials."

(f) Maintaining an overly broad rule that prohibits employees from making "false" statements concerning the Respondent.

(g) Maintaining an overly broad rule that prohibits employees from participating in "outside activities that are detrimental to the Company's image or reputation, or where a conflict of interest exists."

(h) Maintaining an overly broad rule that prohibits employees from conducting themselves "during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company."

(i) Maintaining an overly broad rule that prohibits employees from being "present at a Company location while not performing authorized services or without express permission."

(j) Maintaining an overly broad rule that prohibits employees from "[p]osting, circulating or distributing written or printed material without authorization from the manager."

(k) Maintaining an overly broad rule that prohibits "[d]iscourteous or inappropriate attitude or behavior" toward "other employees."

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

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

(a) Within 14 days of the Board's Order, rescind and/or revise the rules set forth in paragraphs 1(a) and (c) through (k) of our Order, above.

(b) Furnish all employees at all of the Respondent's facilities nationwide with (1) inserts for the current employee handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute a revised employee handbook that does not contain the unlawful rules.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure

unlawful conduct in relation to union organizing activity belies its adherence even to those Sec. 7 rights specifically referenced.

[12] See *Ingram Book Co*., 315 NLRB 515, 516 (1994).

[13] 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."

that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 2009.

(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.

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

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 make and/or maintain overly broad rules that restrain you in the exercise of the rights set forth above by:

Prohibiting protected employee/union representative meetings in nonwork areas of our facility.

Prohibiting employees from discussing wages with other employees.

Prohibiting employees from disclosing "any Company information," including wage and benefit information as contemplated by our Acceptable Use Policy, for any purpose other than to perform job duties or further company-sponsored activities without written authorization.

Prohibiting employees from making statements about work-related accidents "to anyone except the police or Company officials."

Prohibiting employees from making "false" statements concerning the Company.

Prohibiting employees from participating in "outside activities that are detrimental to the Company's image or reputation, or where a conflict of interest exists."

Prohibiting employees from conducting themselves "during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company."

Prohibiting employees from being "present at a Company location while not performing authorized services or without express permission."

Prohibiting employees from "[p]osting, circulating or distributing written or printed material without authorization from the manager."

Prohibiting "[d]iscourteous or inappropriate attitude or behavior" toward "other employees."

WE WILL NOT disband or otherwise discourage protected employee meetings during nonworktime and in nonwork areas.

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

WE WILL, within 14 days, rescind and/or revise the overly broad rules (as promulgated orally or as maintained in our employee handbook) described above.

WE WILL furnish all employees with (1) inserts for the current employee handbook that advise that the unlawful rules have been rescinded, or (2) the language of lawful rules on adhesive backing that will cover or correct the unlawful rules, or (3) publish and distribute revised handbooks that do not contain the unlawful rules.

FIRST TRANSIT, INC.

David Kelly, Esq., for the General Counsel.
Frederick C. Miner, Esq. (Littler Mendelson, P.C.), of Phoenix, Arizona, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Amalgamated Transit Union Local #1433, AFL–CIO (the Union), the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on May 28, 2010.[1] The complaint alleges that First Transit, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). This matter was tried in Phoenix, Arizona, on November 8–9.

[1] By order dated October 29, 2010, the General Counsel severed Case 28–CA–022916 from Case 28–CA–023017 and withdrew pars. 6 and 8 of the complaint. The conduct alleged in pars. 5 and 7 remains at issue. All dates herein are 2010, unless otherwise specified.

II. ISSUES

A. Did the Respondent violate Section 8(a)(1) of the Act by orally promulgating and maintaining a rule prohibiting employees from discussing their wages and pay rates?

B. Did the Respondent violate Section 8(a)(1) of the Act by orally promulgating and maintaining an overly broad and discriminatory rule prohibiting employees from meeting with union representatives at the Respondent's facility.

C. Did the Respondent violate Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals by telling them they were not allowed to meet with union representatives.

D. Did the Respondent violate Section 8(a)(1) of the Act by threatening its employees with unspecified reprisals by telling them that the Respondent would call the police if union representatives did not leave the Respondent's facility.

E. Did the Respondent violate Section 8(a)(1) of the Act by maintaining overly broad employment rules that interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

III. JURISDICTION

At all material times, the Respondent, a Delaware corporation, has operated a local passenger bus transit system in Phoenix, Arizona, where it also maintains an office and place of business. During the 12-month period ending February 24, 2010, the Respondent, in conducting its business operations derived gross revenues in excess of $250,000 and purchased and received at the Respondent's facility goods and materials valued in excess of $50,000 directly from points outside the State of Arizona. I find that at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

IV. FINDINGS OF FACT

Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings:

A. The Respondent's Business

The Respondent provides municipality transportation services in the United States, Europe, and Canada. Contracting municipalities provide transit vehicles and physical facilities; the Respondent provides maintenance and operational labor. On December 3, 2007, the Respondent began operating the West Transit facility in Phoenix, Arizona. About 400 employees worked at the West Transit facility, 24 of whom were vehicle mechanics.

