

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

BCG PARTNERS, INC. d/b/a
NEWMARK GRUBB KNIGHT FRANK¹

and

Case 28-CA-178893

PATRICK THURMAN, an Individual

Nestor M. Zarate-Mancilla, Esq.,
for the General Counsel.

Derek Barella, Esq. (Winston & Strawn, LLP) and
Nirav S. Shah, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Phoenix, Arizona on March 21, 2017. The complaint alleged, inter alia, that G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank (G&E or the Respondent) violated §8(a)(1) of the National Labor Relations Act (the Act) by maintaining certain unlawful Employee Handbook policies. The controlling facts in this case are undisputed.

On the entire record, including my observation of the witnesses' demeanors, and after considering post-hearing briefs, I make the following

FINDINGS OF FACT²

I. JURISDICTION

At all material times, G&E, a corporation, which operated an office and place of business in Tucson, Arizona, and continues to operate several other offices nationally, has provided real estate management services.³ Annually, it performs services valued in excess of \$50,000 in states located outside of Arizona. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6), and (7) of the Act.

¹ The complaint was amended at the hearing to allege that G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank was the correct Respondent. (Tr. 28-31).

² Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

³ G&E closed its Tucson office in early 2017.

II. UNFAIR LABOR PRACTICES

5 G&E provides real estate management services. (GC Exhs. 2, 5). Its services include:
 10 maintenance; property management; housekeeping; management of common areas,
 15 infrastructure, sewer and waste water operations; and monitoring telecommunications and other
 20 systems. This case challenges the legality of several portions of its Employee Handbook.

III. ANALYSIS⁴

A. General Principles

§7 of the Act provides that:

15 Employees shall have the right to self-organization, to form, join, or assist labor
 organizations, to bargain collectively through representatives of their own
 20 choosing, and to engage in other concerted activities for the purpose of collective
 bargaining or other mutual aid or protection, and shall also have the right to
 refrain from any or all of such activities.

20 Under §8(a)(1), it is unlawful for an employer to interfere with, restrain, or coerce employees in
 the exercise of their §7 rights. The Board has held that, “[i]n determining whether a work rule
 violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to
 25 chill employees in the exercise of their Section 7 rights.” *Hyundai America Shipping Agency*,
 357 NLRB 860, 861 (2011), *enfd.* in relevant part, 805 F.3d 309 (D.C. Cir. 2015). “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.” *Lafayette Park*
Hotel, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).⁵ When a rule is
 30 ambiguous, “[i]t is settled that ambiguity in a rule must be construed against the ... employer.”
DirectTV, 359 NLRB 545, 546 (2013).

35 If a rule expressly restricts §7 rights, it is unlawful. *Lutheran Heritage*, 343 NLRB 646,
 646 (2004). If a rule does not expressly restrict §7 activity, “the violation is dependent upon a
 showing of one of the following: (1) employees would reasonably construe the language to
 prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the
 rule has been applied to restrict ... Section 7 rights.” *Id.* at 647.

⁴ G&E avers that, because the charging party is a §2(11) supervisor, the complaint should be consequently dismissed. Even assuming *arguendo* that he is a supervisor, this contention is flawed. A charge can be filed by anyone, e.g., a labor organization, an employee, an employer, or any other individual or entity. See NLRB Rules and Regulations, §§102.9 (a charge may be filed by “any person”), and 102.1 (the term “person” has the same meaning set forth in §2 of the Act), and §2(1) of the Act (“The term “person” includes one or more individuals, labor organizations, associations, corporations, legal representatives, trustees, . . . or receivers”). See also *Operating Engineers Local 39 (Kaiser Foundation)*, 268 NLRB 115, 116 (1983) (“The simple fact is that anyone for any reason may file charges with the Board.”), *enfd.* 746 F.2d 530 (9th Cir. 1984).

⁵ There is no requirement that the employer has applied the rule. *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), *enfd.* 450 F.2d 942 (5th Cir. 1971); *New Passages Behavioral Health*, 362 NLRB No. 55, slip op. at 1 (2015).

In the instant case, the General Counsel does not allege that the challenged policies expressly restrict §7 activity, were promulgated in response to union activity, or have been discriminatorily applied. His sole claim is that the challenged policies are overbroad and employees would reasonably construe them to ban their §7 activities.

B. “Responsive Action” Policy

This policy is unlawful; it provides as follows:

If, after investigating a complaint ... , the Company determines ... that persons involved in the investigation provided false information, the individual(s) who made the false allegations or gave the false information may be subject to appropriate discipline, up to and including termination

(GC Exh. 2 at §206). The Board has held that, while employers may proscribe “maliciously false” statements, broader prohibitions of merely “false statements” have a reasonable tendency to chill protected activity and are unlawful. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 4 (2014); *Lafayette Park Hotel*, supra, 326 NLRB at 825; *Cincinnati Suburban Press*, 289 NLRB 966, 966 fn. 2, 975 (1988). The instant policy, which broadly subjects workers who merely provide false information during an investigation, is, thus, unlawful.⁶

C. “Conflicts of Interest” Policy

This policy is unlawful; it provides as follows:

We expect our employees to ... always avoid activities ... inconsistent with the best interests of the Company and our clients. Business dealings that reasonably appear to create a conflict between the interests of an employee ... and the Company or a client are unacceptable. The Company recognizes the right of employees ... to engage in activities outside of their employment that are unrelated to our businesses. However, the employee ... must disclose any possible conflicts

[E]mployees ... must avoid any situation ... inconsistent with the best interests of the Company ... or ... may be construed to be a conflict of interest

An employee must promptly disclose ... conflicts of interest Approval will not be given unless the relationship will not, interfere with the employee's ... duties or will not damage the Company's relationship [F]ailure to report a ... conflict of interest ... will result in discipline up to and including termination

⁶ Although Director of Human Resources Lindsey Sherman stated that this policy solely restricts employees from making frivolously false statements regarding Title VII issues, and that G&E would never prosecute someone who merely makes a false statement, the written policy is vastly more expansive than her account, and is, thus, unlawful.

(GC Exh. 2 at §302). This policy, which bans conflicts of interest and has an ongoing disclosure requirement, is unlawful, given that it can be reasonably construed to bar any §7 activities conflicting with G&E’s interests. See, e.g., *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 fn. 4 (2015) (“conflict of interest with the ... company is not permitted”).⁷

D. “Outside Employment and Business Activities” Policy

This policy is unlawful; it states as follows:

In order to avoid ... conflicts of interest, employees are prohibited - without ... approval ... from participating in outside work activities that might present a conflict of interest

(GC Exh. 2 at §303). This policy fails on the same basis as the “Conflicts of Interest” policy.

E. “Reference Inquiries and Requests for Employee Information” Policy

This policy violates §8(a)(1); it states as follows:

All requests for information regarding a[n] ... employee must be forwarded to the Human Resources Department for response. Should an employee ... receive a ... request for a reference, the employee should direct the individual seeking information ... to the Human Resources Department

No Company employee may ... supply employee information ... without ... permission

(GC Exh. 2 at §403). This policy may reasonably be construed to ban employees from engaging in their §7 right to discuss wages or other workplace issues amongst themselves or with a union. It is, thus, unlawful. *Costco Wholesale Corp.*, 358 NLRB 1100 (2012).⁸

F. “Confidentiality” Policy

This policy is unlawful; it provides as follows:

The protection of confidential ... information is of critical importance to the Company Employees who disclose ... confidential Company information are subject to disciplinary action up to and including termination of employment

⁷ Although Sherman stated that G&E would never prosecute an employee for interacting with a union, the written policy is more expansive than her account of its scope, and can be reasonably construed to ban union contacts.

⁸ Although Sherman stated that G&E would never prosecute an employee under the “Confidentiality” policy for discussing wages or other workplace matters with their coworkers or a union, the written policy is more expansive than her account of its scope, and can be reasonably construed by employees to ban such discourse.

(GC Exh. 2 at §701). This policy fails on the same basis as the “Reference Inquiries” policy.

G. “Company Property” Policy

5 This policy violates the Act; it provides as follows:

Offices, cubicles, desks, computers, file cabinets, lockers, and vehicles are Company property and must be maintained according to Company rules and regulations. All Company property must be used solely for the Company's benefit and business purposes, and not for the employee's ... personal benefit (or the benefit of any other person or entity). The Company's property includes its ... premises, equipment ... and supplies, as well as proprietary information and intellectual property (e.g., ... non-public information, ... customer, vendor and employee lists, confidential information and materials)

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(GC Exh. 2 at §703).

This policy, which wholly bans non-business usage of G&E’s facilities and equipment, is unlawful. It can be reasonably construed by employees to bar all unauthorized solicitation and other protected activity outside of working hours on G&E’s premises, and bar using its email systems during nonworking time for §7 activities.⁹ See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Purple Communications*, 361 NLRB No. 126, slip op. at 17 (2014) (“right of employees to use their employers' email systems for protected communications on nonworking time”); *Stoddard-Quirk*, 138 NLRB 615 (1962) (prohibition on unauthorized distribution of literature on company premises is unlawful).

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H. “Telecommunications Usage” Policy

This policy violates the Act; it provides as follows:

The primary purpose of our Company's telecommunications systems ... is to facilitate the exchange of information within the Company and with clients and vendors It is expected that our employees ... who have access to these resources will use these corporate resources ... for the benefit of the Company.

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Telephone lines ... are intended solely for business use

(GC Exh. 2 at §706). This policy fails on the same basis as the “Company Property” policy (i.e. it can be reasonably construed by employees to bar usage of phone and other systems during nonworking time for §7 activities. *Purple Communications*, supra).

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⁹ Although Sherman stated that G&E would never prosecute an employee under this policy for sending limited emails concerning workplace issues to a union or amongst themselves, the written policy is vastly more expansive than her account of its scope, and is, thus, invalid.

