Fresh & Easy Neighborhood Market *and* United Food and Commercial Workers International Union.
Cases 31–CA–077074 and 31–CA–080734

July 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

The issue presented here is whether the Respondent violated Section 8(a)(1) of the Act by maintaining a confidentiality rule prohibiting the disclosure of employee information. The judge concluded that there was no violation and dismissed the complaint. The General Counsel excepts and contends that the rule is unlawful because employees would reasonably construe it to prohibit Section 7 activity. For the reasons set forth below, we agree with the General Counsel and reverse the judge's finding.

On March 22, 2013, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Charging Party Union filed 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 and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. STIPULATED FACTS

The Respondent operates a chain of grocery stores in California. It maintains a 20-page "Code of Business Conduct" that is available to employees on its website. Employees are required to follow the policies described in the Code, as "[b]reaches of the Code, Fresh & Easy policy or the law may result in disciplinary action." The Code discusses a range of topics, including: restrictions on certain types of business dealings; ethical considerations; protection of company and customer resources; equal employment opportunity; and abusive and otherwise unacceptable employee behavior. Its discussion of the need to protect company resources includes several subsections, entitled "Intellectual Property," "Responsible Use of Company IT," "Confidentiality and Data Protection," and "Accurate Accounting and Money Laundering." The entire "Confidentiality and Data Protection" section states:

> CONFIDENTIALITY AND DATA PROTECTION
>
> We have an important duty to our customers and our employees to respect the information we hold about them and ensure it is protected and handled responsibly. The trust of our staff and customers is very important, so we take our obligations under relevant data protection and privacy laws very seriously. We should also regard all information concerning our business as an asset, which, like other important assets, has a value and needs to be suitably protected.
>
> What does it mean for me?
>
> DO
>
> - Make sure any customer or staff information you collect, is relevant, accurate and, where necessary, kept up to date. Keep it for no longer than necessary.
> - Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.
> - Ensure that data is appropriately and securely stored and disposed of. Be aware of the risk of discussing confidential information in public places.
>
> DON'T
>
> - Release information, without making sure that the person you are providing it to is rightfully allowed to receive it and, where necessary, that it has been encrypted in accordance with Fresh & Easy policy.
>
> CONTACT
>
> If you are ever unsure about how to handle Fresh & Easy data, be cautious and seek advice from:
>
> - Your Line Manager
> - Information Security
> - Our Legal Department

II. DISCUSSION

"[A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999)). In *Lutheran Heritage*, the Board held that a rule that does not explicitly prohibit Section 7 activity would nonetheless be unlawful if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

The complaint alleges that the Respondent's second directive to employees in the Confidentiality and Data Protection section is unlawful. That rule instructs them to "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained." As stated above, the General Counsel argues that employees would reasonably construe this rule to prohibit the protected disclosure of employee terms and conditions of employment, such as wages and working conditions. The judge concluded that employees would not interpret it in this manner. He found that the Code only addresses "ethical matters," and "is not a typical employee handbook" affecting employees' working conditions. He further found that consideration of the entire Confidentiality and Data Protection section suggests that it prohibits only the release of "collected" and "confidential" information not relevant to Section 7 rights, such as social security numbers, medical information and other such information customarily maintained in employees' personnel files.

Contrary to the judge and our dissenting colleague, we find that the challenged rule is unlawful. We agree with the General Counsel that employees would reasonably construe the admonition to keep employee information secure to prohibit discussion and disclosure of information about other employees, such as wages and terms and conditions of employment. The Board has repeatedly found rules with similarly overbroad phrasing to be unlawful because they infringe upon rights protected by Section 7 of the Act. See, e.g., *Cintas Corp.*, 344 NLRB 943, 943 (2005) (prohibition against releasing "any information" about employees unlawful), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (prohibition on revealing confidential information about "fellow employees" unlawful). In addition, the instruction to use information "only for the purpose for which it was obtained" reinforces the impression that the rule prohibits Section 7 activity, as the Respondent's business purpose clearly does not include protected discussion of wages or working conditions with fellow employees, union representatives, or Board agents.

