

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**FLEX FRAC LOGISTICS, LLC
AND SILVER EAGLE LOGISTICS, LLC,
JOINT EMPLOYERS
Respondent**

and

Case No. 16-CA-27978

**KATHY LOPEZ
An Individual**

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

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Dated: March 19, 2012

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COMES NOW Counsel for the Acting General Counsel, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, and files this Answering Brief to Respondent's Exceptions to the Decision and Recommended Order of the Administrative Law Judge. The Honorable Administrative Law Judge Margaret Brakebusch heard this case on October 13, 2011. On February 6, 2012, the judge issued her recommended Decision and Order. In her Decision and Order, the judge correctly found that Respondent violated Section 8(a)(1) of the Act by: promulgating and maintaining an overly broad confidentiality rule that employees could reasonably understand to prohibit them from discussing their wages and other terms and conditions of employment and by discharging Kathy Lopez pursuant to an overly broad confidentiality rule. The recommended Decision and Order requires Respondent to cease and desist from promulgating and maintaining its overly broad and ambiguous confidentiality rule and to offer immediate and full reinstatement and make Kathy Lopez whole for any loss of earnings and other benefits, computed on a quarterly

basis from the date of her discharge to the date of a proper offer of reinstatement, less any net interim earnings.

Respondent filed eight Exceptions to the judge's finding of facts, conclusions of law and recommended remedy and order. This Brief addresses Respondent's Exceptions, explaining specific points of fact in record evidence and case law that support the judge's findings and conclusions with regard to Respondent's Exceptions. Counsel for the Acting General Counsel submits that the judge's decision that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad confidentiality rule and terminating employee Lopez pursuant to that rule is fully supported by the credible record evidence and case law and urges the Board to adopt the judge's decision with respect to the Exceptions filed by Respondent.

In reviewing the administrative law judge's decision and the exceptions, a brief introduction to the facts is provided. The specific allegations to which the judge found merit will also be reviewed. The violative overly broad rule and the unlawful termination are then analyzed in context of the judge's decision, which is supported by case law.

I. FACTS

A. Background

Respondents Flex Frac Logistics and Silver Eagle Logistics are joint employers created about February 2010. [JD slip op. at 2; Tr. 19] Respondent is an authorized Department of Transportation (DOT) carrier which delivers frac sand to oil and gas well site servicing companies. [JD slip op. at 3; Tr. 19, 21] It operates 24 hours a day. [Tr. 56]

Respondent's chain of command is as follows: William Funk is the president of Silver Eagle Logistics and oversees the entire operation of both Silver Eagle Logistics

and Flex Frac Logistics. [JD slip op. at 2-3; Tr. 21] Funk also shares ownership of the operation with Jeff Blackwood, Virginia and Marty Moore. [Id.] John Wilkinson is the chief financial officer (CFO) and Rick Fourpaugh is the general manager. [Id.] As controller, Susie Kellum reports to Wilkinson and manages employees in the office. [JD slip op. at 3] In November 2010, Kellum replaced former controller Patricia Villarreal. [Id; Tr. 27]

Respondent employs approximately 250 employees, including about 100 employee drivers. [JD slip op. at 3; Tr. 22] Respondent also uses roughly 100 nonemployee drivers (also referred to as vendors, leased drivers, independent contractors, and customers). [Id; Tr. 20]

Four managers and approximately 16 dispatcher managers work in dispatch. [Tr. 22, 27] The dispatch department responds to requests by service companies that need trucks by assigning employee or vendor drivers. [Tr. 22] The dispatch department also monitors drivers' progress and assigns them to their next load. [Tr. 22-23] In addition to dispatchers, the dispatch department also has two load planners. [Tr. 23] Jamie Stingley and Kevin Smith manage the dispatch department. [Id.] Ben Gatzke was a supervisor over dispatch at the time Lopez was employed by Respondent. Dispatch employees included, Catherine Coile-Chambers, Billy Funk, and Nocona Stingley. [Tr. 121]