I. “Use of Company Information Technology” Policy

This policy is unlawful; it states:

5 Computers, electronic communication, electronic information and other technology ... support the Company's business. The Company provides many of its employees with access to telecommunication and electronic communication means and computer systems owned or operated by the Company

10 It is the responsibility of each employee ... to ensure that this technology and all Information Systems are used for proper business purposes

15 Users should not use or access Company Information Systems in any manner that is unlawful, inappropriate, or contrary to the Company's best interests Users may only use Company Information Systems in a manner that is consistent with the Company's policies and procedures

[V]oice mail and ... e-mail ... are to be used for business purposes only

20 (GC Exh. 2 at §707). This policy, which bans the non-business usage of information technology (IT) equipment, is overbroad and unlawful, inasmuch as it bans employees from using email and IT systems during nonworking time for §7 activities. *Purple Communications*, supra.

J. “Tape Recording” Policy

25 This policy is unlawful; it states as follows:

30 [I]t is a violation of Company policy for an employee ... to record conversations at or related to their work or services at the Company with a tape recorder, mobile device or any other recording device or to make a video recording in a work-related setting unless (1) prior approval has been granted by the Company..., or (2) use of the device has been otherwise properly authorized in connection with the employee's ... performance of his ... assigned duties

35 Violation of this policy will result in ... disciplinary action, up to and including immediate termination of employment

40 (GC Exh. 2 at §708). This policy, which prohibits unauthorized workplace recordings, unlawfully and over-broadly encompasses recordings made for one’s own mutual aid and protection (i.e. it even covers recordings where the company may lack an overriding interest in its prohibition). See, e.g., *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3–4 (2015) (unqualified prohibition on all workplace recordings); *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015) (“[p]hotography and audio or video recording in the workplace”). The Board has noted that protected conduct “may include, for example, recording images of
45 protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment,

documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions.”¹⁰

K. “Respectful Workplace” Policy

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This policy violates the Act; it provides as follows:

The Company is committed to maintaining a safe and collegial work environment that is free from intimidation The following guidelines apply:

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- Employees, ..., guests and other individuals who have a relationship with the Company should be treated with courtesy and respect at all times
- All individuals ... are expected to refrain from verbal ... fighting, ... or other conduct that may be ... unduly offensive
- Conduct that is in some way connected with employment at the Company and that ... intimidates or coerces an employee, contractor, client or a member of the public at any time, including off-duty periods, will not be tolerated....

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Reporting Procedures:

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- If the Company has reason to believe an employee is responsible for ... conduct that is in violation of this policy, the individual will be subject to disciplinary action, up to and including immediate termination

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(GC Exh. 2 at §709). This policy, which essentially bars any disrespectful workplace commentary, is unlawful, inasmuch as employees could reasonably construe this rule to ban statements of criticism toward their employer, which are generally protected.¹¹ See, e.g., *Casino San Pablo*, 361 NLRB No. 148 (2014); *Knauz BMW*, 358 NLRB 1754 (2012).

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L. “Social Media” Policy

This policy is unlawful; it provides as follows:

The Company recognizes the importance of social media [O]nly those types of social media that have been approved by the Company... are permitted. As a general matter, use of social media that provides for communication that the, Company cannot capture and/or monitor (e.g., Facebook, Twitter, Snapchat, Instagram and similar apps ...) is prohibited....

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¹⁰ Although Sherman stated that this policy is solely aimed at preserving proprietary information, it is vastly more expansive than her account, and may be reasonably construed by employees to ban all recordings, including those capturing picketing or dangerous conditions not entailing the release of confidential business information.

¹¹ Although Sherman stated that this policy is solely aimed at preventing harassment, and that criticizing a supervisor would not fall under its coverage, it is vastly more expansive than her account of its scope, and can be reasonably construed by employees to ban protected discourse.

Where certain postings are permitted, the policy is intended to ensure that any social media activities affiliated with the Company and its affiliate offices are used appropriately, furnish accurate information, and are in compliance with the Company's established policies and procedures

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(GC Exh. 2 at §802).

G&E’s mandate that employees obtain consent before posting about the company on social media is unlawful. The Board has held that analogous social media and blogging policies were unlawful, inasmuch as they over-broadly limit employees’ §7 rights to engage in collective activities online. See, e.g., *Direct TV U.S. Holdings*, 362 NLRB No. 48 (2015) (“Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations” and that “Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.”); *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 2; *Lily Transportation*, 362 NLRB No. 54, slip op. at 1 fn. 2, 3 (2015).

M. “Outside Speaking and Writing Activities” Policy

20 This policy violates the Act; it states as follows:

Prior Company approval must be obtained for participation in any outside writing/publishing activities, speaking engagements relating to the Company ... and engaging in other similar activities....

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(GC Exh. 2 at §803). This policy, which requires pre-approval for writing and speaking engagements, could be reasonably construed to require authorization before speaking at union meetings, writing about workplace issues, or engaging in a host of other §7 activities. It is, thus, unlawful. See, e.g., *Trump Marina Associates*, 355 NLRB 585 (2010); *Crowne Plaza Hotel*, 352 NLRB 382 (2008) (§7 protects “employee communications to the public that are part of and related to an ongoing labor dispute”); *Eastex, Inc., v. NLRB*, 437 U.S. 556, 565–566, 569–570 (1978); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007).