We reject the judge's and our dissenting colleague's position that the Code is dedicated only to consideration of ethical matters and in no way resembles an employee handbook dealing with working conditions. Much like an employee handbook, the Code covers a variety of subjects related to work performance. While some of these subjects facially relate to classically ethical considerations, such as bribery or conflicts of interest, others address broader work issues—e.g., information security, equal opportunity, and unacceptable behavior. Critically, the Code informs employees of established rules and policies that govern the day-to-day handling of their work duties and may subject them to disciplinary action for noncompliance. Thus, employees would reasonably view the Code provisions as having the same import as any other work rules implicating terms and conditions of employment.

We also disagree with the judge's and our dissenting colleague's interpretation of the Confidentiality and Data Protection section as a whole to apply only to the "collected" and "confidential" information mentioned in the first and third bullet points. This interpretation is premised on their belief that the sole purpose of this section is to ensure that employees comply with relevant data protection and privacy laws. We find that its scope is not so limited. While the introduction to the section does mention "relevant data protection and privacy laws," it also discusses the importance of respecting and protecting customer and employee information: "We have an important duty to our customers and employees to respect the information we hold about them," and instructs employees to "regard *all* information concerning our business as an asset, which . . . needs to be suitably protected." [Emphasis added.] These categories encompass a wide range of information and there is no language limiting the types of employee information that employees may not disclose. Contrary to our colleague, we do not agree that subsequent discrete references to "information you collect" and "the risk of discussing confidential information in public places" necessarily override the sweeping introduction and the related overbroad admonition in bullet two to "[k]eep customer and employee information secure" and use it "only for the purpose for which it was obtained." Plainly, if an employee had knowledge of a coworker's wages that was obtained for some business purpose, the admonition would discourage the employee from sharing that information with others in an effort to improve terms and conditions of employment.[1]

Because the reach of the challenged rule is not adequately limited by context, we further find this case distinguishable from *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003), cited by our colleague. In that case, the employer's handbook rule prohibited disclosure of "customer and employee information, including organizational charts and databases." The rule was part of a section prohibiting the unauthorized use of "company

[1] Similarly, as the judge found, the disclosure prohibition would encompass employee personnel files. Such files customarily include disciplinary notices—clearly a subject relating to employee terms and conditions of employment.

and third party proprietary information, including information assets and intellectual property" and contained a long list of materials prohibited from disclosure such as "business plans," "copyrighted works," "trade secrets," and patents. The context of that rule and its relationship to legitimate employer concerns (i.e., the protection of intellectual property assets) was therefore much clearer and would, unlike here, reasonably inform employees that the rule's scope was not as broad as might be suggested by reading it in isolation. Likewise, we find that the rule in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079 (D.C. Cir. 2003), also cited by our colleague, is narrower than the challenged rule here. That rule prohibited the "[r]elease or disclosure of confidential information concerning patients or employees," which arguably suggested that it applied only to a small subset of highly sensitive information about employees.[2] In contrast, the rule here impermissibly suggests that *all* employee information, which an employee could reasonably conclude includes terms and conditions of employment, is confidential.

In sum, because employees would reasonably interpret the rule to state that all employee information is confidential, and that disclosure of such information is allowed only for the purpose for which it was obtained, we find that this directive infringes upon employees' Section 7 rights. We therefore reverse the judge's dismissal of the complaint and find that the challenged rule is unlawful.[3]

[2] The Board found this rule to be unlawful because employees would reasonably construe "confidential information" to include employee wages and other terms and conditions of employment. See *University Medical Center*, 335 NLRB 1318, 1322 (2001), enf. denied sub nom. *Community Hospitals of Central California v. NLRB*, supra.

