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

PROFESSIONAL ELECTRICAL CONTRACTORS OF CONNECTICUT, INC.

and **Case No. 34-CA-071532**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 35

Rick Concepcion, Esq., for the General Counsel
Meredith G. Diette, Esq. & Edward F. O'Donnell Jr., Esq., for the Respondent

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this case in Hartford, Connecticut. It opened on December 15, 2012 by telephone conference call and closed on March 13, 2014. The charge and the first amended charge in 34-CA-071532 were filed on June 27 and July 25, 2012.

This case originally was consolidated with Case No. 34-CA-067376. That case was settled after the opening of the hearing. After approving the withdrawal of that charge, I severed that case from the instant case on June 14, 2013. Notwithstanding efforts at settlement, the parties could not reach an agreement on the instant case and so it was litigated.

In essence the Complaint alleges that certain rules contained in the employer's employee handbook violate Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

Findings and Conclusions

I. Jurisdiction

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Respondent is engaged in the business of providing electrical contracting services throughout New England. Its focus is on commercial work and it performs a variety of electrical installation and other services for commercial customers either during the construction or the renovation of buildings. As such, the Respondent's employees, for the most part, will be located

out in the field working at customer sites. As such, they will be working on the property of the Respondent's customers and come in contact with the employees of the customers.

The most recent employee handbook was revised in December 2011 and it was stipulated that these rules act as guidelines for employee behavior and that the breach of the rules may lead to employee discipline.

At pages 55 and 56 of the handbook, there is a rule relating to conduct by employees at customer premises. Most of the content of the rules in this section are not challenged. However, the General Counsel challenges that part of the rule that states:

> Do not disclose the location and telephone number of your customer assignment to outsiders.

On its face, it is not all that clear what this rule means. The company's president testified that the rule is really meant to prevent employees from disclosing the phone numbers of the Respondent's customers. As to location, he testified that it should not be construed as precluding employees from telling others where an employee is physically located. He also testified that the rule is not meant to preclude employees from giving out either the numbers of their private phones or the phones issued to them by the Respondent.

At page 56 of the handbook, the General Counsel challenges the rule relating to confidentially of customer matters. This states:

> Confidentiality of PEC's customer matters is the cornerstone of our business ethics. Our professional ethics require that each associate maintain the highest degree of confidentiality when handling customer matters. Violation of customer confidentiality may lead to discipline up to and including termination.
>
> To maintain this professional confidence, no associate shall disclose customer information to outsiders, including other customers or third parties and members of one's own family.
>
> Questions concerning customer confidentiality may be addressed with your immediate supervisor.

At page 60 of the handbook, and as a portion of the rules relating to the company's progressive disciplinary system, it states inter alia:

> [H]ere are some examples of conduct that may result in immediate termination:
>
> > Boisterous or disruptive activity in the workplace.

At pages 69 and 70 of the handbook there are a series of rules relating to information technology policy. Most of these rules are not challenged. However, the General Counsel does challenge that portion of this section (on page 70) that prohibits:

> Initiating or participating in distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.

At pages 78 and 79 of the handbook, there are a series of rules prohibiting employees from taking photographs or making recordings at the workplace without prior authorization by management. This states:

> Except as otherwise provided for in this policy, no associate may photograph, tape, or otherwise record any person, document, conversations, communication, or activity that in any way involves PEC [the Respondent] or associates of PEC, any customers or any other individual with whom PEC is doing business or intending to do business in any capacity (for example, vendors, suppliers, consultants, attorneys or independent contractors). The authorized copying of documents in the ordinary course of business for the benefit of PEC is not prohibited by this policy. Use of company voicemail, and saving messages thereon, whether on company phones or company cell phones, is not prohibited by this policy.
>
> "Photographing," "taping," and "recording" under this policy include talking still or video pictures (film or digital), or recording any conversation or communications, regardless of ether the conversation or communication takes place in person, over the telephone, or via any other communications device or equipment, and regardless of the method used to tape or record (for example, tape recorder, video recorder, mechanical recording, or wire-tapping equipment), and regardless of where the conversation or communication takes place, I.e., on or off PEC's premises. "Taping" or "recording" also include photographing or recording digital images through cameras of any kind (for example, camera phones, PDA cameras, or concealed cameras). Limited exceptions will apply where the photographing, taping or recording is being conducted by an individual who has been provided advance written authorization for the activity by an authorized member of company management.