CFO Wilkinson and Controller Kellum supervise the accounting department, which consists of about 10 employees. [JD slip op. at 3; Tr. 24] The accounting employees prepare the invoices for both the customers, company and leased drivers. [JD slip op. at 3] Within the accounting department, the coding department prepares the haul tickets to reflect the actual demurrage time and mileage. [Tr. 24] The coding department sends the haul tickets to accounts receivable, where the accounts receivable employees

invoice the service companies. [Tr. 25] The haul tickets are then sent to accounts payable where the employees in that area prepare the tickets to ensure that their detention hours and mileage are calculated properly before sending the ticket on to payroll. [Tr. 24-25]

B. Employer Maintained An Unlawful Overly Broad Rule

Respondent provided Lopez with a copy of its confidentiality agreement shortly after Lopez began her employment. [Tr. 198; GC Exh. 2] This rule states:

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, process and plans; our financial information, including costs, prices; current and future business plans, our computer software systems and processes; *personnel information and documents*, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

[GC Exh. 2] (*emphasis added*)

Respondent stipulated that its confidentiality rule was implemented in early May 2010. The controller at the time, Patricia Villarreal, drafted the rule and CFO Wilkinson approved its implementation. [Tr. 248] The rule remained in effect at the time of the hearing. [Tr. 28, 59-62, 76]

Employees also knew that Respondent prohibited them from discussing wages upon pain of termination. Employee Frank “Tucker” Gay testified that he believed employees were prohibited from discussing wages. [Tr. 171] Gay testified, “I know for a fact I wasn’t supposed to discuss [wages] when I was in dispatch, because some people get commissions, some people don’t.” [Id.] Gay further explained, “I know for a fact we

wasn't [sic] supposed to do that." [Tr. 172] He clarified his point testifying, "[I]f two people decide to go outside the building and start discussing their wages, we don't have no problem with it until they get caught. Once they get caught it's subject for termination." [Tr. 174]

C. Employer Unlawfully Terminated Lopez Pursuant to the Rule

Additionally, in violation of Section 8(a)(1), Respondent terminated employee Kathy Lopez on December 30, 2010 because she violated Respondent's overly broad confidentiality rule.

Lopez's termination notice stated:

Kathy told one of our dispatch employees that we paid our drivers one rate and our customers another. She has also discussed what people make in the accounting office to other employees that are or were looking for raises.

[GC Exh. 5]

Lopez worked in accounts payable from May 2010 until her termination. [JD slip op. at 3] Her job required her to obtain haul tickets from the drivers, input their data, and prepare the drivers' pay at the end of each week. [Id.] Prior to Lopez's termination, she had no prior discipline. [Tr. 208] Lopez received a stellar performance review and a glowing letter of recommendation. [GC Exhs. 4 and 7] Kellum testified that she was sorry to see Lopez leave the company and that despite Funk's orders, she and Wilkinson "fought for her" to be able to stay. [Tr. 84] Furthermore, Kellum even testified that Lopez was not terminated because of any disciplinary issues. [Tr. 85] Nothing in the record disputes that Lopez was terminated pursuant to the unlawful rule. [JD slip op. at 3, LL. 41-42]

II. EVIDENCE AND LEGAL AUTHORITY SUPPORT THE JUDGE'S CONCLUSIONS AND FINDINGS

Respondent filed eight (8) Exceptions to the judge's finding of facts, conclusions of law and recommended remedy. This Section will discuss how the judge correctly found violations of Section 8(a)(1) and why the judge appropriately concluded that Lopez was unlawfully terminated pursuant to an unlawful rule. Counsel for the Acting General Counsel submits that Respondent's Exceptions to the judge's factual findings and legal determinations regarding the Section 8(a)(1) violations are unfounded, as such determinations are fully supported by the credible record evidence and case law.

A. The Judge Correctly Found Respondent Maintained An Overly Broad Confidentiality Rule That Restricted Protected Concerted Activity

The judge found Respondent maintained an unlawful overly broad confidentiality rule since May 2010. An employer violates Section 8(a)(1) of the Act when it maintains a work rule that "reasonably tend[s] to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The Board developed a two-step inquiry to determine if a rule is unlawful. The initial inquiry is whether the rule explicitly restricts Section 7 activities. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). If the rule does not explicitly restrict Section 7 activities, the rule will be found 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. Any ambiguity in a rule is construed against its promulgator. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 224 (1995), *enfd.* in part 81 F.3d 209 (D.C. Cir. 1996).