[3] We further conclude that the Respondent did not effectively repudiate the unlawful rule under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) (effective repudiation must be timely, unambiguous, specific, free from other illegal conduct, adequately published, and include assurances that employer will not interfere with Section 7 rights). Prior to the issuance of the complaint, the Respondent revised the challenged rule to include the sentence: "This policy does not limit nonsupervisory employees' rights to engage in protected activities under the National Labor Relations Act, including the right to share information related to terms and conditions of employment." However, in doing so, the Respondent did not admit wrongdoing or assure employees that it would not further interfere with their Section 7 rights. In addition, because the Respondent waited over 2 years to revise the rule, and did so only 10 days before issuance of the complaint, its attempted repudiation was not timely. See, e.g., *Passavant*, supra at 139 ("Nor can we ignore the fact that Respondent delayed until very nearly the eve of the issuance of the complaint before publishing its disavowal.").

ORDER[4]

The National Labor Relations Board orders that the Respondent, Fresh and Easy Neighborhood Market, El Segundo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule in its Code of Business Conduct entitled "Confidentiality and Data Protection" that contains the following language: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

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

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

(a) Within 14 days of the Board's Order, rescind the rule in its Code of Business Conduct entitled "Confidentiality and Data Protection" that contains the following language: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

(b) Within 14 days after service by the Region, post at the Respondent's retail grocery stores located throughout the United States copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 31, 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 internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these

[4] We reject the Union's request for a broad order. On the facts of this case, we do not find that the Respondent has a demonstrated proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). Accord: *Excel Case Ready*, 334 NLRB 4, fn. 5 (2001).

[5] We shall substitute a new notice to conform with *Durham School Services*, 360 NLRB No. 85 (2014). 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."

proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 15, 2011.

(c) 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.

Dated, Washington, D.C. July 31, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

Contrary to my colleagues, I conclude that the judge correctly found that the Respondent did not violate Section 8(a)(1) of the Act by maintaining the rule, "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained," in its Code of Business Conduct booklet (the "Code"). As noted by the majority, the only issue before us is whether employees would reasonably construe the rule to restrict Section 7 activity. I agree with the judge that they will not. By finding that the rule would reasonably be construed by employees to prohibit disclosure of employee wages and terms and conditions of employment, the majority signals its intent to steer the Board away from the carefully balanced framework and practical approach established in *Lutheran Heritage*, 343 NLRB 646 (2004), towards a presumption that certain rules are unlawful unless there is an explicit exception for Section 7 activity. I respectfully dissent.

When *Lutheran Heritage* was decided almost ten years ago, the Board instructed that we give rules a "reasonable reading," and "refrain from reading particular phrases in isolation" and presuming "improper interference with employee rights." Id. (*citing Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998)). In other words, we must consider context. In providing these instructions, the Board acknowledged and was guided by the established Board principle that requires balancing the competing rights of employers and employees. Thus, as the Board explained in *Lafayette Park Hotel*, supra, the inquiry into whether the mere maintenance of a rule "would reasonably tend to chill employees in the exercise of their Section 7 rights" involved the balancing of "the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945).

It is debatable whether the Board has adhered faithfully to the instructions and guidance set forth in *Lutheran Heritage.* With the large number of Board cases that examine whether employees would reasonably construe rules in handbooks as restricting Section 7 activity,[1] it is a logical assumption that these cases would reveal a frequently used methodology of analysis. But they do not. What has been consistent is that the Board considers context—as required by *Lutheran Heritage*—without any clear definition as to how it is factored into analysis. For example, the Board has focused on the other rules or language immediately surrounding the disputed rule,[2] the kind of work environment in which the disputed rule operates,[3] and the disputed rule itself.[4]

Furthermore, it is also important to acknowledge that the majority of cases arising under *Lutheran Heritage* do

[1] The Board has issued over 50 decisions applying *Lutheran Heritage*. Almost two-thirds deal with the first prong of the *Lutheran Heritage* test—whether employees would reasonably construe the rule to restrict Section 7 activity. In two-thirds of those decisions, the disputed rules were contained in employee handbooks. The rest were included in other formal employer documents such as employment and confidentiality agreements, and a variety of other documented stand-alone policy statements.