As to this set of rules, the company's president testified that with respect to the taking of pictures, its customers often prohibit pictures being taken on their property except as specifically authorized. Thus, the rule against taking pictures as applied to when employees are on someone else's property is necessary because that represents the customer's wishes. With respect to the rules against recording conversations etc., he testified that he felt that the recording of conversations not only was unseemly, but would tend to inhibit candid conversations between employees, supervisors and managers.

III. Analysis

Section 7 of the Act gives employees the right to engage in union or in concerted activity for their mutual aid and protection. It also gives employees the right to refrain from such activities.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, (2005), the Board set forth a framework for determining whether employee handbook rules violate the Act by interfering with Section 7 rights. First, a violation will found if the rule explicitly restricts activities that clearly fall within the rights protected by Section 7. More difficult, is where a rule does not explicitly restrict Section rights but may be interpreted as doing so. In this respect, a violation will be found if (a) employees would reasonably construe the rule as restricting Section 7 activity; (b) the rule was promulgated in response to union activity; and (c) the rule is applied to restrict Section 7 activity.

In *Lafayette Park Hotel*, 326 NLRB 824, (1998) the Board held that the mere maintenance of a rule that adversely affects Section 7 rights will violate the Act. In *Clemont Resort and Spa*, 344 NLRB 832, 836, (2005), the Board held that where a rule is ambiguous (rule prohibiting negative conversations about managers), the fact that there was no limiting language to assure employees that their Section 7 rights were protected has to be taken into account. On the other hand, rules that clearly restrict their scope so that they cannot reasonably be construed by employees to cover Section 7 activity are lawful. Thus in *Tradesman Intl*., 338 NLRB 460, (2002), the Board held that a rule prohibiting "disloyal, disruptive, competitive, or damaging conduct" did not violate the Act when the rule listed examples of clearly illegal or unprotected conduct so that a reasonable employee could not reasonably construe it as applying to union or concerted activity.

At the same time, the Respondent points out in its Brief, the Board has held that a rule has to be read in context to determine a reasonable meaning. *Luther Heritage Village*, 343 NLRB 646 (2004) and *Palms Hotel & Casino*, 344 LRB 1363, 1368 (2005). In this regard, it is not my function to read a rule with such a fine tooth comb so as to divine a hidden meaning that would result in finding a violation of the Act.

With the above principles in mind let us examine each of the rules that are in dispute.

1. At pages 55 and 56 there is a rule relating to conduct by employees at customer premises. The General Counsel challenges that part of the rule that states:

> Do not disclose the location and telephone number of your customer assignment to outsiders.

The General Counsel argues that the Respondent failed to offer any valid business justification for preventing employees from disclosing the location and telephone number of their assignments. He asserts that such a prohibition violates the Act because employees could reasonably interpret the rule as barring Section 7 activity such as telling an outside union, for example, where they were working "for the purpose of an organizing campaign, picketing or information dissemination." He also asserts that because the Respondent's employees mostly work at customer locations, the rule would theoretically inhibit a union from being able to meet with employees or to take other legal actions at the places where the employees work.

The Respondent argues that a rule prohibiting its employees from disclosing the work location and phone number of a customer has no adverse impact on an employee's ability to discuss with other employees their wages and working conditions. It points out that the employees work at customer sites and therefore have access to information about the customers which should be protected. The Respondent also points out that its policy does not prevent employees from disclosing their own personal cell phone numbers so that the rule prohibiting disclosure of the customer's phone number could not have any significant impact on Section 7 activity.

In my opinion, the rule insofar as it prohibits the disclosure of a customer's location to outsiders is too broad and could interfere with Section 7 activity because it could tend to inhibit the ability of a union to meet with and communicate with employees. But as to disclosure of a customer's phone number, I think that a different result should prevail. As all of these employees have either personal or company provided cell phones there is simply no need to have the customer's phone number in order for a union to contact employees or for employees to contact each other. Accordingly I do not think

that this rule, insofar as customer phone numbers, could reasonably be construed or applied to restrict or mitigate against Section 7 activity.

2. At page 56 of the handbook, there is a rule relating to confidentially of customer matters. The General Counsel challenges this rule only to the extent that it states:

> To maintain this professional confidence, no associate shall disclose customer information to outsiders, including other customers or third parties and members of one's own family.