N. “Press Inquiries and Other Information Requests” Policy

35 This policy is unlawful; it states as follows:

40 Press Inquiries: Company policy precludes any comment to the press or media (including radio and television reporters, on-line media, blog posts, etc.) concerning the Company's ongoing businesses, conditions, corporate developments, business strategies and plans, litigations or other legal matters relating to the Company, without prior authorization This rule does not prohibit employees from speaking to the press regarding concerns for which they have a legal right to disclose (such as protected concerted activity under the National Labor Relations Act or other statutory rights) ..., but employees may not disclose Confidential Information in such communications

[These] rules apply to all press contacts other than legally protected communications:

- 5 • Employees ... refer all calls or inquiries (including e-mails) from the press or media to either the Global Head of Marketing and Communications or the General Counsel.
- An employee ... may not make any comment ... to the press or media unless and until he or she has obtained proper clearance and authorization
- 10 • An employee ... may not initiate contact with the press or media without first getting approval
- An employee ... may not read to or send to the press or media any Company internal memoranda or written material containing Confidential Information.
- 15 • Only the General Counsel can grant exceptions to this policy.

Legal and Regulatory Information Requests: All requests ... from government agencies, legal counsel, self-regulatory organizations or similar entities or persons for information from the Company should be immediately directed to the Director of Compliance or General Counsel. Under no circumstances should an employee ... attempt to respond without ... authorization. Failure to comply with this policy will subject the employee to disciplinary action, up to ... termination

25 (GC Exh. 2 at §804).

This policy is unlawful due to its great ambiguity surrounding one’s right to talk with outside entities absent authorization. See *DirectTV*, 359 NLRB 545, 546 (2013) (“[i]t is settled that ambiguity in a rule must be construed against the ... employer.”). Specifically, the policy is ambiguous because, although it states once that it “does not prohibit employees from speaking to the press regarding ... protected concerted activity under the National Labor Relations Act or other statutory rights,” it then goes on repeatedly ban all unauthorized contacts, which is unlawful.¹² A reasonable reading suggests that the several admonishments against unauthorized contacts, would render the single exception ambiguous to a reasonable employee.¹³ In sum, this policy is ambiguous as to one’s right to seek outside assistance to improve terms and conditions

¹² See, e.g., *Trump Marina Assoc.*, 355 NLRB 585 (2010) (§7 right to “improve terms and conditions of employment” by seeking outside assistance); *Valley Hospital Medical Center Inc.*, 351 NLRB 1250, 1252 (2007) (newspaper contacts); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), enforced, 95 F.3d 681 (8th Cir. 1996) (customer contacts); *Knausz BMW*, 358 NLRB 1754 (2012) (government contacts); *Crowne Plaza Hotel*, 352 NLRB 382 (2008)(rule prohibiting employees from talking to the press).

¹³ “[I]n determining whether a challenged rule is unlawful, the Board must give the rule a reasonable reading... [.] must refrain from reading particular phrases in isolation, and ... must not presume improper interference with employee rights.” *Lutheran Heritage*, supra at 846, citing *Lafayette Park Hotel*, 326 NLRB at 827. Ironically, the single condoning clause in the instant policy creates added ambiguity, when it bars the disclosure of “Confidential Information,” which, as discussed under the analysis of the “Reference Inquiry” policy above, is also unlawful.

of employment and unlawful.¹⁴

O. “Cooperation in Investigations and Litigation” Policy

5 This policy unlawfully provides that:

10 Employees ... are required to cooperate with the Company with respect to internal investigations and the defense or prosecution of claims by providing truthful information or testimony in interviews, meetings or proceedings In the event the investigation or claim involves allegations made by the employee ... against the Company, the employee ... will be required to provide information that the Company views as necessary to its internal investigation of the claim, but will not be required to provide assistance to the Company in its defense or prosecution of the claim.

15 (GC Exh. 2 at §804).

20 This rule unlawfully compels cooperation with unfair labor practice investigations. In *Grandview Health Care Center*, 332 NLRB 347, 349 (2000), the Board held:¹⁵

25 By compelling employees to cooperate in unfair labor practice investigations, or risk discipline, the Respondent ... violate[d] ... the longstanding principle, established in *Johnnie’s Poultry*, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union. If the employees’ Section 7 right of mutual protection is to be safeguarded, cooperation must be voluntary. Failure to inform employees of the voluntary nature of the employer’s investigation is ‘a clear violation of Section 8(a)(1) of the Act.

30 The instant policy, which mandates cooperation with all investigations and litigation, runs afoul of *Johnnie’s Poultry* and its hallmark requirement that employee cooperation in unfair labor practice investigations must be voluntary.

35 **P. “Solicitation, Distribution of Literature & Political Advocacy” Policy**

This policy is unlawful; it states:

The Company has established rules applicable to all employees ... that govern

¹⁴ Although Sherman stated that G&E’s policy is solely designed to promote accurate media exchanges, and that employees would not be prosecuted for talking to the NLRB, the written policy is vastly more expansive than her account of its scope, and can be reasonably construed by employees to ban them from seeking outside aid.