Respondent's confidentiality rule specifically states:

Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; Silver Eagle Logistics LLC organization management and marketing processes, plans and ideas, process and plans; our financial information, including costs, prices; current and future business plans, our computer software systems and processes; *personnel information and documents*, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any Silver Eagle Logistics LLC records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

[GC Exh. 2] (*emphasis added*).

Nothing in this expansive rule provides an employee a clue that any discussion of wages would not subject to the rule's inclusion of "personnel information and documents" or that an employee would not be subject to termination or other "legal action" for violating the rule. Gay's testimony demonstrates that employees knew that Respondent maintained a rule that an employee who talked about wages with fellow employees risked termination. (Tr. 171-174) As noted in the judge's decision, "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." See JD slip op. at 11-12, citing *Hyundai American Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. (2011).

The judge correctly found that the overly broad rule has language that employees may reasonably construe as restricting their Section 7 right to discuss wages. [JD slip op. 11-12] In support of her position, the judge relied on *Iris USA, Inc.*, 336 NLRB 1013 (2001) and found the facts of *Iris USA* and the instant case to be similar. In *Iris USA Inc.*, the employer's handbook contained rules that defined confidential information as:

[I]ncluding customer lists and information, financial information, leases, licenses, agreements, sales figures, business plans and proprietary information. All of this information, whether about IRIS, its customers, suppliers, or employees is strictly confidential...Each employee's personnel records are considered confidential Any doubts about confidentiality of information should be resolved in favor of confidentiality.

The Board held that the rules were overbroad and violated the Act because the employer advised employees to resolve doubts in favor of confidentiality. *Id.*

The judge also correctly relied on *Guardsmark, LLC*, 344 NLRB 809 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007). Here, like *Iris* and *Guardsmark, LLC*, the rule does not identify what personnel information is confidential and therefore the rule is violative.

Because Respondent's rule does not carve out an exception for matters that do not involve wages and other terms and conditions of employment, the rule is overly broad and therefore violates Section 8(a)(1). See *Cintas Corp. v. NLRB*, 482 F.3d 463, 464 (D.C. Cir. 2007) (employer's confidentiality rule prohibiting disclosure of "any information concerning . . . partners [employees]" could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with a union).

Further, Respondent's exceptions do not require a different result. Respondent argues that its rule protects a legitimate business purpose and has not been enforced to prevent the discussion of employees' conditions of employment. Specifically, Respondent maintains that the rule was designed to prevent the disclosure of the Employer's contract rates with its customers and to maintain a competitive advantage in its business. In support of its position, it cites *Lafayette Park Hotel* for the proposition that that an employer is justified in maintaining a confidentiality provision that restricts

disclosure of guest information, trade secrets, contracts with suppliers and other proprietary information. *Id.* at 824. However, Respondent fails to acknowledge that in *Lafayette Park*, *supra*, the employer's rule pertained to "hotel-private" information that listed the types of proprietary information that employees were restricted from disclosing and did not include or describe interactions relating specifically to wages or have any other qualifiers such as 'personnel information' to chill employees' Section 7 rights.

As the judge correctly found, a violation of the Act is not premised on "mandatory phrasing, subjective impact, or even evidence of enforcement but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of fundamental rights protected by the Act." *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), *enfd.* 987 F.2d 1376 (8th Cir. 1993). Despite Respondent's claims that it did not enforce the rule, that claim does not relieve Respondent of liability for an unlawful overly broad rule.

Cases cited by Respondent, including *International Business Machines Corp.*, 265 NLRB 638 (1982), are inapplicable to the rule at hand. In *IBM*, the Board found that the employer's confidentiality rule was breached when an employee came upon confidential information from a third party and printed that information in a newsletter that was distributed to some employees. *International Business Machines Corp.*, 265 NLRB 638 (1982). These facts do not apply here because Respondent distributed its rule to all of its employees and failed to clarify the type of personnel information that was restricted.

Likewise, Respondent's reliance on *Kmart*, 330 NLRB 263 (1999) is misplaced. Therein, an employer rule prohibited discussion of "company business and documents" and did not contain any other language prohibiting discussion of terms and conditions of employment. *Kmart*, 330 NLRB 263 (1999). Although the Board found no violation in *Kmart*, this case is not applicable to the facts of the instant case where the rule at issue

specifically states that dissemination of any *personnel information and documents* outside the organization is not permitted without prior management approval.

