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

TT & W FARM PRODUCTS, INC. D/B/A
HEARTLAND CATFISH COMPANY, INC. AND
HEARLTAND ALABAMA, LLC

and **Case 26-CA-23722**

TONEY WILLIAMS, AN INDIVIDUAL

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

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Dated: February 1, 2011

I. STATEMENT OF THE CASE

This case involves the lawfulness of certain rules maintained in Respondent's employee handbooks at its Itta Bena, Mississippi and Greensboro, Alabama catfish processing facilities. The parties waived an evidentiary hearing and a joint motion for issuance of a decision based a stipulated record was granted on November 9, 2010. On December 21, 2010 Judge Robert A. Giannasi issued a decision and recommended order finding that Respondent's maintenance of handbook rules prohibiting the: (1) distribution of handbills or similar literature on company property at any time, (2) interruption of work and leaving one's work station without permission of a supervisor, and (3) bearing false witness against the Company, violated Section 8(a)(1) of the Act. The recommended order contains a cease and desist provision, as well as provisions requiring Respondent to take affirmative actions to effectuate the policies of the Act.[1] Respondent, on January 14, 2011, filed exceptions and a supporting brief to the judge's decision concerning these three allegations.[2] Pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files this answering brief.

[1] The judge's Notice to Employee's inadvertently reflects the wrong address for the Regional Office. Any published decision should reflect the correct address.

[2] The judge dismissed allegations that Respondent's maintenance of rules prohibiting employees from making disparaging remarks about Respondent and disclosing confidential or proprietary information about Respondent violated the Act. No exceptions are taken the judge's dismissal of these allegations.

II. ISSUE PRESENTED

The issue presented by Respondent's exceptions is whether the judge's conclusions regarding the unlawfulness of Respondent's handbook rules are supported by the record.

III. SUMMARY OF FACTS

Respondent employs approximately 460 employees at its Mississippi facility and 190 employees at its Alabama facility. Employees at both facilities work on an assembly line processing live catfish for shipment to customers. The Mississippi facility processes approximately 300,000 pounds of catfish daily while the Alabama facility processes approximately 200,000 pounds daily. (ALJD 2:6-10, Stip 5)[3]

Employees at both facilities are governed by handbooks containing identical rules of conduct. New employees are educated as to the contents of the handbooks during the new employee orientation process and are required to sign an acknowledgement that they have reviewed the handbook and understand their responsibility to abide by all rules, policies, and procedures. Although employees are not provided with a personal copy of the handbook, copies are maintained in the human resource department at each facility and are available for employees to review. (ALJD 2: 16-44, Stips 6-11, and Exhs A-C)

[3] References to the judge's decision are designated as ALJD followed by the appropriate page and line number. References to the joint stipulation of facts are designated as Stip followed by the appropriate stipulation umber. References to joint exhibits are designated as Exh followed by the appropriate exhibit number.

Pages 18 and 19 of both handbooks contain Respondent's absenteeism, attendance and punctuality policy for employees at the Mississippi and Alabama facilities. That policy includes inter alia, the following provision:

> . . . **Leaving the plant without your supervisor/group leader's permission is considered a major violation of the attendance policy and such an incident will be treated as a voluntary quit.** (ALJD 4:21-34, Stip 18, Exhs A & C)

Similarly, a rule on page 21 of both handbooks, states that an employee leaving his workstation without permission or approval has committed a minor offense which will be considered cause for disciplinary action. (ALJD 4:1-4, Stip 15, Exhs A & C)

Moreover, pages 22 and 23 of both handbooks list major offenses that may be considered cause for immediate discharge and intolerable offenses that will be considered cause for immediate discharge. Included in the list of major offenses is the "unauthorized selling or distributing of tickets, soliciting contributions, or ***distributing handbills or similar literature on Company property at any time***." (Emphasis added) (ALJD 4:45-49, Stip 20, Exhs A & C)

Included in the list of intolerable offenses are the following:

- Bearing false witness for or against the Company under any and all circumstances.
- Willfully restricting production, impairing or damaging product or equipment, interfering with others in the performance of their jobs or ***engaging or participating in any interruption of work***. (Emphasis added)
- Walking off the job or leaving the plant without permission or notifying the supervisor. (ALJD 4:51-52; 5:4-12, Stip 21, Exhs A & C)

The above rules have been maintained at Respondent's Mississippi facility since at least March 20, 2008 and since at least September 2008 at Respondent's Alabama facility. (ALJD 2:16-17, 34-35, Stips 6 & 9) The rules were not promulgated in response to any union activity and have not been enforced against employees exercising their Section 7 rights.