¹⁵ See also *Beverly Health & Rehabilitation Services*, 332 NLRB 347 (2000) enfd. 297 F.3d 468 (D.C. Cir. 2002) (holding that, “[r]ules threatening employees with discipline for failure to cooperate in internal investigations, without allowing for *Johnnie’s Poultry* assurances, have the reasonable tendency to discourage employees from engaging in protected activity and are therefore unlawful).

solicitation, distribution of written material, political advocacy and access to Company property. Strict compliance with these rules is required

- 5 • Employees are prohibited from distributing or circulating non-Company written or printed material in work areas at any time, or during their working time or the working time of the employees at whom such activity is directed.
- 10 • Employees are prohibited from engaging in political advocacy in a manner and/or on a subject that is disruptive to Company operations. Employees engaged in personal political activity should be sure-to make clear that they are acting on their own behalf and not as representatives of the Company.
- 15 • Off-duty employees are generally not permitted in the interior of the Company's facilities or in working areas

(GC Exh. 2 at §810).

20 The Board has held that, “an employer may not generally prohibit union solicitation ... during nonworking times or in nonworking areas.” *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987). Although employers can generally ban solicitation in working areas during working time, such bans cannot extend to working areas during non-working time. *Food Services of America, Inc.*, 360 NLRB 1012, 1018 (2014). It is also generally verboten to require employees to obtain managerial approval prior to engaging in §7 activity. *Brunswick Corp.*, 282 NLRB 794, 795 (1987). G&E’s policy is, therefore, unlawful, given that it proscribes all work-area solicitations, including those occurring during nonworking time.

Q. “Personal Appearance” Policy

30 This policy is unlawful, inasmuch as it bans, “clothing with printed slogans/promotions.” (GC Exh. 2 at §811). An employer violates §8(a)(1), when, absent special circumstances, it prohibits employees from wearing union insignia in the workplace. *Daily Grill*, 364 NLRB No. 36 (2016). The Board recognizes special circumstances, where union insignia could “jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image ... through appearance rules for its employees.” *Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086 (2003), enf. sub nom. *Communications Workers of America, Local 13000 v. NLRB*, 99 Fed. Appx. 233 (D.C. Cir. 2004). Rules restricting employees’ rights to wear union insignia must be narrowly tailored to the special circumstances justifying the rule.¹⁶ *Boch Honda*, 362 NLRB No. 83, slip op. at 2–3 (2015). It is the employer’s burden to establish special circumstances. *Pathmark Stores, Inc.*, 342 NLRB 378, 379 (2004).

¹⁶ In analyzing an employer's public image justification, the Board considers the appearance and message of the insignia to determine if it interferes with the employer's desired public image. See *United Parcel Service*, 312 NLRB 596, 597 (1993), enf. denied 41 F.3d 1068 (6th Cir. 1994). Neither the fact that employees are required to wear a uniform, nor the fact that customers may be exposed to union insignia, is alone sufficient to constitute special circumstances. *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007).

The “Personal Appearance” policy is unlawful, inasmuch as employees may reasonably construe its complete ban of “printed slogans/promotions” to bar workplace union insignia. G&E failed to adduce any special circumstances, which would justify this prohibition.¹⁷

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R. “Standards of Conduct” Policy

This policy violates the Act; it provides as follows:

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We expect all employees ... to conduct themselves in an appropriate and professional manner at all times

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[E]mployees [must] ... refrain from any behavior that might be harmful to themselves, their coworkers and colleagues, and/or the Company or that might be viewed unfavorably by current or potential customers, the industry or the public at large....

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Employees' ... activities on behalf of the Company should always be carried out in an ethical and legal manner, and conflicts of interest should be avoided

Listed below are some examples of conduct that is unacceptable

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Unacceptable conduct may result in immediate disciplinary action, including ... termination of employment or suspension of services

Examples of conduct likely to lead to disciplinary or corrective action include:

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- Stopping work before the end of a shift or scheduled work day or not returning to work promptly at the end of lunch or rest break
- Indecent or offensive language or conduct
- Insubordination or other disruptive conduct
- Unauthorized access to or disclosure of confidential information ... or failure to take necessary measures to protect confidential information
- Verbal ... abuse towards any employee or customer
- Any conduct that could be construed as harming the operations or reputation of the Company

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(GC Exh. 2 at §813) (emphasis added).

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The “Standards of Conduct” policy reiterates several portions of other unlawful policies. *First*, to the extent that the “Standards of Conduct” policy bans all conflicts of interest without qualification in the same way that the “Conflicts of Interest” policy does, this provision must also

¹⁷ Sherman conceded that there are no such special circumstances present herein, when she testified that employees can freely wear union shirts and paraphernalia. (Tr. 112). Once again, however, the written policy is vastly more expansive than her account of its scope, and could reasonably be construed by employees to ban union insignia.

fail. See, e.g., *Sheraton Anchorage*, supra. *Second*, to the extent that the “Standards of Conduct” policy broadly bans negative commentary towards supervision in the same way that the “Respectful Workplace” policy does, this provision must also fail. See, e.g., *Casino San Pablo*, supra. *Third*, to the extent that the “Standards of Conduct” policy bans employees from engaging in their §7 right to hold wage or other workplace discussions in the same manner that the “Reference Inquiries” and “Confidentiality” policies do, it must similarly fail. See, e.g., *Costco Wholesale Corp.*, supra. *Fourth*, the “Standard of Conduct” policy’s prohibition against engaging in any action that “could be construed as harming the operations or reputation of the Company” could be reasonably construed by employees to limit their ability to strike or engage in other legitimate protected activities that might harm G&E’s reputation. See, e.g., *Boch Honda*, supra; *Karl Knauz Motors, Inc.*, supra. Finally, the Standard of Conduct” policy’s prohibition against stopping work before the end of one’s shift or not returning to work could be reasonably construed by employees to infringe upon their §7 right to engage in a strike or work stoppage. See, e.g., *Purple Communications, Inc.*, supra (no-disruption rule, “[c]ausing, creating or participating in a disruption of any kind during working hours on Company property.”).