With respect to this rule, the General Counsel contends that it is too broad and like the previous rule, would preclude disclosure of customer locations, even though that is not stated in the rule. In my opinion, this rule read in context, only relates to the disclosure of customer information acquired by employees working at a customer's location. I do not think that it could reasonably be understood by employees to prevent them from either talking to or communicating with a union or to each other about their own wages, hours and/or other terms and condition of employment. I therefore shall recommend that the Complaint be dismissed as to this allegation.

3. At page 60 of the handbook, there is a statement of the types of conduct that can result in immediate termination. Among the items listed is;

> Boisterous or disruptive activity in the workplace.

The General Counsel argues that a rule that bars "boisterous" activity in the work place is overly broad and could reasonably be construed as prohibiting "vigorous" discussion by employees amongst themselves or with their supervisors regarding their wages and working conditions. In support of his position, the General Counsel cites *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 (2011) and *First Transit Inc*., 360 NLRB No. 72, (2014).

In *2 Sisters Food Group, Inc.*, supra, a case involving a rule relating to the "inability or unwillingness to work harmoniously with other employees," the Board stated:

> In *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999), the Board found unlawful a rule that prohibited, among other things, "[u]sing loud, abusive or foul language." The Board reasoned that "[b]ecause the [rule did] not define abusive or insulting language or conduct, . . . [it] could reasonably be interpreted as barring lawful union organizing propaganda." Id. Like the rule in *Flamingo Hilton-Laughlin*, the Respondent's rule does not define what it means to "work harmoniously" (or to fail to do so). Its patent ambiguity distinguishes it from those conduct rules found to be lawful in *Palms Hotel & Casino,* 344 NLRB 1363, 1367**–**1368 (2005), and *Lutheran Heritage,* supra at 647**–**649, cited by our dissenting colleague, that were more clearly directed at unprotected conduct. In these circumstances, we agree with the judge that the Respondent's rule was sufficiently imprecise that it could encompass any disagreement or conflict among employees, including those related to discussions and interactions protected by Section 7, and that employees would reasonably construe the rule to prohibit such activity.

In *First Transit*, supra, the Board discussed two rules, each represented by a bullet point. The first prohibited, "[d]iscourteous or inappropriate attitude or behavior to passengers, other

employees, or members of the public" and "disorderly conduct during working hours." The second rule prohibited "[p]rofane or abusive language where the language used is "uncivil, insulting, contemptuous, vicious, or malicious." As to the first, the Board held that the rule was invalid under the reasoning of *2 Sisters*, supra. But as to the second, the Board held that the rule was lawful. With Chairman Pierce dissenting, the Board majority stated:

> [W]e do not find that the words "uncivil" and "insulting" in the second bullet point are so patently ambiguous as to render that bullet point overbroad. The clear thrust of the second bullet point is to prohibit "profane or abusive" language, and the latter clause just be interpreted in the context of the introductory language which makes its overarching purpose clear. The second bullet point is similar to a rule found lawful in *Lutheran Heritage Village-Livonia*, above, at 646, 654 ("using abusive or profane language"). See also *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), which issued after the judge's decision, finding lawful a rule requiring employees to use "appropriate business decorum" in communicating with others.

In light of the above, I conclude that the rule to the extent that it prohibits "boisterous" activity in the workplace is violative of Section 8(a)(1) of the Act.

4. There is a set of rules relating to information technology policy. The General Counsel challenges only that portion that prohibits:

> Initiating or participating in distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.

The challenge by the General Counsel to this rule relates to communications by employees using their own personal computers. It does not relate to communications by employees using computers owned by the Respondent, which would present an entirely different issue.

In my opinion, the rule insofar as it prohibits employees from using their own computers to communicate with others in "any manner that may adversely affect company business interests or reputation," is invalid under the cases cited by the General Counsel. Thus, in *Costco Wholesale Corp*., 358 NLRB No. 106, (2012), the Board found that the Respondent violated Section 8(a)(1) by maintaining a rule, without accompanying language that would tend to restrict its application, that prohibited employees from electronically posting statements that "damage the Company . . . or damage any person's reputation."

5. At pages 78 and 79 of the handbook, there are a series of rules prohibiting employees from taking photographs or making recordings at the workplace without prior authorization by management.

Basically, the General Counsel contends that these rules are too broad and would reasonably be construed as prohibiting employees from photographing or recording a wide range of Section 7 activity including picketing activity, employee communications used in social media, or even recording evidence that might be used in NLRB or other employment related civil actions.