In addition to mechanics, the Respondent employed drivers, fuelers, and cleaners at the West Transit facility. The drivers, fuelers, and cleaners were represented by the Union and covered by a collective-bargaining agreement for the term of July 1, 2008, through June 30, 2011 (the drivers/fuelers/cleaners agreement). Robert Bean (Bean) served as president of the Union in 2010 and had general responsibility for union oversight and administration of the drivers/fuelers/cleaners agreement. Dana Kraiza (Kraiza) served as the Union's recording secretary,[2] and Virginia Mazzone (Mazzone), employed as a busdriver by the Respondent, was also a union executive officer at the West Transit Facility.[3]

The West Transit facility was composed of a number of buildings, two of which were the maintenance shop or garage and the operators' (drivers) building, separated by about 200 feet. Each of the two buildings had an employee breakroom or lounge. The West Transit facility was a secure, fenced property with entry through guarded gates. Security guards provided by the city of Phoenix patrolled the facility. The Respondent issued security badges to authorized entrants, including employees. Visitors to the facility who did not possess security badges were expected to check in through the visitors' office during the hours of 9 a.m. to 5 p.m. Certain areas of the facility, including the visitor and employee parking lots and the area in front of the administrative building, did not require a security badge for access.[4] During July to November 2009, union representatives had security badges permitting access to the facility. When the Respondent thereafter deactivated the badges at the request of the city of Phoenix, union representatives were authorized access to the facility only through the visitors' office during business hours.[5]

The mechanics worked three shifts. The second and third shifts overlapped during the period of 8:30 p.m. to 4 a.m. During the overlap period, the mechanics had a scheduled meal break at 1:30 a.m., which they usually took in the mechanics' lounge.

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

Marc Perla	—	General Manager, Phoenix Facility
Grant Hansen	—	General Manager of Maintenance
Cecil Blandon	—	Maintenance Manager
Fernando Mena	—	Maintenance Supervisor

Beginning in June 2009, the Respondent maintained and issued to employees a written policy entitled "Freedom of Association," which stated in pertinent part:

> [T]he company supports human rights and the individual rights of its employees, including an employee's right to asso-

[2] During 2010, Kraiza was employed by the Union while on a leave of absence from the Respondent. During her leave of absence, she had no security badge for the facility.

[3] Mazzone performed her regular work duties at the facility and also provided liaison between represented employees and the Union with authority to resolve with management potential employee grievances arising under the drivers/fuelers/cleaners agreement.

[4] Employee parking areas were set off by a low decorative wall and were otherwise unguarded.

[5] Although Bean testified that he accessed the facility after hours on several occasions after his security badge was deactivated, there is no evidence his after-hours visits were authorized.

ciate themselves with a labor union if they so choose.

Rights: Though not an exhaustive list, management at [the Respondent] supports an employee's right to:

Freedom of Association
A secret ballot election
An informed choice
A representative voter turnout

. . . .

[D]uring union organizing campaigns, management shall support the employee's individual right to choose whether to vote for or against union representation without influence or interference from management.

. . . .

Intimidation or harassment of employees or any other unlawful activity is strictly prohibited.

B. Relevant Written Employee Rules

Since on or about August 24, 2009, the Respondent has maintained the following employee rules nationally. The rules were set forth in the employee handbook distributed to employees at the Respondent's West Transit facility:

9.10 COMPUTER SECURITY AWARENESS AND CONFIDENTIALITY

Employees shall not, without prior written authorization from their senior manager or director level manager, acquire, use, access, copy, remove, modify, alter, or disclose to any third parties, any Company information for any purpose other than to perform duties required in the fulfillment of job responsibilities or in furtherance of expressly stated Company-sponsored activities, e.g., United Way. Refer to the Company intranet for the latest version of the Company's Acceptable Use Policy.[6]

9.16 REFERENCES

Employees are prohibited from supplying any information in response to requests for references unless specifically authorized to do so by the HR Department. The Company's policy is to only furnish or verify an employee's name, employment dates and job title. No other information regarding a current or former employee will be provided unless the individual first provides written authorization. Employment and salary information for creditors, lenders, etc. must be obtained from the TALX System via The Work Number. . . .

10.02 VEHICLE ACCIDENT AND INCIDENTS

[All accidents and collisions, possible claims of accidents, damage to equipment, injury and possible injury must be reported in writing as set forth in the rule] . . . Operators must not make any statements about an accident to anyone except the police or Company officials.

11.01 STEALING/THEFT

Conducting activities not related to work during working time or using company property for activities not related to work anytime.

11.01 VIOLENCE/FIGHTING/THREATS

Fighting, violence, threats, harassment, intimidation, horseplay, and other disruptive behavior in the workplace including oral or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm.

11.01 DISLOYALTY

Making false, vicious, or malicious statements concerning the Company or its services, a client, or another employee.

Participation in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists.

Conducting oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company.

11.02 PERSONAL CONDUCT

Discourteous or inappropriate attitudes or behaviors to passengers, other employees, or members of the public. Disorderly conduct during working hours.

Profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious or malicious.

11.02 SECURITY

Being present at a company location while not performing authorized services or without express permission.