[2] See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 378 (2006) (statement in employee handbook requiring employees to bring work-related complaints first to management was not unlawful because it appeared in the same paragraph and immediately followed employer's assertion that employees can speak up for themselves at all levels of management and would be given a responsible reply; and nothing else in the handbook foreclosed employees from using other avenues); *Guardsmark, LLC*, 344 NLRB 809 (2005) (security company's rule against fraternization with client employees or with co-employees was not unlawful where employees would reasonably understand the rule to prohibit only personal entanglements because the rule appeared together with a rule against dating client employees and co-employees and rule's purpose was so security would not be compromised by interpersonal relationships).

[3] See, e.g., *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 6 (2011) (rule against photographing hospital patients, property, or facilities lawful because employees would reasonably interpret the rule as a legitimate means of protecting the patient privacy).

[4] See, e.g., *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 2–3 (2011) (dismissing complaint allegation that employer's rule against "exhibiting a negative attitude toward or losing interest in your work assignment" was unlawful because employees would construe the rule as applicable only to displaying a negative attitude toward *work assignments* [emphasis added]).

not involve employers applying rules to restrict exercise of Section 7 activity or promulgating coercive rules in response to union activity, and instead involve existing employee handbooks and other employer documents.[5] Of course, the relevant inquiry is whether employees would reasonably construe rules as restricting Section 7 activity, and not whether employers intended the rule to restrict Section 7 activity. But certainly, this fact does not support construing rules to presume a malicious intent on the part of the employer. An employer's primary purpose in drafting employee handbooks and policies is not to stifle employee rights, but to attempt to comprehensively cover many topics, including compliance with other workplace statutes and policies that protect business interests and the workplace environment of its employees.

Therefore, in light of the frequency that the Board decides this particular type of *Lutheran Heritage* case—whether employees would reasonably construe rules in handbooks (and other formal employer documents) as restricting Section 7 activity—it is prudent that the Board apply one systemic methodology to ensure consistent and predictable decisions that both employers and employees can rely on for guidance. And with the considerations described above in mind, I believe the best approach is to examine the *overall* context of a disputed rule—from the general purpose of the document in which the rule is contained, its introduction, its general sections and topics and accompanying explanatory texts, and finally, to the disputed rule and the text around it—to give a rule a reasonable reading. Moreover, in doing so, the Board should adhere to familiar concepts of statutory interpretation, such as the principle of "*ejusdem generis*."[6] This concept cannot be ignored in considering employees' interpretation of language just because it is labeled and used by the legal profession, including the Board.[7] In daily, ordinary speech, the principle of *ejusdem generis* is used all the time by lay people as a common sense approach to understanding each other.[8]

Applying this methodology to the rule here, it is clear that employees would not reasonably interpret the rule to preclude the discussion of wages and other work conditions. First, the rule is contained in the Respondent's Code of Business Conduct (the "Code"), a booklet dedicated to ethical matters. Thus, immediately, employees are aware that the wages and work conditions are not the intended focus of the Code. I agree with the majority that both documents contain mandatory work rules and would be viewed as having the same importance. But, although the judge's characterization of the Code as not a "typical employee handbook" is not necessarily helpful, we can best glean the Code's purpose from the Code itself. As stated by the Respondent's Chief Executive, the Code lays down important responsibilities and duties placed on employees, regardless of where they work, that are based on high ethical standards, respect for the law, and the need to report wrongdoing. Employees are also told that the Code provides guidance on how to respond appropriately to "fourteen key issues" that may arise in their work and provides information about an anonymous Ethics Hotline.