IV. LEGAL STANDARD

An employer violates Section 8(a)(1) by maintaining work rules that "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement. *Id.* at 825. The Board has held that a rule is unlawful if it explicitly restricts Section 7 activity or if employees would reasonably construe the language to prohibit such activity. *Lutheran Heritage Village – Livonia*, 343 NLRB 646, 647 (2004). In determining whether a challenged rule is unlawful, the Board will give the rule a reasonable reading. *Guardsmark, LLC*, 344 NLRB 809 (2005); *Lutheran Heritage Village – Livonia*, 343 NLRB at 646.

V. ANALYSIS OF EXCEPTIONS

A. The Judge Properly Rejected Respondent's General Argument in Support of the Lawfulness of the Rules

Respondent argues that the judge's conclusion that the challenged rules are unlawful is erroneous and generally excepts to the judge's findings, asserting that the record is devoid of evidence that employees have a present day recollection, understanding or knowledge of the handbook rules in questions.

Accordingly, Respondent contends that there can be no finding that any of the rules at issue could be "reasonably construed by employees" as limiting or impacting their right under *Lafayette Park Hotel*, supra. In finding that maintenance of the rules violated Section 8(a)(1) of the Act, the judge considered and rejected Respondent's argument. The Board should affirm the judge's findings since they are amply supported by the record and established Board precedent.

In attacking the judge's rationale, Respondent references the movie "Animal House" and argues that its employees could not reasonably construe the rules as coercive since they have no present day recollection of them. Unlike the characters in the "Animal House" movie, Respondent's employees have knowledge of the existence of the rules, since they are reviewed when employees are hired and thereafter, maintained in the human resources department at each facility. (ALJD 2:20-24, 35-41) Moreover, Respondent, in advancing this argument, assumes a fact not in evidence. There is no evidence that employees do not have a present day recollection of the rules. The evidence is that the rules are reviewed with every employee at the time of hire and every employee signs an acknowledgement, agreeing to be bound by the rules. Interestingly, although Respondent excepts to the judge's findings that "surely Respondent is not contending that the rules in the handbook do not apply and that it could not penalize employees for violating the rules simply because the employees did not know about the rules or did not see the handbook since they were first hired" and that the handbook does not state that employees are

excused from following the rules because they did not know about them. . . ", Respondent does not dispute the accuracy of the finding.[4] Rather, Respondent asserts that the findings/conclusions are not relevant to the operative issue of whether employees can reasonably construe the rules to prohibit Section 7 activity.

The Board, like the judge, should reject any assertion by Respondent that employees cannot reasonably construe its rules to prohibit Section 7 activity because they do not know about the rules, since the facts are inconsistent with any such assertion. The record clearly establishes that employees are made aware of the rules and policies governing the employment relationship at the time of hire. Included in those rules and policies are the rules which the judge found unlawfully restricted employees in the exercise of their Section 7 rights. There is no dispute that Respondent continues to maintain the rules and requires employees to sign an acknowledgement stating they are aware of the rules and understand their responsibility for abiding by all rules. (Emphasis added) Under these circumstances the judge's findings are amply supported by the record and applicable case law. Thus, Respondent's exceptions 6, 7, and 8 are without merit and the Board should affirm the judge's findings.

B. The Judge Properly Rejected Respondent's Specific Arguments in Support of the Lawfulness of the Rules

1. *Respondent's rule prohibiting distribution at any time violates Section 8(a)(1) of the Act*

Although an employer may lawfully prohibit employee distribution of literature in work areas at all times, it may not prohibit distribution during

[4] Exception 8.

nonworking time and in nonworking areas. *Hale Nani Rehabilitation & Nursing*, 326 NLRB 335 (1998); *Stoddard-Quirk Mfg. Co.* 138 NLRB 615, 621 (1962). The Board has long held that employees have a Section 7 right to distribute materials during non-work time in non-work areas. Board law further provides that rules which prohibit employees from distributing materials during non-work time in non-work areas are unlawful. *Turtle Bay Resorts*, 353 NLRB at 1271; *Bryant Health Center, Inc.*, 353 NLRB at 745.