CONCLUSIONS OF LAW

1. G&E is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.
2. G&E violated §8(a)(1) by maintaining these policies in its Employee Handbook:
 - a. “Responsive Action” policy, which subjects workers who non-maliciously provide false information during investigations to potential discipline and discharge.
 - b. “Conflicts of Interest” policy, which bans conflicts of interest and has an ongoing disclosure requirement.
 - c. “Outside Employment and Business Activities” policy, which bans employees “from participating in outside work activities that might present a conflict of interest.”
 - d. “Reference Inquiries and Requests for Employee Information” policy, which bans workers from supplying employee information to outside entities without authorization.
 - e. “Confidentiality” policy, which subjects “[e]mployees who disclose ... confidential Company information ... to disciplinary action up to and including termination of employment.”
 - f. “Company Property” policy, which bars all unauthorized solicitation and other protected activity from G&E’s facilities, and bans using email during non-working time for non-business purposes.
 - g. “Telecommunications Usage” policy, which bans employees from using telephones and other communication systems during non-working time for non-business

purposes.

5 h. “Use of Company Information Technology” policy, which bans employees from using email and other information technology systems during non-working time for non-business purposes.

i. “Tape Recording” policy, which bars all unauthorized workplace recordings.

10 j. “Respectful Workplace” policy, which bans any negative commentary towards supervision that might be deemed disrespectful.

k. “Social Media” policy, which requires employees to obtain consent prior to posting anything concerning the company on social media.

15 l. “Outside Speaking and Writing Activities” policy, which requires pre-approval before employees’ write or speak publicly.

20 m. “Press Inquiries and Other Information Requests” policy, which bars employees from talking to the press, media, government or other outlets without authorization.

25 n. “Cooperation in Investigations and Litigation” policy, which compels employees to cooperate in all workplace investigations, including unfair labor practice investigations.

o. “Solicitation, Distribution of Literature & Political Advocacy” policy, which bans all solicitations, including those occurring in nonwork areas during nonworking time.

30 p. “Personal Appearance” policy, which prohibits, “[a]ny clothing with printed slogans/promotions.”

35 q. “Standards of Conduct” policy, which: bans all conflicts of interest and has an ongoing disclosure requirement; bars any negative commentary to supervision that might be considered disrespectful or disruptive; prohibits the disclosure of employee and company information without authorization; bans employee from engaging in any action that “could be construed as harming the operations or reputation of the Company;” and prohibits employees from stopping work before the end of one’s shift or not returning to work.

40 3. The unfair labor practices set forth above affect commerce within the meaning of § 2(6) and (7) of the Act.

REMEDY

45 Having found that G&E committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act. Given that its policies are maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities

where the unlawful policies have been, or are, in effect. See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). Its duty to rescind or modify the unlawful policies is governed by *Guardsmark LLC*, supra.¹⁸ It shall nationally distribute remedial notices via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J Picini Flooring*, 356 NLRB 11 (2010).¹⁹

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended²⁰

ORDER

G&E Real Estate Management Services, Inc. d/b/a Newmark Grubb Knight Frank, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining a “Responsive Action” policy in its Employee Handbook, which subjects workers who non-maliciously provide false information during workplace investigations to discipline and discharge.

b. Maintaining a “Conflicts of Interest” policy in its Employee Handbook, which bans conflicts of interest and has an ongoing disclosure requirement.

c. Maintaining an “Outside Employment and Business Activities” policy in its Employee Handbook, which bans employees “from participating in outside work activities that might present a conflict of interest.”

d. Maintaining a “Reference Inquiries and Requests for Employee Information” policy in its Employee Handbook, which bans workers from supplying employee information to outside entities without authorization.

e. Maintaining a “Confidentiality” policy in its Employee Handbook, which subjects “[e]mployees who disclose ... confidential Company information ... to disciplinary action up to and including termination of employment.”

¹⁸ “The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees.” *Guardsmark*, supra at 812 fn. 8.

¹⁹ Although Counsel for the Acting General Counsel has requested a notice reading remedy, such relief is unwarranted. Standard remedial relief will adequately remedy the unfair labor practices at issue herein.

²⁰ 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.

f. Maintaining a “Company Property” policy in its Employee Handbook, which bars all unauthorized solicitation and other protected activity from its facilities, and bans using email during non-working time for non-business purposes.

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g. Maintaining a “Telecommunications Usage” policy in its Employee Handbook, which bans employees from using telephones and other communication systems during non-working time for non-business purposes.

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h. Maintaining a “Use of Company Information Technology” policy in its Employee Handbook, which bans employees from using email and other information technology systems during non-working time for non-business purposes.