11.03 SELLING GOODS OR SERVICES, AND SOLICITING AND DISTRIBUTION OF LITERATURE

Selling or offering for sale any good or services to other employees, patrons, or visitors to a Company location or Company vehicle, except on the authorized bulletin board in the employee lounge area.

Posting, circulating or distributing written or printed material without authorization from the manager.

11.04 EMPLOYEE PERFORMANCE

Poor work habits including loafing, wasting time, loitering, or excessive visiting.

C. Orally Promulgated Employee Rules

On February 10, during the course of a mechanics' safety meeting, Fernando Mena (Mena), maintenance supervisor, told the mechanics they were not allowed to meet with the Union on maintenance property. In response to a mechanic's question, Mena said that mechanics could only meet with union representatives off property and on their own time. Another mechanic asked if it were permissible to meet union representatives off property on meal breaks, and Mena said it was, so long as the meeting was off property on employees' own time.

[6] The Acceptable Use Policy, given to employees who have access to company computers, provides that "company confidential" information includes "confidential employee and human resources data (such as salary and benefit information)," "results of investigations," "safety information," and "marketing and sales programs," "regardless of the manner or format in which it is recorded . . . whether orally, via hard copy printout, on-screen, or via other means."

In March, when Grant Hansen, in his position as general manager of maintenance at the Respondent's facility, conducted regular performance reviews with employees, he told them their wage rates were not open for discussion with other employees.

D. Union Organization Drive Among Mechanics

In February union representatives distributed union authorization cards to mechanics in the mechanics' breakroom at the West Transit facility during the mechanics' 1:30–2 a.m. meal break. After obtaining signed authorization cards, the Union filed a petition for election with the Region and planned a meeting with the mechanics for February 11 at the West Transit facility. The union representatives did not obtain prior permission from the Respondent to hold the meeting on secured facility premises. The meeting was scheduled to coincide with the mechanics' 1:30–2 a.m. meal break and was to be held in the operators' rather than the mechanics' breakroom.[7]

Shortly before 1:30 a.m., Mazzone utilized her security badge to gain access to the facility, and Bean, Kraiza, and Mazzone entered the West Transit facility to wait outside the maintenance department. When the mechanics took their meal break, the union representatives directed interested mechanics to follow them to the operators' breakroom, which Mazzone accessed with her security badge. About 15 mechanics joined the union representatives in the operators' breakroom where Bean addressed the group.

Maintenance manager, Cecil Blandon (Blandon), and Mena were both working at the West Transit facility in the early hours of February 11. At about 1:30 a.m., Mena told Blandon that mechanics had left the maintenance building for the operations building. Blandon and Mena went to the operations building where they found Bean addressing a group of mechanics while Kraiza and Mazzone watched. Blandon drew Kraiza and Mazzone aside and told them "you guys" have to leave" and "the Union can't be on property."[8] Kraiza said he needed to speak to Bean. Blandon moved to where Bean was talking to the mechanics and said, in the hearing of all present, "This meeting is finished. You guys gotta leave."[9] Kraiza told Blandon that she and Mazzone were on the company seniority list and were employees, to which Blandon did not respond.

Shortly after Blandon told Bean "you guys" have to leave, the mechanics left the operations breakroom, saying they were going back to the shop. Bean, Kraiza, and Mazzone refused to leave. Blandon told Bean that if the Union wanted to talk to the mechanics they could do so off the property, but they had no authority to conduct that particular meeting.[10] Blandon told Bean that he and Mena would just sit there with the union representatives until they decided to leave. There followed a 10-minute standoff before the union representatives left, during which Blandon, in response to a query by Bean, said he would call the police if they didn't leave.[11]

On the following day, according to Kraiza, she met with Perla in his office and asked him why he had had them removed from the property the preceding day. Perla said it was because union representatives come into the company and promise employees higher wages and the union has ruined corporate America. Perla said the Union could meet with the mechanics anytime, as long as it was off property. Perla testified that although he told her the Union did not have rights to access the property, he "didn't think" he had said he was opposed to union organization among the mechanics, and he did not recall telling her that unions were ruining corporate America, but as he did joke around with Kraiza, it was "possible it was brought up." I accept Krause's testimony, which was forthright and not clearly contradicted.

V. DISCUSSION

A. Legal Principles

Section 7 of the Act provides that employees have the right to engage in union activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

The Board utilizes the following framework for evaluating employer rules affecting employees: it must first be determined if the rule explicitly restricts Section 7 activity, which renders the rule unlawful. If it does not, the circumstances must be evaluated to determine whether: (1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[12] If the answer to any of the above is affirmative, the rule infringes on employee rights under the Act and is therefore unlawful unless the employer articulates and estab-

[7] Mazzone originally heard the meeting was going to be in the mechanics' lounge. Kraiza or Bean thereafter told her that the group would not be allowed to meet there, and the meeting would take place in the operators' lounge. The Respondent has no rule prohibiting the mechanics' use of or presence in either the mechanics' or the operators' lounge.

[8] Blandon included Mazzone in the restriction because "she was there for union business. They were all there for union business, not there as an employee of the company."