The record amply supports the judge's conclusion that Respondent's rule on page 22 of the employee handbooks prohibiting the "unauthorized selling of tickets, soliciting contributions, or distributing handbills or similar literature on Company property at any time" is unlawful. The judge found that the rule, as read, prohibits three different types of activities on Respondent property at any time: (1) unauthorized selling of tickets; (2) soliciting contributions; and (3) distribution of handbills or similar literature. (ALJD 6:30-38)

Respondent excepts to the judge's finding, contending that employees would not reasonably construe the language at issue to prohibit Section 7 activity in light of Respondent's lawful no solicitation/distribution rule contained on page two of the handbooks. That rule falls under the heading: **NON-INTERFERENCE WITH WORK.**[5] As noted by the judge, although that provision defines work and worktime, it (unlike the unlawful no-distribution rule on page 22) does not speak

[5] The provision provides: Working time is for work. There will be no solicitation of any kind and not distribution of literature of any kind by any employee during work time. You should accomplish your work and not interfere with other employee trying to accomplish their work. Work time does not include the time before your scheduled work day begins, the time after you have completed your scheduled work day, or your break and lunch periods. Employees are not permitted to engage in the distribution of advertising material, literature or other non-work materials at any time in work areas. Persons not in the

of what can or cannot be done on company property. The Judge found that at a minimum, the conflicting policies would confuse employees as to what conduct could subject them to discipline. See *Farr Co.*, 304 NLRB 203, 215 (1991) (employer that maintained an unlawful no solicitation policy in its handbook, did not avoid liability by issuing a memorandum containing a lawful policy, since "legal confusion" would result even if the employees knew of both policies).

Respondent also argues that the language banning distribution of handbills or similar literature relates back to the bar on distribution of tickets or solicitation of contributions. (ALJD 6:40-42) The Judge rejected this argument for the reason that any reasonable employee reading the rule would understand that the rule prohibits distribution of handbills or similar literature in addition to other types of solicitation activities. (ALJD 6:45-49) The Judge further noted that, if Respondent intended for the bar on distribution of handbills or similar literature to relate back to the other types of solicitation activities, it would have written the rule to prohibit "selling or distribution of tickets by handbilling or similar literature." (ALJD 6:43-45)

Moreover, assuming Respondent's interpretation of the rule was reasonable, the judge concluded that it demonstrated that the rule, as written, is ambiguous. (ALJD 7:1-2) Thus, the judge properly found that the ambiguity must be held against the promulgator of the rule. See *Naples Community Hospital*, 355 NLRB No. 171, Slip op. at 50-51 (2010) citing *Teletech Holdings, Inc.*, 333

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employ of the company will not be permitted to make solicitations or distributions of any kind on plant property at any time.

NLRB 402, 403 (2001). See also *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

The judge found unpersuasive Respondent's reliance on *Children's Center for Behavioral Development*, 347 NLRB 35, 37 (2006), distinguishable because the rule in that case was explicitly limited to prohibiting employees from soliciting for personal gain or profit, whereas the rule in this case broadly prohibits distributing handbills or similar literature. (ALJD 7:37-41, fn. 2). Similarly, the judge distinguished *NLRB v. Mock Road Super Duper, Inc.*, 393 F.2d 432, 435 (6th Cir. 1968). In that case the Circuit Court reversed the Board and found a no-solicitation rule lawful. There, the Court interpreted the word "solicitation" as selling and there was no evidence that the law was unlawfully applied. (ALJD 7:41-45, fn. 2) Here, the rule prohibits distribution of handbills and similar literature, not solicitation as was the issue in *Mock Road.* Moreover, the judge explained that the *Mock Road* decision is contrary to the Board's more recent and definitive rulings in *Lafayette Park Hotel* and *Lutheran Heritage Village – Livonia*, supra, which make clear that simple maintenance of a broad rule, without enforcement, can establish a violation of the Act. (ALJD 7:48-51, fn. 2).

Respondent does not advance any business justification for maintenance of the rule. Respondent makes the same arguments in its exceptions as it did before the judge in support of its argument that the no distribution rule is lawful. However, Board law is clear that absent compelling business justifications, a ban on employee distribution in non-work areas during non-work time unlawfully

infringes upon employees' Section 7 rights. The Respondent provides no basis for reversing the judge findings, which are supported by the record and consistent with Board precedent. Accordingly, the Board should affirm the judge's finding that Respondent's rule prohibiting employees from distributing handbills or similar materials on company property at any time is overbroad and violates Section 8(a)(1).

2. *Respondent's Rules Prohibiting Work Interruptions and Leaving Work Stations Without Permission Violate Section 8(a)(1)*

As noted above, Respondent maintains rules prohibiting employees from leaving their work station, leaving the plant or walking off the job without permission from a supervisor. Respondent also maintains a rule prohibiting employees from engaging in any interruption of work. Infractions of any of these rules result in disciplinary action. (Stip. 15, 18 & 21) Additionally, Respondent's handbooks provide that participating in any interruption of work is an intolerable offense.