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i. Maintaining a “Tape Recording” policy in its Employee Handbook, which bars all unauthorized workplace recordings.

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j. Maintaining a “Respectful Workplace” policy in its Employee Handbook, which bans any negative commentary towards supervision that might be considered disrespectful.

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k. Maintaining a “Social Media” policy in its Employee Handbook, which requires employees to obtain consent prior to posting anything concerning the company on social media.

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l. Maintaining an “Outside Speaking and Writing Activities” policy in its Employee Handbook, which requires pre-approval before employees’ write or speak publicly.

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m. Maintaining a “Press Inquiries and Other Information Requests” policy in its Employee Handbook, which bars employees from talking to the press, media, government or other outlets without authorization.

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n. Maintaining a “Cooperation in Investigations and Litigation” policy in its Employee Handbook, which compels employees to cooperate in all workplace investigations, including unfair labor practice investigations.

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o. Maintaining a “Solicitation, Distribution of Literature & Political Advocacy” policy in its Employee Handbook, which bans all solicitations, including those occurring in non-work areas during non-working time.

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p. Maintaining a “Personal Appearance” policy in its Employee Handbook, which prohibits, “[a]ny clothing with printed slogans/promotions.”

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q. Maintaining a “Standards of Conduct” policy in its Employee Handbook, which: bans all conflicts of interest and has an ongoing disclosure requirement; bans any negative commentary to supervision that might be considered disrespectful or disruptive; prohibits the disclosure of employee and company information without authorization; bans employee from

engaging in any action that “could be construed as harming the operations or reputation of the Company;” and prohibits employees from stopping work before the end of one’s shift or not returning to work.

5 r. In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by §7 of the Act.

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

15 a. Rescind or modify the language in the following provisions of its Employee Handbook

20 i. The “Responsive Action” policy to the extent that it subjects workers who non-maliciously provide false information during workplace investigations to discipline and discharge.

25 ii. The “Conflicts of Interest” policy to the extent that it bans all conflicts of interest and has an ongoing disclosure requirement.

30 iii. The “Outside Employment and Business Activities” policy to the extent that it bans employees “from participating in outside work activities that might present a conflict of interest.”

35 iv. The “Reference Inquiries and Requests for Employee Information” to the extent that it bans workers from supplying employee information to outside entities without authorization.

40 v. The “Confidentiality” policy to the extent that it subjects “[e]mployees who disclose ... confidential Company information ... to disciplinary action up to and including termination of employment.”

45 vi. The “Company Property” policy to the extent that it bars all unauthorized solicitation and other protected activity from its facilities, and bans using email during non-working time for non-business purposes.

50 vii. The “Telecommunications Usage” policy to the extent that it bans employees from using telephones and other communication systems during non-working time for non-business purposes.

55 viii. The “Use of Company Information Technology” policy to the extent that it bans employees from using email and other information technology systems during non-working time for non-business purposes.

60 ix. The “Tape Recording” policy to the extent that it bars all unauthorized workplace recordings.

x. The “Respectful Workplace” to the extent that it bans any negative commentary towards supervision that might be deemed disrespectful.

5 xi. The “Social Media” policy to the extent that it requires employees to obtain consent prior to posting anything concerning the company on social media.

10 xii. The “Outside Speaking and Writing Activities” policy to the extent that it requires pre-approval before employees’ write or speak publicly.

xiii. The “Press Inquiries and Other Information Requests” policy to the extent that it bars employees from talking to the media, government or other outlets without authorization.

15 xiv. The “Cooperation in Investigations and Litigation” policy to the extent that it compels employees to cooperate in all workplace investigations, including unfair labor practice investigations.

20 xv. The “Solicitation, Distribution of Literature & Political Advocacy” policy to the extent that it bans all work-area solicitations, including those occurring during nonworking time.

25 xvi. The “Personal Appearance” policy to the extent that it prohibits employees from wearing “[a]ny clothing with printed slogans/promotions.”

30 xvii. The “Standards of Conduct” policy to the extent that it: bans all conflicts of interest and has an ongoing disclosure requirement; bans any negative commentary to supervision that might be considered disrespectful or disruptive; prohibits the disclosure of employee and company information without authorization; bans employees from engaging in any action that “could be construed as harming the operations or reputation of the Company;” and prohibits employees from stopping work before their shift ends or not returning to work.

35 b. Furnish all current employees with inserts for the Employee Handbook that

i. Advise that the unlawful rules have been rescinded, or

ii. Provide the language of lawful rules or publish and distribute a revised Employee Handbook that

40 1. Does not contain the unlawful rules, or

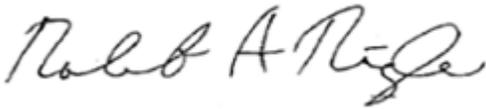
2. Provides the language of lawful rules.

45 c. Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Handbook is in effect, copies of the attached notice,

marked "Appendix."²¹ 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 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, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed it at any time since December 23, 2015.

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 it has taken to comply.

Dated Washington, D.C. May 10, 2017



Robert A. Ringler
Administrative Law Judge

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²¹ If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain provisions in our Employee Handbook, which subject workers who non-maliciously provide false information during workplace investigations to potential discipline and discharge.