[9] There is little dispute as to this part of the interaction between Blandon and the union representatives, which is based on an amalgamation of Blandon, Kraiza, and Bean's testimonies. Kraiza also described Blandon as saying to Bean, "This meeting is over; you all have to leave the property." Bean testified that he asked Blandon if the company were denying mechanics the right to form and organize a union on their own time, to which Blandon replied, "That's really not the issue here right now. Perla wants you off the property."

[10] Blandon said he told Bean he could continue the meeting with employees in "a public place," by which Blandon meant to exclude the facility's parking lots.

[11] I found Blandon's testimony about events occurring after the mechanics left to be clear and forthright, and I credit it, including testimony that his statement about calling the police was made outside the mechanics' presence.

[12] *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and restated in *NLS Group*, 352 NLRB 744, 745 (2008), incorporated by reference into 355 NLRB 1154 (2010).

lishes a legitimate and substantial business justification for the rule that outweighs the infringement on employee rights.[13]

In considering the lawfulness of employer communications to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect.[14]

B. Orally Promulgated Restriction on Meetings with Union Representatives

The complaint alleges that on February 10, the Respondent, through Mena, orally promulgated and since then has maintained an overly broad and discriminatory rule prohibiting employees from meeting with union representatives at the Respondent's facility at any time. During a February 10 safety meeting, Mena told mechanics they could not meet with the Union on facility property but were restricted to meeting with union representatives off property and on their own time.

The Respondent's off-duty employees are permitted in the facility's exterior, nonwork areas such as its parking lots. Mena's February 10 restriction against employees meeting with union representatives on facility property was so broad as to include all property including parking and other nonwork areas. Focusing as it did on meetings with union representatives, the rule pronounced by Mena explicitly restricted Section 7 activity. Even if it did not, employees would reasonably construe the restriction to prohibit Section 7 activity in nonwork areas. The Respondent has presented no legitimate or substantial business justification for restricting Section 7 activity in the facility's nonwork areas; accordingly, the Respondent violated Section 8(a)(1) of the Act when Mena promulgated a discriminatory and overly-broad rule prohibiting employee/union-representative meetings in nonwork areas.

C. The February 11 Meeting

In the early hours of February 11, without having obtained prior permission from the Respondent to meet with employees on secured facility premises, union representatives, Bean and Kraiza, facilitated by employee/union officer Mazzone, surreptitiously entered the secured area of the facility to meet with the Respondent's mechanics in the operations breakroom during their 1:30–2 a.m. meal break.

Shortly after the meeting began, Blandon interrupted it. After speaking briefly with Kraiza and Mazzone, Blandon said in the hearing of the assembled mechanics, without addressing any particular persons, "This meeting is finished. You guys gotta leave" or, as also recalled, "This meeting is over; you all have to leave the property." After the mechanics left the operations breakroom, Blandon spoke with the union representatives, including Mazzone, telling them, inter alia, that he would call the police if they didn't leave.

The General Counsel correctly acknowledges that the Respondent may have properly sought to limit Bean's and Kraiza's access to the West Transit facility on February 11. The Supreme Court has held that employers may lawfully deny workplace access to nonemployee union agents to pursue organizational activities so long as "reasonable efforts by the union through other available channels of communication" would enable them to reach employees with the union's message." *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956). No party contends the Union lacked available communication channels to disseminate the Union's message to the mechanics outside the workplace or that the Respondent's restrictions on nonemployee access to secured areas were discriminatory.[15] In the absence, therefore, of a legally sufficient justification for access by the union representatives, the Respondent had a right to exclude the unauthorized access of Bean and Kraiza to the secured facility property and to warn them that it would seek the assistance of police authorities to have them removed if they refused to leave.[16]

The General Counsel argues, however, that Blandon's communications to the assembled mechanics and union representatives on February 11 went beyond a legitimate curtailment of nonemployee access to property. The General Counsel contends that Blandon's orders to break up the meeting were so broadly expressed that "they prohibited employees from meeting with any union representative—employee or non-employee, authorized to be on property or not—at any time on any part of the West Transit facility."

The Respondent acknowledges that "as a result of Mr. Blandon's directive to end the [February 11] meeting, the employees returned to their work area." The Respondent argues, however, that Blandon's statements were not unlawful, as they contained no threats, the mechanics were familiar with facility-access rules, the application of which Mena had explained earlier that night, and they demonstrated their understanding of the rules by returning to work rather than leaving the property.

As explained above, Mena's February 10 safety-meeting caution to mechanics about not meeting with the Union on maintenance property was an infringement of their Section 7 right to meet on exterior or public-accessible areas of the facility. Similarly, Blandon's February 11 pronouncement that the mechanics' meeting with union representatives was over and that all had to leave was overbroad. It is true, as the Respondent points out, that the mechanics did not think Blandon's order required them to abandon their work or leave the facility, but that is not the only consideration here. Blandon's all-encompassing announcement would, particularly in light of Mena's earlier-announced restrictions, reasonably cause the mechanics to believe they could not, even in the absence of

[13] Ibid; see also, e.g., *Caesar's Palace*, 336 NLRB 271 (2001); *Phoenix Transit System*, 337 NLRB 510 (2002).