Moreover, the rule appears on page 16 of the 20-page booklet. Thus, by the time employees read the rule, they are already familiar with a variety of topics, including a section on "The way we trade," which covers the topics "Competition laws," "Trade restrictions and sanctions," and "Relationships with our commercial suppliers;" and a section on "Personal and business integrity," which covers the topics "Fraud, bribery and corruption," "Conflicts of interest," "Insider dealing and market abuse," "Gifts and improper payments," and "Political activity." And before employees read the rule, which is located in "The resources of the company and our customers" section, they would have already read about the other topics in the section—"Intellectual property" and "Responsible use of company IT." Accordingly, when the employees read the disputed rule, they have already been informed about a myriad of topics and would reasonably understand, at the very least, that the Code is not an employee handbook that primarily addresses wages and other terms and conditions of employment, but instead is specifically focused on various ethical concerns.[9]

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[5] See footnote 2.

[6] Latin for "of the same kind or class." "1. A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed. For example, in the phrase *horses, cattle, sheep, pigs, goats, or any other farm animals*, the general language *or any other farm animals*—despite its seeming breadth—would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens." *Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS.

[7] See, e.g., *Local Union No. 710*, 333 NLRB 1303 (2001) (adopting judge's dismissal of complaint allegations against the union based, in part, on his application of the *ejusdem generis* principle to interpret a settlement agreement between the parties).

[8] See, e.g., *U.S. v. Holmes*, 646 F.3d 659, 665 (9th Cir. 2011) (Kleinfeld, C.J., concurring).

[9] I do not view the Code as dedicated "only" to consideration of ethical matters. As stated above, I agree with the majority that it contains mandatory work rules. I point out only that the Code's primary focus is on ethical concerns.

Furthermore, the disputed language itself is part of the "Confidentiality and Data Protection" section. Applying the *ejusdem generis* principle, employees would reasonably interpret the rule to apply only to confidential information because "employee information" is found within numerous terms and phrases about confidential and collected information. In this regard, and contrary to the majority's view, this language cannot be meaningfully distinguished from *Mediaone of Great Florida, Inc.*, 340 NLRB 277 (2003). In *Mediaone*, the Board, albeit not explicitly, applied the *ejusdem generis* principle to find the employer's prohibition on the disclosure of "customer and employee information" lawful because it was included in a detailed list of what constituted "intellectual property," which the employer also considered proprietary information. Id. at 279. Similarly here, the rule's inclusion in the "Confidentiality and Data Protection" section about the Respondent's obligations under "relevant data protection and privacy laws" would reasonably be interpreted by employees as limiting "employee information" to *confidential* employee information. See, e.g., *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1089 (D.C. Cir. 2003) (prohibition on "[r]elease or disclosure of confidential information concerning patients or employees" not unlawful where prohibition was limited only to "confidential" information).

The majority places great significance on the fact that the section introduction refers to "all information." Certainly, had the rule been the only bullet-point in this section, there may be uncertainty as to what is included in "employee information." But this is not the case here. Instead, the rule is printed in the following context:

> DO
>
> - Make sure any customer or staff information you collect, is relevant, accurate and, where necessary, kept up to date. Keep it for no longer than necessary.
> - Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.
> - Ensure that data is appropriately and securely stored and disposed of. Be aware of the risk of discussing confidential information in public places.
>
> DON'T
>
> - Release information, without making sure that the person you are providing it to is rightfully allowed to receive it and, where necessary that it has been encrypted in accordance with Fresh & Easy policy.

The rule is the second bullet-point in the "Do" column. Again applying the *ejusdem generis* principle, the added context of the first bullet-point and the third bullet-point would reasonably inform employees that "employee information" only refers to information that is collected *and* meant to be held in confidence. By contrast, this type of limiting context is absent in cases where the Board has found broad confidentiality rules unlawful. *See, e.g.*, *Cintas Corp.*, 344 NLRB 943, 943 (2005) ("unqualified prohibition" on the release of "any information" about employees is unlawful), enfd. 482 F.3d 463 (D.C. Cir. 2007); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (no explanatory context around unlawful prohibition against revealing confidential information about "fellow employees"). In addition, especially here where the context of the rule contains specific and comprehensive explanatory details, I do not require that a rule contain an explicit exception for Section 7 activity to pass muster under Board law.