The Company's witness testified that these rules were intended to protect confidential matters of customers and to protect customer privacy. He also testified that he felt that the

recording of conversations with its own managers not only was unseemly, but would tend to inhibit candid conversations between employees, supervisors and managers. In this respect, I have a good deal of sympathy with the Employer's position.

Indeed, I very much doubt that these particular rules were adopted with the intention of inhibiting employee Section 7 activity. But the legal issue relates to the effect and not to the intention.

The Respondent cites a fairly recent Administrative Law Judge (ALJ) decision in *Whole Foods Market Inc*., 01-CA-096965 (October 30, 2013), where the ALJ concluded that a rule forbidding the recording of conversations or use of recording devices, did not violate the Act. On the other hand, a different ALJ is a case involving *Boeing Co.*, 19-CA-90932 (May 15, 2014), concluded that the company violated the Act by maintaining a rule that prohibited them from taking their own pictures or videos at work. Neither of those cases has been decided by the Board.

It seems to me that the thrust of the General Counsel's position is that this rule would tend to prevent employees from recording statements or events that might later be used as a means to preserve evidence in employment related matters including NLRB cases, grievances and lawsuits. In this respect, it not common for recorded material to be used as evidence in NLRB proceedings. Nevertheless, there is no general prohibition in our proceedings for the receipt of surreptiously recorded evidence. And when available and intelligible, a recording will be more accurate than the testimony of witnesses who tend to have imperfect memories and sometimes truthfully but inaccurately remember what they want to remember. [1]

There is, in my opinion, a legitimate conflict of principles regarding this set of rules which will require Board and Appellate Court clarification. In this case, however, I am going to come down on the side of the General Counsel and conclude that this set of rules, except to the extent that a customer explicitly prohibits photographing or videotaping on its premises, is too broad and is therefore a violation of Section 8(a)(1) of the Act.

Conclusions of Law

The Respondent has violated Section 8(a)(1) of the Act by maintaining certain employee rules that would reasonably be construed as prohibiting them from engaging in union and/or concerted activity as defined in Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [2]

ORDER

The Respondent, Professional Electrical Contractors of Connecticut, Inc., its officers, agents, and representatives, shall

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[1] As a matter of policy, the Board has a rule precluding, upon objection, the introduction of secret recordings made of bargaining sessions. *Triple A Fire Protection*, 315 NLRB 409, 411 (1994).

[2] 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.

1. Cease and desist from

(a) Maintaining a provision in its employee handbook that requires employees not to disclose the location of their customer assignment to outsiders.

(b) Maintaining a provision in its employee handbook that prohibits employees from engaging in "boisterous" activities in the workplace.

(c) Maintaining a provision in its employee handbook that prohibits employees from initiating or participating in the distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.

(d) Maintaining a provision in its employee handbook that prohibits employees from taking photographs or making recordings at the workplace without the prior authorization by management.

(e) In any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Rescind or modify the language in the rules described above.

(b) Furnish all current employees with inserts for the current employee handbook that

1. advise that the unlawful provisions 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.

(c) Within 14 days after service by the Region, post at its facility in Plainville Connecticut, copies of the attached Notice marked "Appendix ."[3] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by 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

[3] 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."

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees employed by the Respondent.

(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 Respondent has taken a comply.

Dated, Washington, DC June 4, 2014

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Raymond P. Green
Administrative Law Judge

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain a provision in our employee handbook that requires employees not to disclose the location of their customer assignment to outsiders.

WE WILL NOT maintain a provision in our employee handbook that prohibits employees from engaging in "boisterous" activities in the workplace.

WE WILL NOT maintain a provision in our employee handbook that prohibits employees from initiating or participating in distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.

WE WILL NOT maintain a provision in our employee handbook that prohibits employees from taking photographs or making recordings at the workplace without the prior authorization by management, except to the extent that our customers explicitly prohibit the taking of photographs or making recordings on their property.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their Section 7 rights.

WE WILL rescind or modify the language in the rules described above.

WE WILL furnish all current employees with inserts for the current employee handbook that;

1. advise that the unlawful provisions 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.

Professional Electrical Contractors of Connecticut, Inc.,
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

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

A.A. Ribicoff Federal Building and Courthouse,
450 Main Street, Suite 410
Hartford, CT 06103-3022
(860) 240-33522 Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/34-CA-071532 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.

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, (860) 240-3006.