[14] *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

[15] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Although Perla may have had animus toward the Union's organizational efforts among the mechanics, as reflected by his February 12 conversation with Kraiza, his attitude alone cannot turn nondiscriminatory restrictions into discriminatory ones.

[16] See *MetFab, Inc*., 344 NLRB 215, 221 (2005) (no exceptions filed to ALJ finding that employer did not violate the Act by calling police to investigate whether union picketing and handbilling encroached on its private property); *North American Pipe Corp.,* 347 NLRB 836, 847 (2006) (no exceptions filed to ALJ finding that prohibiting union literature-distribution in company parking lot was unlawful), cited by the General Counsel, is inapposite to this question, as it involved enforcement of an unlawful access policy.

nonemployee union representatives, continue the meeting in the operations breakroom and, further, could not continue the meeting in the facility's nonwork areas with union representatives present. Such constraints are impermissible when, as noted, the Respondent has presented no legitimate or substantial business justification for so restricting Section 7 activity; accordingly, the Respondent violated Section 8(a)(1) of the Act when Blandon disbanded the February 11 meeting.

D. Orally Promulgated Rule Prohibiting Employees from Discussing Wages

In March, Maintenance General Manager Grant Hansen told employees during their performance reviews that their wage rates were not open for discussion with other employees. Employees have a protected right to discuss and distribute information regarding wages, hours, and other terms and conditions of employment.[17] Hansen's caution explicitly restricted employees' Section 7 right to discuss wages and thereby violated Section 8(a)(1) of the Act.

E. Employee Handbook Provisions

The General Counsel argues that the employee handbook rules maintained by the Respondent violated Section 8(a)(1) even absent enforcement, as employees would reasonably construe the rules to prohibit Section 7 activity, which would reasonably tend to chill employees' exercise of their Section 7 rights. The Respondent contends that a reasonable reading of the rules, particularly in light of the Respondent's Freedom of Association policy, could not be construed to improperly interfere with employees' Section 7 rights.

1. Rule 9.10—Computer Security Awareness and Confidentiality

Rule 9.10 prohibits disclosure of any company information for any purpose other than to perform job duties or further company-sponsored activities without written authorization. A reasonable employee is likely to construe the proscription to include information about terms and conditions of employment including wage and benefits information, which inclusion the Respondent's Acceptable Use Policy clearly contemplates. Moreover, Hansen's March warning that wage rates were not to be discussed with other employees could only have emphasized that the Respondent's restriction on disclosure of company information included employee benefit information. Such a restriction violates Section 8(a)(1) of the Act. See *Mediaone of Greater Florida, Inc.,* supra; *Double Eagle Hotel & Casino*, supra.

2. Rule 9.16–References

Rule 9.16 prohibits employees from supplying unauthorized information "in response to requests for references," and sets forth company policy regarding employment and salary information the company will furnish to "creditors, lenders, etc."

The General Counsel argues the rule is ambiguous and overbroad because it may be reasonably construed to prohibit employees from providing information about their coworkers even if they are not purporting to speak on Respondent's behalf. The Respondent contends that section 9.16 applies to requests for employment references by prospective employers and in no way restricts employees' protected rights to discuss or disseminate wage and benefit information. The Respondent also argues the rule is necessary to avoid tort claims based on attribution to the company of unauthorized employment references.

Rule 9.16 does not, as the Respondent suggests, specifically limit "requests for references" to those coming from prospective employers but has a broader thrust. However, the Board requires the trial judge to give a rule a reasonable reading, to refrain from reading particular phrases in isolation and to avoid improper presumptions about interference with employee rights. *Lutheran Heritage Village-Livonia*, supra at 646. With that caution in mind, it is appropriate to find that a reasonable employee is likely to understand from rule 9.16 in its entirety that the proscription is limited to information sought by an entity regarding a specific employee for the purpose of granting or withholding some advantage to the employee. Such a restriction would not impede an employee's discussion of wages and benefits inter-employee or with a nonemployee party, such as a labor organization, so long as the information was not purported to bear the Respondent's imprimatur. Since the Respondent has articulated a legitimate and substantial business justification for the rule that outweighs any speculative infringement of employee rights, the rule does not violate Section 8(a)(1) of the Act, and I shall dismiss that complaint allegation.

3. Rule 10.02—Vehicle Accident and Incidents

Rule 10.02 sets forth the procedures that employees involved in vehicular accidents must follow. The rule prohibits operators involved in an accident from "mak[ing] any statements about an accident to anyone except the police or Company officials."

The General Counsel argues that the general "gag rule" imposed on making statements about an accident expressly deters employees from talking to coworkers or union representatives about accident details and sequelae that may affect employment terms. Since an accident may result in discipline or otherwise impact employees' working conditions, the rule impinges on Section 7 rights. The Respondent argues that all operators are represented by the Union and covered by the terms of a collective-bargaining agreement that specifically protects operators' rights to discuss accidents or incidents with their representatives and provides grievance procedures for infringement of rights. In light of the contractual provision, the Respondent urges, rule 10.02 cannot reasonably be read to interfere with employee Section 7 rights.