In sum, because the rule provides ample details to employees on what "employee information" means—i.e., the rule is contained in a comprehensive Code on ethical conduct and limiting language surrounds the rule—employees would not reasonably fear that "employee information" extends to information about wages and other working conditions and that the rule precludes them from exercising Section 7 activity. Accordingly, because I do not find that the rule would reasonably tend to chill employees' exercise of their Section 7 rights, I would affirm the judge's finding that the rule does not violate Section 8(a)(1) of the Act.

Dated, Washington, D.C. July 31, 2014

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Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate or maintain a rule in our Code of Business Conduct entitled "Confidentiality and Data Protection" that contains the following language: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

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

WE WILL, within 14 days of the Board's Order, rescind the rule in our Code of Business Conduct entitled "Confidentiality and Data Protection" that contains the following language: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

FRESH & EASY NEIGHBORHOOD MARKET

The Board's decision can be found at www.nlrb.gov/case/31-CA-077074 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Nicole Buffalano, Esq., for the General Counsel.
Joseph A. Turzi, Esq. and *Colleen Hanrahan, Esq., (DLA Piper LLP (US))*, of Washington, D.C., for the Respondent.
David A. Rosenfeld, Esq., (Weinberg, Roger & Rosenfeld), of Alameda, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. This decision is based on a stipulated record. The charges were filed by United Food and Commercial Workers International Union (Union) on March 15 and May 9, 2012, respectively. On October 22, 2012, the Acting Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Fresh & Easy Neighborhood Market (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged. Thereafter, on about January 16, 2013, the parties entered into a stipulation and joint motion to transfer the matter to the Division of Judges.

Following the assignment of this matter to me, briefs have been received from counsel for the Acting General Counsel, counsel for the Respondent, and counsel for the Union. Upon the entire record and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and place of business located in El Segundo, California, and with retail grocery stores located throughout the United States. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of $500,000 and purchases and receives at its California grocery stores products, goods and materials valued in excess of $5000 directly from points outside the State of California. 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.

II. THE LABOR ORGANIZATION INVOLVED

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The stipulated issue in this proceeding is whether certain language contained within the Respondent's Code of Business Conduct that applies to employees at its retail grocery stores violates Section 8(a)(1) of the Act.

B. Facts and Analysis

The Respondent maintains a 20-page booklet entitled, "Code of Business Conduct." The booklet is available to employees on the Respondent's website. The booklet may fairly be described as essentially a compendium of policy "do's and don'ts" regarding ethical business conduct, which all employees are required to follow. Under the heading "The resources of the company and our customers," beginning on page 14 of the booklet, are the following sections: Intellectual property; Responsible use of company IT; Confidentiality and data protection; and Accurate accounting and money laundering. The Confidentiality and data protection section, on page 16, is as follows:

> CONFIDENTIALITY AND DATA PROTECTION
>
> We have an important duty to our customers and our employees to respect the information we hold about them and ensure it is protected and handled, responsibly. The trust of our staff and customers is very important so we take our obligations under relevant data protection and privacy laws very seriously. We should also regard all information concerning our business as an asset, which, like other important assets, has a value and needs to be suitably protected.
>
> What does it mean for me?

DO

- Make sure any customer or staff information you collect, is relevant, accurate and, where necessary, kept up to date. Keep it for no longer than necessary.
- Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained.[1]
- Ensure that data is appropriately and securely stored and disposed of. Be aware of the risk of discussing confidential information in public places.

DON'T

- Release information, without making sure that the person you are providing it to is rightfully allowed to receive it and, where necessary that it has been encrypted in accordance with Fresh & Easy policy.