WE WILL NOT maintain provisions in our Employee Handbook, which ban conflicts of interest with us and have an ongoing disclosure requirement.

WE WILL NOT maintain provisions in our Employee Handbook, which ban you “from participating in outside work activities that might present a conflict of interest.”

WE WILL NOT maintain provisions in our Employee Handbook, which ban you from giving employee and workplace information to outside entities without authorization.

WE WILL NOT maintain provisions in our Employee Handbook, which subject “[e]mployees who disclose ... confidential Company information ... to disciplinary action up to and including termination of employment.”

WE WILL NOT maintain provisions in our Employee Handbook, which bar all unauthorized solicitation and other protected activity from our facilities, and ban using email and other information technology during non-working time for non-business purposes.

WE WILL NOT maintain provisions in our Employee Handbook, which ban you from using telephones and other communication systems during non-working time for non-business purposes.

WE WILL NOT maintain provisions in our Employee Handbook, which bar all unauthorized workplace recordings.

WE WILL NOT maintain provisions in our Employee Handbook, which ban any negative commentary towards supervision that we consider disrespectful.

WE WILL NOT maintain provisions in our Employee Handbook, which require you to obtain our consent before posting anything about us on social media.

WE WILL NOT maintain provisions in our Employee Handbook, which require our pre-approval before you can write or speak publicly.

WE WILL NOT maintain provisions in our Employee Handbook, which bar you from talking to the press, media, government or other outlets without authorization.

WE WILL NOT maintain provisions in our Employee Handbook, which compel you to cooperate in all workplace investigations, including unfair labor practice investigations.

WE WILL NOT maintain provisions in our Employee Handbook, which ban all solicitations, including those occurring in non-work areas during non-working time.

WE WILL NOT maintain provisions in our Employee Handbook, which prohibit you from wearing “[a]ny clothing with printed slogans/promotions.”

WE WILL NOT maintain provisions in our Employee Handbook, which ban you from engaging in any action that “could be construed as harming the operations or reputation of the Company,” or prohibits you from stopping work before the end of one’s shift or not returning to work.

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

WE WILL rescind or modify the language in the following provisions of our Employee Handbook:

1. The “Responsive Action” policy to the extent that it subjects workers who non-maliciously provide false information during workplace investigations to potential discipline and discharge.
2. The “Conflicts of Interest” policy to the extent that it bans conflicts of interest and has an ongoing disclosure requirement.
3. The “Outside Employment and Business Activities” policy to the extent that it bans you “from participating in outside work activities that might present a conflict of interest.”
4. The “Reference Inquiries and Requests for Employee Information” to the extent that it bans you from supplying employee information to outside entities without authorization.

5. The “Confidentiality” policy to the extent that it subjects “[e]mployees who disclose ... confidential Company information ... to disciplinary action up to and including termination of employment.”

6. The “Company Property” to the extent that it bars all unauthorized solicitation and other protected activity from our facilities, and bans using email during non-working time for non-business purposes.

7. The “Telecommunications Usage” policy to the extent that it bans employees from using telephones, mobile devices and other communication systems during nonworking time for nonbusiness purposes.

8. The “Use of Company Information Technology” policy to the extent that it bans employees from using email and other information technology systems during non-working time for non-business purposes.

9. The “Tape Recording” policy to the extent that it bars all unauthorized workplace recordings.

10. The “Respectful Workplace” policy to the extent that it bans any negative commentary towards supervision that might be considered disrespectful.

11. The “Social Media” policy to the extent that it requires employees to obtain consent prior to posting anything concerning us on social media.

12. The “Outside Speaking and Writing Activities” policy to the extent that it requires pre-approval before employees write or speak publicly.

13. The “Press Inquiries and Other Information Requests” policy to the extent that it bars employees from talking to the press, media, government or other outlets without authorization.

14. The “Cooperation in Investigations and Litigation” policy to the extent that it compels you to cooperate with all workplace investigations, including unfair labor practice investigations.

15. The “Solicitation, Distribution of Literature & Political Advocacy” policy to the extent that it bans all solicitations, including those occurring in non-work areas during non-working time.

16. The “Personal Appearance” policy to the extent that it prohibits you from wearing “[a]ny clothing with printed slogans/promotions.”

17. The “Standards of Conduct” policy to the extent that it: bans all conflicts of interest and has an ongoing disclosure requirement; bars any negative commentary to supervision that might be considered disrespectful or disruptive; prohibits the disclosure of

employee and company information without authorization; bans employee from engaging in any action that “could be construed as harming the operations or reputation of the Company;” and prohibits employees from stopping work before the end of one’s shift or not returning to work.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or
2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:
 - a. Do not contain the unlawful provisions, or
 - b. Provide the language of lawful provisions.

**G&E REAL ESTATE MANAGEMENT
SERVICES, INC. D/B/A NEWMARK GRUBB
KNIGHT FRANK**

(Employer)

Dated _____ **By** _____

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

2600 North Central Avenue, Suite 1400, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge’s decision can be found at www.nlrb.gov/case/28-CA-178893 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, (602) 416-4755.