Respondent contends that the judge's findings that the above rules are unlawful infringements on employees' Section 7 rights are unsupportable. According to Respondent, the rules represent a sound management practice and are absolutely necessary to run an efficient, safe and profitable business operation. (R Brief 11) Relying on clear Board precedent, the judge rejected Respondent's argument and concluded that a reasonable employee would interpret Respondent's rules as prohibiting lawful strikes and work stoppages. The judge noted that Board law is clear that employees who concertedly refuse to work in protest over wages, hours or other working conditions...are engaged in

'concerted activities' for 'mutual aid and protection' within the meaning of Section 7 of the Act. (ALJD 9:21-27) See, *Labor Ready, Inc.*, 331 NLRB 1656, 1656 fn. 2. (2000) (invalidating, as overbroad, a rule stating that, "Employees who walk off the job will be discharged") and *Crowne Plaza Hotel*, 352 NLRB 382, 387 (2008) citing *NLRB v. Washington Aluminum Co.*, 307 U.S. 9, 16-17 (1962). The judge further explained that, even in the absence of actual enforcement, a reasonable employee would interpret these rules to prohibit employees from leaving their work station or the plant or engaging in any interruption of work even where the employees are engaging in lawful strikes and work stoppages. (ALJD 9:29-33)

The judge rejected Respondent's safety argument since there is no reference to safety concerns in the rules and safety concerns would not justify the broad prohibitions set forth in the rules which a reasonable employee would read to prohibit him from leaving his work station or interrupting work without permission to engage in a legitimate dispute over working conditions. (ALJD 9:40-47)

Respondent argues that the rules must be read in conjunction with other provisions of its handbooks, such as its communication procedure provision that states there will be no retaliation against employees for presenting complaints or suggestions. Respondent further states that the handbook informs employees that policies in the handbook reflect how Respondent will handle ordinary matters and that, in deciding the discipline to be imposed, consideration will be given to the specific facts of each case. (Stip. 12 & 16) However, these policies must be read in conjunction with Respondent's stated position opposing unions and the

strikes and work stoppages that often ensue when employees seek representation. (Jt. Ex. 1 & 3, p.2) Thus, while Respondent may claim that, based on a full reading of the handbook, employees cannot reasonably read the rules as prohibiting protected activity, the rules, when read alongside Respondent's anti-union stance, are so broad that employees would understand them to prohibit lawful protected activity.

Respondent argues the same cases in its brief as it did before the judge as support for its position that it rules requiring employees to receive permission before leaving their work area are lawful. First, Respondent relies upon *SMI Steel, Inc.*, 286 NLRB 274 (1987), a case where the Board did not find a rule prohibiting employees from leaving their work area without permission to be per se unlawful. However, as the judge notes, the case is distinguishable as it dealt specifically with the discriminatory enforcement of a rule and not the maintenance of an unlawfully broad rule. (ALJD 10:7-10) The Board, which affirmed the violation, merely modified the judge's order to conform to the violation found. (ALJD 10:10-11) Moreover, the Board's more recent pronouncement regarding the maintenance of unlawful rules is set forth in *Lafayette Park Hotel* and *Lutheran Heritage Village – Livonia, supra,* where the Board made clear that simple maintenance of a broad rule, without enforcement, can establish a violation of the Act.

Respondent also relies upon *Wilshire at Lakewood,* 343 NLRB 141 (2004), vacated on other grounds, 345 NLRB 1050 (2005), reversed and remanded sub. nom. *Jochims v. NLRB*, 480 f.3d 1161 (D.C. Cir. 2007) for the

proposition that simple maintenance of a rule prohibiting employees from leaving their job without permission can be lawful. That case involved employees who worked at a nursing home. The Judge properly distinguished the case since Respondent's operation does present similar health care concerns. (ALJD 10:5-6)

Respondent also argues that the rule prohibiting "engaging or participating in any interruption of work" must be read in the context of the entire provision, which it argues is limited to non-protected activity. Respondent cites the Board's decision in *Daimler-Chrysler Corp.*, 344 NLRB 1324 (2005) for the proposition that employees who engage in deliberate slowdowns of work or who advocate such actions are not protected by the Act. That case is distinguishable as it concerned an employer's threat of discipline against an employee who advocated that other employees engage in acts intended to frustrate the employer's performance under a negotiated collective bargaining agreement. *Id.* at 1325. In this case, the sole issue is whether the rule, as written, can be reasonably read to prohibit employees from engaging in lawful protected activities. The judge properly determined that the rule here is not sufficiently restrictive to only apply to only unprotected activity. (ALJD 9:35-39) Furthermore, while Respondent argues that the rule applies only to "working time," there is no language in the rule which states that the rule is specifically limited to working time. Thus, the rule can be reasonably read to apply to lawful strikes or work stoppages or entreaties to other employees to join in the protected activity.