Finally, Respondent relies on *MediaOne of Greater Florida, Inc.*, 340 NLRB 277 (2003). In that case, the employer restricted employees from disclosing propriety information that consisted of information assets and intellectual property, which included “customer and employee information, including organization charts and databases.” The Board found the rule did not violate the Act because the rule specifically described the type of information about which the employer prohibited discussion, subsequently described the type of information that was restricted, and had no other mention of wages or any other terms and conditions of employment. This case is distinguishable from the instant case because Respondent here failed to include limiting language that removes the rule’s ambiguity and limits its broad scope.

The above discussion demonstrates that Respondent’s reliance on *Lafayette Park Hotel*, supra, *International Business Machines Corporation*, supra, *Kmart*, supra, and *MediaOne of Greater Florida*, supra, is misplaced since in each of these cases the rules were explained to employees in such a way that they would not perceive restrictions on their Section 7 rights. In the instant case, Respondent failed to clarify or limit its rule in any way that would exclude Section 7 activity and thus, employees would reasonably construe the rule to restrict their Section 7 conduct.

B. The Judge Correctly Found Respondent Violated Section 8(a)(1) by Terminating Lopez Pursuant to Its Unlawful Overly Broad Rule

Respondent did not dispute that it terminated Lopez pursuant to the confidentiality rule. [JD slip op. at 3, LL. 41-42] Because Respondent’s rule is overly broad and violates the Act on its face, Lopez’s termination pursuant to the overly broad rule also

violates the Act. See *Double Eagle Hotel & Casino*, 341 NRB 112, fn. 3 (2004), enfd. 414 F. 3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Saia Motor Freight Line*, 33 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997). In applying the *Double Eagle* principals, the Board clarified that an employee must be engaged in protected conduct or engage in conduct that implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB No. 39, slip op. at 3 (2011). The Board further explained that an employer does not violate the Act by disciplining an employee for conduct prohibited by an overbroad rule if the conduct is “wholly distinct” from the concerns of Section 7. However, if the conduct for which discipline is imposed pursuant to an unlawfully overbroad rule “touches the concerns animating Section 7,” the discipline has a “chilling effect” on other employees’ exercise of protected rights, even if the conduct could have been proscribed pursuant to a more narrowly drawn rule. For this reason, the Board concluded that discipline imposed pursuant to an overly broad rule is unlawful when the employee conduct concerns the subjects “protected” by Section 7 even if the conduct is not concerted.

Here, Lopez was terminated based upon the overly broad confidentiality rule discussed above. Lopez’s termination notice confirms the reason for her termination. Her termination notice stated:

Kathy told one of our dispatch employees that we paid our drivers one rate and our customers another. She has also discussed what people make in the accounting office to other employees that are or were looking for raises.

[GC Exh. 5]

The evidence shows that Lopez was terminated pursuant to Respondent’s overly broad confidentiality rule, which Respondent concedes in its termination notice and its

failure to further discuss the termination except in terms of confidentiality. Because the rule does not differentiate between what type of personnel information and documents may and may not be disclosed, employees would construe it to apply to wages, which is a critical issue to employees' terms and conditions of employment. Thus, Lopez was terminated for the kind of activity that the *Double Eagle* rule was designed to protect: Activity that touches concerns at the heart of Section 7, because the rule would be construed by employees to apply to wages and other terms and conditions of employment. *Double Eagle*, supra.

III. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel requests that the Board deny Respondent's Exceptions in their entirety, affirm the judge's findings of fact and conclusions of law that Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining an overly broad confidentiality rule and terminating employee Lopez pursuant to that rule and adopt the judge's recommended remedy and Order in full, except to the extent identified in Counsel for the Acting General Counsel's Cross-Exceptions also filed in this matter. Counsel for the Acting General Counsel also requests any further relief the Board deems appropriate.

Dated at Fort Worth, Texas, this 19th day of March 2012.

Respectfully submitted,



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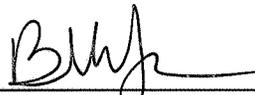
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions has been served this 19th day of March 2012, upon each of the following:

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