The Board has found imposition of gag rules on discussion of work conditions, such as those on wages, to be unlawful restrictions on Section 7 rights. See *Ashley Furniture Industries,* 353 NLRB 1255 (2008). Even if rule 10.02 is not an

[17] *NLS Group,* supra at 745 (rule prohibiting disclosure of employment terms including compensation, to other parties unlawful, as employees "reasonably would construe it to prohibit activity protected by Section 7"); *Mediaone of Greater Florida, Inc.,* 340 NLRB 277, 281 (2003); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 fn. 14 (2004); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (dissatisfaction with wages and benefits is the "grist" and "sinew" for concerted action); *Mobile Exploration & Producing U.S., Inc*., 323 NLRB 1064, 1068 (1997), enfd. 156 F.3d 182 (5th Cir. 1998).

explicit restriction of Section 7 rights, a reasonable employee is likely to construe the rule as prohibiting protected discussion of accidents with other employees or union representatives. Cf. *NLS Group*, supra. As to the Respondent's assertion that any ambiguity attaching to rule 10.02 is effectively resolved by provisions of the collective-bargaining agreement, the mere maintenance of such an unlawful rule serves to inhibit employees from engaging in otherwise protected activity. *Lafayette Park Hotel*, 326 NLRB 824 at 825, 827 (1998); *Cintas Corp.*, 344 NLRB 943, 946 (2005). Further, the existence of lawful provisions does not cure an unlawful rule; rather two facially inconsistent rules create an ambiguity that must be resolved against the Respondent, as the drafter of the rule. See *Mediaone of Greater Florida, Inc.,* 340 NLRB 277, 277 fn. 4 (2003). Accordingly, that portion of rule 10.02 that prohibits employee statements about an accident to anyone except the police or company officials violates Section 8(a)(1) of the Act.

4. Rule 11.01—Stealing/Theft

Rule 11.01 prohibits the use of company property for nonwork activities at any time and precludes employees from conducting nonwork activities only during "working time." It is well settled that an employer may lawfully prohibit non-work activities during working time. See *Stevens Construction Corp.*, 350 NLRB 132, 134 fn. 13 (2007), citing *Our Way,* 268 NLRB 394 (1983). Further, the Board instructs that employees have no statutory right to use an employer's equipment for Section 7 activity. See *Guard Publishing Co.,* 351 NLRB 1110, 1114 (2007). While an employer has a right to impose some restrictions on employees' statutory right to engage in protected activity, such restrictions must be clearly limited so as not to interfere with employee rights to engage in protected activities on their own time in nonwork areas. See *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945). Here, employees may reasonably construe the words "using company property" to encompass the use of facility areas where employees may congregate during non-working time and where their right to engage in union or other protected activities may not be restricted. See *Crowne Plaza Hotel,* 352 NLRB 382, 384 (2008). Accordingly, that portion of rule 10.02 that prohibits employees from using company property for nonwork activities anytime violates Section 8(a)(1) of the Act.

5. 11.01—Violence/Fighting/Threats

Rule 11.01 prohibits, in part, "fighting, violence, threats, harassment, intimidation, horseplay, and other disruptive behavior in the workplace including oral or written statements, gestures, or expressions that convey a direct or indirect threat of physical or emotional harm."

The General Counsel apparently concedes that the violence/fighting/threats portion of rule 11.01 does not explicitly prohibit Section 7 activity but argues that "harassment" and "other disruptive behavior" are inherently ambiguous and subjective words that may be understood by employees to encompass enthusiastic union solicitation or vigorous work protests.

I cannot agree with the General Counsel that a reasonable employee would construe rule 11.01 to be a restriction on Section 7 activities. The Board has found lawful a rule that prohibited "any type of conduct, which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow [employees] or patrons." *Palms Hotel & Casino*, 344 NLRB 1363, 1367 (2005). In doing so, the Board reasoned the rule was not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace." Id. at 1368. Here the words "harassment" and "other disruptive behavior" are set in a context of prohibited "fighting, violence, threats . . . intimidation, horseplay," and employees would reasonably consider the terms "harassment" and "other disruptive behavior" to signify a similar level of unacceptable behavior. Accordingly, I conclude rule 11.01 does not violate Section 8(a)(1) of the Act, and I shall dismiss that complaint allegation.

6. 11.01—Disloyalty

Rule 11.01 prohibits, in part, (1) making "false, vicious, or malicious statements concerning the Company or its services, a client, or another employee," (2) participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or (3) conducting "oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company."

The General Counsel argues that each of the "disloyalty" prohibitions in rule 11.01 is overbroad and that maintenance of the prohibitions would reasonably discourage employees from engaging in untrammeled discussion of protected issues, participating in protected "outside" activities," or risking protected conduct that the Respondent might perceive to be detrimental to its interests.

As to the prohibition of "false, vicious, or malicious statements concerning the Company or its services, a client, or another employee," the Respondent contends the prohibition covers only disloyal statements that are malicious or vicious and therefore unprotected by the Act. However, the proscriptions are expressed in the disjunctive; thus, the Respondent bars vicious or malicious or merely false statements about the Company. The Board has invalidated similar provisions on grounds that they prohibited and punished merely "false" statements, as opposed to maliciously false statements, and were therefore overbroad.[18] In *Valley Hospital Medical Center,* 351 NLRB 1250 (2007), cited by the Respondent, the Board emphasized that an employee's public criticism of an employer must evidence "a malicious motive" to lose the Act's protection as an act of disloyalty,[19] and the fact that an employee's statement is false, misleading or inaccurate is, alone, insufficient to demonstrate malicious falsity.[20] Accordingly, rule 11.01's prohibition against making "false" statements concerning the Respondent is impermissibly overbroad and violates Section 8(a)(1) of the Act.