3. *Respondent's Rule Prohibiting Employees from Bearing False Witness Violates Section 8(a)(1)*

A violation of Respondent's rule prohibiting employees from "bearing false witness for or against the Company under any and all conditions" will be considered cause for immediate discharge. Relying on the Board's analysis in *Lafayette Park Hotel*, supra at 828, which found a rule that punished employees for making merely false statements unlawful, the judge also found Respondent's rule prohibiting employees from bearing false witness overbroad with a tendency to chill protected activity. (ALJD 11: 21-28). The judge correctly determined that this rule punishes employees for making merely false statements, which flies in the face of established Board precedent and violates Section 8(a)(1). Rules prohibiting merely false statements are unlawful because the Act protects merely inaccurate employee statements. *Mission Foods*, 350 NLRB 336, 344 (2007); *Tawas Industries*, 321 NLRB 269, 276 (1996), *Lafayette Park Hotel*, 326 NLRB at 828. The Supreme Court has held that non-malicious false statements can be protected in the context of a union/management dispute. *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966).

The judge correctly held that the rule in this case can be reasonably read to prohibit employees from making merely false statements when speaking about Respondent. (ALJD 11:21-24) The judge notes that, because the rule is specifically focused on lies about Respondent, this would undoubtedly chill protected activity because employees have the right to criticize their employer about their terms and conditions of employment without fear that the occasional falsehood or hyperbolic comment will cause their discharge. (ALJD 11:25-30)

Respondent argues that the phrase, "bear false witness," is a term of art and notes that Black's Law Dictionary, Revised 4th ed. (1968) defines the phrase as "one who intentionally rather than mistakenly false." Conceding that the judge properly concluded that most employees have not read Black's Law Dictionary, Respondent asserts that most employees have access to the internet and several internet sites support Respondent's contention that the phrase means deliberate or intentional falsehoods. Thus, the policy cannot be construed to violate an employee's Section 7 rights.

Respondent's argument is flawed for several reasons. First, Respondent again assumes facts not in evidence. There is nothing in the record to support Respondent's assertion that virtually all of today's employees have access to the Internet. Even assuming most of Respondent's employees have access to the Internet, the fact that it would be necessary for them to go to the internet to determine what the policy prohibits demonstrates that the rule on its face is overbroad. Moreover, once the employees do a search query for the term "bearing false witness", several definitions can be found, including ones defining the term as "person who has lied", www.thefreedictionary.com. About.com discusses the phrase in terms of proscribing all forms of lying, including gossiping and boasting. As the judge concluded, the term at the very least, is so ambiguous as to confuse employees into believing that a merely false statement against their employer in the course of protected concerted activity would subject them to violation of the rule and possible discharge. Thus, Respondent's assertion that the only literal meaning of the rule is to simply advise employees

that they are not to intentionally lie is inaccurate. If Respondent wants to advise employees that they are prohibited from intentionally lying, it should simply say so. However, its current rule, as appropriately found by the judge is overbroad and violates Section 8(a)(1) of the Act.

Respondent attempts to distinguish its rule from similar rules found to be unlawful, *Lafayette Park Hotel,* 326 NLRB at 828 and *Mission Foods*, 350 NLRB 336, 344 (2007), arguing that those cases involved rules prohibiting employees from making false, vicious, or malicious statements against employees or the company, whereas, Respondent's rule against bearing false witness is merely aimed at prohibiting knowingly false statements that are not protected by the Act. However, in rejecting Respondent's assertion, the judge noted that there is no clarifying language in Respondent's rule prohibiting only maliciously false statements, or otherwise defining or limiting the term "bearing false witness." Thus, the rule is sufficiently ambiguous to confuse employees into believing that merely false statements in the course of protected activity would subject them to discipline and possible discharge. (ALJD 11:38-42, fn. 3).

VI. CONCLUSION

A review of the record establishes that the Judge properly concluded that Respondent violated Section 8(a)(1) by maintaining an overbroad no-solicitation/no-distribution rule, a rule prohibiting employees from leaving their work station or interrupting work and a rule prohibiting employees from "bearing false witness" against Respondent. Respondent presents no arguments or legal authority that would warrant reversing the judge's findings and conclusions.

Accordingly, the Board should affirm the judge's rulings, findings, and conclusions and adopt his recommended Order.

Dated this 1st day of February, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was filed by e-filing with the Division of Judges and a copy was served by email on the following:

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I further certify that a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was served by regular mail on December 9, 2010 on:

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