CONTACT

If you are ever unsure about how to handle Fresh & Easy data, be cautious and seek advice from:

- Your Line Manager
- Information Security
- Our Legal Department

The complaint alleges that the following language violates Section 8(a) (1) of the Act: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained."

The General Counsel and Union, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), argue that this language "would reasonably tend to chill employees in the exercise of their Section 7 rights," in that employees would interpret this language to prohibit disclosure of employee wages and other terms and conditions of employment to other employees or individuals including union representatives.

The category heading, Confidentiality and Data Protection, under which the alleged unlawful language appears, is about insuring that employees take their "obligations under relevant data protection and privacy laws very seriously."

The language alleged to be violative of the Act is one component of various additional requirements: that employees who "collect" customer or staff information should collect it, maintain it, update it, and dispose of it when it is no longer needed; that the data should be kept and disposed of in a secure manner; and that the information should not be released to persons unauthorized to receive it and, even when released to such persons, the information should be in encrypted form when necessary.

Significantly, there is nothing in the Confidentiality and Data Protection section that defines what type of information or data is subject to the confidentiality safeguards. The General Counsel and Union argue that because of this lack of specificity the alleged violative language is ambiguous, and should therefore be interpreted to impliedly preclude the release by employees of information concerning their own wages and conditions of employment and the wages and conditions of employment of other employees.

I do not agree. The Code of Business Conduct booklet is a stand-alone booklet devoted to ethical matters. It is not a typical employee handbook that provides information and establishes policies, rules and requirements governing employees' day-to-day activities; and it does not deal with or even mention wages and working conditions. The alleged violative language does not appear in isolation. A reading of the entire Confidentiality and Data Protection section may be fairly understood to prohibit the release of "collected" information. Collected information may be reasonably understood to mean information obtained from customers or employees such as, for example, customers' credit information and employees' social security numbers, medical information and other such information which is customarily maintained in employees' personnel files. Obviously, the Respondent does not need to obtain information from employees regarding their wages and working conditions as this is information that the Respondent generates; and conversely, confidential information that the Respondent may collect and maintain is clearly not germane to the Act's protection of Section 7 rights. Accordingly, I find that employees reading this language, in the context of the booklet's overall purview and the essence of the section of the booklet in which the language appears, would not reasonably interpret it to preclude them from revealing and discussing with coworkers specific information regarding wages and working conditions or sharing such information with outside sources in furtherance of their Section 7 rights.[2] See, generally, *Lafayette Park*, 326 NLRB 824, 826 (1998); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003).

I recommend that the complaint be dismissed in its entirety.[3]

[1] On October 12, 2012, prior to the issuance of the complaint herein, the Respondent posted on its website a revised Code of Business Conduct in which this language was modified as follows: "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained. This policy does not limit non-supervisory employees' rights to engage in protected activities under the National Labor Relations Act, including the right to share information related to terms and conditions of employment." The revised Code of Business Conduct was neither distributed directly to employees nor were employees given notice that the Code had been revised.

[2] The Union in its brief maintains that the language is also violative of the Act in that it precludes the release of customer information, and that employees have a right under the Act to identify and approach customers as well as other employees with their concerns; thus, the identity of customers may not be prohibited. Assuming arguendo that the complaint allegation encompasses this matter, I find that employees would not reasonably interpret the language to preclude them from identifying and approaching customers in furtherance of their Sec. 7 rights.

[3] In view of the finding that the language is not violative of the Act, it appears unnecessary to address the General Counsel's contention that the Respondent neither effectively repudiated the original language, nor did it timely or adequately communicate the revision to the employees in accordance with the guidelines enunciated by the Board in *Passavant Memorial Area Hospital,* 237 NLRB 138, 138–139 (1978).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(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 not violated the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended[4]

ORDER

The complaint is dismissed in its entirety.

Dated: March 22, 2013

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