[18] *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979), followed in *Lafayette Park,* supra; *Cincinnati Suburban Press*, 289 NLRB 966 (1988).

[19] *Valley Hospital,* supra at 1252, citing *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).

[20] *Valley Hospital,* supra at 1252, citing, e.g., *Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003).

The Respondent argues that rule 11.01's prohibition against participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," is consistent with one approved by the Board in *Lafayette Park,* supra at 824 and therefore lawful. The *Lafayette* rule forbade "being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [employer's] goals and objectives." The Board concluded the rule, set in that context, addressed the legitimate business concern of uncooperativeness "with supervisors, employees, guests and/or regulatory agencies." The Board stated that arguable ambiguity arose only by viewing the phrase "goals and objectives" in isolation and by attributing to the employer an intent to interfere with employee rights. The instant rule is different from the *Lafayette* rule. Here, no wording provides a context limiting the rule to legitimate business concerns such as uncooperation with supervisors. Rather, the prohibition bans all outside activities the Respondent may consider to be detrimental to its image or reputation or to present a conflict with the Respondent's interests. It would not be unreasonable for employees to suppose that such outside activities as public union rallies, informational picketing, or public expressions of workplace dissatisfaction would, in the Respondent's view, fall into "detrimental" or "conflict" of interest categories. Since employees might reasonably view the rule as restricting protected outside activities, the rule chills participation in Section 7 activity and violates Section 8(a)(1) of the Act.

As to rule 11.01's prohibition against conducting "oneself during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company," the Respondent cites *Ark Las Vegas Restaurant Corp.,* 335 NLRB 1284 (2001), as support for its position that the prohibition is lawful. In *Ark*, the company rules forbade: (1) conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company, and (2) participating in any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, [the employee], fellow associates, the Company, or its guests, or that adversely affects job performance or [employees'] ability to report to work as scheduled.[21] The Board noted that the *Ark* rules were largely identical to those found lawful in *Lafayette Park,* which was the appropriate precedent to apply.[22] The instant rule is readily distinguishable from those the Board considered in *Lafayette Park* and *Ark.* The rules in both *Lafayette Park* and *Ark* contextually limited the prohibited conduct to unprotected actions: the *Lafayette Park* rule related to uncooperative behavior with supervisors and others; the *Ark* rules related to unprofessional or unethical behavior or behavior that brings "discredit to or reflects adversely on" the employee and others. Set in those contexts, the *Lafayette Park* and *Ark* rules clearly contemplated employee conduct that was intrinsically improper and unprotected. The instant rule prohibiting nonworking conduct that "would be detrimental to the interest or reputation of the Company," does not focus on inherently improper actions. Rather, the rule could reasonably be read to comprise any behavior, however proper and protected, that the Respondent considered detrimental to its interest or reputation. With the rule focused on the Respondent's opinion of the conduct rather than on generally accepted views of respectable and principled behavior, the rule is overbroad and violates Section 8(a)(1) of the Act.

7. 11.02—Personal Conduct

Rule 11.02 prohibits discourteous or inappropriate attitudes or behaviors to passengers, other employees, or members of the public, disorderly conduct during working hours, and profane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious.

The General Counsel argues that rule 11.02–Personal Conduct is overbroad and ambiguous and could reasonably be read to prohibit protected activity. I cannot agree with the General Counsel that a reasonable employee would construe rule 11.02 as a restriction on Section 7 activities. The restrictions of rule 11.02 are comparable to those found lawful in *Palms Hotel & Casino*, supra. Given rule 11.02's specific description of prohibited behavior, reasonable employees would, as the Board concluded in *Palms Hotel & Casino*, understand the Respondent's expectation to be that "they comport themselves with general notions of civility and decorum." Id. at 1368. Accordingly, I conclude that rule 11.02 does not violate Section 8(a)(1) of the Act, and I shall dismiss that complaint allegation.

8. 11.02—Security

Rule 11.02 prohibits employees from being present at a company location while not performing authorized services or without express permission.

An employer's restrictions on employees' statutory right to engage in protected activity must be clearly limited so as not to interfere with employees' rights to engage in protected activities on their own time in nonwork areas. See *Republic Aviation Corp. v. NLRB,* supra. The Board considers that, except where justified by business reasons, a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.[23] Here, employees may reasonably construe the words "company location" to encompass outside nonworking areas where employees may congregate during nonworking time and where their right to engage in union or other protected activities may not be restricted. See *Crowne Plaza Hotel,* supra. Further, a rule that requires employees to secure permission from their employer before engaging in protected concerted activities on their free time and in nonwork areas is unlawful. *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). Accordingly, rule 11.02, insofar as it prohibits employees from being present at a company location while not performing authorized services or without express permission, violates Section 8(a)(1) of the Act.

9. Rule 11.03—Selling Goods or Services; Soliciting and Distribution of Literature

Rule 11.03 prohibits employees from (1) selling or offering

[21] Id. at 1291.

[22] Id. at 1285 fn. 2.

[23] *Tri-County Medical Center*, 222 NLRB 1089 (1976), followed in *Continental Group, Inc.,* 353 NLRB 348, 350 (2008).

for sale any goods or services to other employees, patrons, or visitors to a company location or company vehicle, except on the authorized bulletin board in the employee lounge area and (2) posting, circulating, or distributing written or printed material without authorization from the manager.

The General Counsel argues that the second part of rule 11.03 is a presumptively invalid no-distribution rule and that the first part of rule 11.03 must be read in context with the no-distribution rule, rendering it similarly over-broad. However, since the two rules are functionally and comprehensibly discrete, they are appropriately considered separately.

An employer has a right to limit employees' proffering of goods or services at the workplace. There being no evidence the Respondent promulgated part one of rule 11.03 in response to union or protected activity or has enforced it in a manner calculated to restrict employees' protected activity, there is no basis for finding it infringes on employees' Section 7 rights. See *Lafayette Parke,* supra at 826 (relying in part on the absence of such evidence to find a rule did not violate the Act). Accordingly, I conclude that part one of rule 11.03 does not violate Section 8(a)(1) of the Act, and I shall dismiss the complaint allegation relating thereto.

As for part two of rule 11.03, while an employer has a right to impose some restrictions on employees' statutory right to engage in union solicitation and distribution, such restrictions, must be clearly limited so as not to interfere with employees' right to solicit their coworkers on their own time or to distribute literature on their own time in nonwork areas. *Republic Aviation Corp.,* supra 803–805; *Our Way, Inc.*, supra. The requirement that employees obtain preauthorization for the dissemination of any written or printed material clearly infringes on employees' right to distribute union or other protected literature on their employer's premises during nonwork time in nonwork areas.[24] Since part two of rule 11.03 interferes with the exercise of protected employee rights, it is invalid and violates Section 8(a)(1) of the Act.

10. Rule 11.04—Work Rules and Employee Performance

Rule 11.04 prohibits poor work habits including loafing, wasting time, loitering, or excessive visiting.

The General Counsel argues that the rule is impermissibly vague and may reasonably be understood to prohibit employees from remaining on the Respondent's premises during nonwork-times even when engaging in concerted or union activities. Although the rule is tied to "work habits," it is not clear from the language that the prohibitions are limited to employee conduct during worktime; rather, they could reasonably be seen as extending to nonworktime. The Board has found the following rules violate Section 8(a)(1): prohibiting employees from "loitering in company premises before and after working hours,"[25] prohibiting "loitering on company property (the premises) without permission," which rule would reasonably chill the exercise of Section 7 rights,[26] and "[l]oitering on Company property after working hours."[27] Here, the undefined and unlimited terms "loafing, wasting time, loitering, or excessive visiting" could lead employees to conclude they could not engage in protected activities with other employees even during nonworking time in nonworking areas of the Respondent's property. The Respondent has presented no legitimate or substantial business justification for such broad restrictions; accordingly, rule 11.04 interferes with the exercise of protected employee rights and violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2 The Union is a labor organization within the meaning of Section 2(5) of the Act.

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

(a) Since February 10, 2010, promulgating and maintaining an overly broad and discriminatory rule prohibiting protected employee/union representative meetings in exterior nonwork areas of the Respondent's facility.

(b) On February 11, 2010, restricting union activity by disbanding and otherwise discouraging a meeting of employees with union representatives.

(c) In March 2010, restricting employees Section 7 right to discuss wages with other employees.

(d) Since August 24, 2009, maintaining an overly broad rule that prohibits disclosure of any company information for any purpose other than to perform job duties or further company-sponsored activities without written authorization.

(e) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from making statements about a work-related accident to anyone except the police or company officials.

(f) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from using company property for nonwork activities anytime.

(g) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from making "false" statements concerning the Respondent.

(h) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from participating in "outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists."

(i) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from conducting themselves "during non-working hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company."

(j) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from being present at a company location while not performing authorized services or without express permission.

(k) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from posting, circulating or distrib-

[24] See ibid; *NLRB v. Babcock & Wilcox,* 351 U.S. 105, 110–111 (1956); *Central Hardware Co. v. NLRB,* 407 U.S. 539, 543 (1972).

[25] *Palms Hotel & Casino*, supra at 1363 fn. 3.

[26] *Lutheran Heritage Village*, supra at 655.

[27] *Tecumseh Packaging Solutions, Inc.*, 352 NLRB 694 (2008).

uting written or printed material without authorization from the manager.

(l) Since August 24, 2009, maintaining an overly broad rule that prohibits employees from "loafing, wasting time, loitering, or excessive visiting." 4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action, as set forth below, designed to effectuate the policies of the Act. Because the Respondent's employee handbook is distributed and maintained at its various facilities, a nationwide posting remedy is appropriate.[28]

[Recommended Order omitted from publication.]

[28] *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).