

**Central Security Services, Inc. and John E. Brady.**  
Case 20-CA-22502

September 30, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND  
BROWNING

On June 24, 1992, Administrative Law Judge George Christensen issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

We are adopting in large part the decision of the administrative law judge. Several modifications are noted in footnote 1, *supra*, however, and we set forth at greater length in section II below our reasons for not adopting all of his recommendations with respect to certain of the Respondent's rules of conduct alleged as violations of Section 8(a)(1) of the Act. For the reasons stated in section I below, we agree that we have

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that the Respondent's discipline of Brady and Clarke and discharge of Brady violated Sec. 8(a)(1) of the Act, we find, contrary to the judge, that *Wright Line*, 251 NLRB 1083 (1980), is applicable. Applying the analysis of that case, we find that the General Counsel made out a *prima facie* case and that the Respondent did not either rebut it or establish the affirmative defense allowable under *Wright Line*.

Additionally, we adopt the judge's finding that the Respondent treated employees Brady and Clarke in a disparate manner when it disciplined them for circulating, discussing, and soliciting coworkers' signatures regarding a letter about the employees' terms and conditions of employment. We also adopt the judge's finding that the Respondent failed to establish that Brady left his guard post at a time that he was supposed to have been working in order to solicit employee Banda to sign the letter. We decline, however, to adopt the judge's apparent alternative rationale that even if Brady had left his post while he was supposed to have been working, discipline of him for this conduct would have constituted disparate treatment. While the evidence shows that the Respondent's employees routinely engaged in solicitation and discussion activities for nonwork purposes during working hours, it was not shown that they left their assigned posts at times when they were supposed to have been working in order to engage in such activities.

<sup>2</sup> As part of his remedy, the judge provided that the Respondent shall "offer Brady reinstatement to his former or a substantially equivalent position." We shall modify the judge's reinstatement language to accord with that traditionally used by the Board.

jurisdiction over the Respondent. In so doing, we reject the Respondent's contention that the control exercised by the United States Marshals Service (USMS) over the Respondent's labor relations and the working conditions of the Respondent's court security officers (CSOs) is so pervasive that meaningful collective bargaining with a labor organization representing the CSOs would not be practical and that therefore the Board's assertion of jurisdiction is improper under the test of *Res-Care, Inc.*, 280 NLRB 670 (1986).

I. JURISDICTIONAL ISSUE

A. *Pertinent Factual Findings*

The Respondent is in the business of providing security services. In this case, pursuant to a contract with the USMS, an agency of the Federal Government, the Respondent provided security services at Federal courthouses within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. The contract between the USMS and the Respondent stated that the USMS had responsibility for Federal court security and needed skilled security officers to provide a "daily deterrent and reactionary force" against unauthorized activities directed toward court personnel and property. The USMS contracted with the Respondent to provide "except as otherwise specified . . . all necessary manpower, supervision, transportation, and clothing to perform court security services for each USMS District covered by this award."

The contract, which began in 1988, was for 1 year and granted the USMS an option to renew annually for a total duration of no more than 5 years.<sup>3</sup> The contract required the Respondent to provide not only CSOs but also an onsite supervisor at each facility. Additionally, the Respondent was required to have a contract manager available at all times for such purposes as re-directing CSOs in their duties, removing CSOs from their posts, and receiving and executing directions from the USMS. The CSOs were assigned to fixed posts and roving patrols within court buildings. As provided by the contract, CSOs received special, limited deputation through the USMS empowering them to enforce Federal law on Federal property in performance of contract duties during normal duty hours.

The contract incorporated CSOs' wage rates, including annual increases, that the Respondent had submitted in the wage compensation plan required as part of its contract proposal. The Respondent was prohibited from paying lower wages unless it obtained USMS approval for reductions in its compensation plan. The Respondent was free to pay wages greater than the rates specified in the plan. The Respondent, however, would not be reimbursed by the USMS for amounts over the

<sup>3</sup> The judge's description of the contract as having a 5-year term but reserving to the USMS an annual right to cancel is in error.

contract rates without prior approval of the USMS. Nicholas Laporte, the Respondent's vice president for administration, testified that the Respondent could increase the CSOs' hourly wages above the rate the Respondent was reimbursed by the USMS, "but we don't as a rule do that" because "we couldn't afford it."

As the contract was subject to the Service Contract Act of 1965,<sup>4</sup> the wage rates could not be below the prevailing area wage determined by the Secretary of Labor. The contract provided, in a section concerning multiyear and option contracts, that "[t]he minimum prevailing wage determination, including fringe benefits . . . current at the beginning of each renewal option period, shall apply to any renewal of this contract." If the prevailing wage increased to a level above that set in the contract, the Respondent would be required to pay no less than the prevailing wage and would be reimbursed at the prevailing wage rate by the USMS.

The wage determination also mandated certain minimum fringe benefit levels for health and welfare, vacations, and number of holidays. However, the Respondent had discretion to pay its CSOs a specified hourly amount in lieu of health and welfare coverage. Additionally, the Respondent was not prohibited from exceeding the minimum benefit levels or from providing additional types of benefits. According to Laporte, the Respondent provided its CSOs 3 days of bereavement leave, which the wage determination did not require.<sup>5</sup>

When the Respondent began work under its contract with the USMS, it hired the CSOs who had been employed by the prior contractor. In filling job openings that subsequently occurred, the Respondent advertised the jobs, gathered applications, interviewed applicants, and had them complete application forms provided by the USMS. To be hired, applicants had to meet training, experience, and medical requirements set by the USMS. The Respondent decided which applicants' forms to submit to the USMS for background investigation. The contract provided that a CSO could not begin work prior to passing the USMS' preliminary background investigation. After a further investigation, the USMS, if not satisfied, could require the CSO's removal from duty.

On the job, CSOs received work assignments and directions from lead CSOs employed by the Respondent. As provided by the contract, USMS personnel did not usually issue directions to a CSO except in an

emergency. Rather, USMS officials communicated their wishes to the Respondent's contract manager or a lead CSO. According to Lead CSO James Perkins, the Respondent's lead CSOs decided which CSO to assign to each post and transferred CSOs from one location to another without seeking approval of USMS personnel. The CSOs' paychecks were issued by the Respondent.

The USMS, however, was involved with the Respondent's operations under the contract in a number of respects. Pursuant to the contract, the USMS determined the location and number of CSO posts, the duties to be performed at each post, the hours of coverage and workshifts, and the length of CSOs' breaks and lunch periods. The USMS also required that CSOs sign in when reporting for duty and sign out at the end of the work day and determined when overtime would be worked. The contract also set forth a dress code for CSOs.

Additionally, the contract contained a "Removal from duty/replacement of CSOs" clause providing that the USMS could require the contractor to remove from the worksite any employee disqualified for suitability or security reasons or found to be unfit for the performance of security duties. The clause specified 11 types of misconduct or delinquency that could result in a determination of unfitness, such as neglect of duty, disorderly conduct, theft, and misuse of weapons.

The contract also contained a "Standards of Conduct" clause providing that the contractor was responsible for "maintaining satisfactory standards of employee competency, conduct, appearance, and integrity" and for taking such disciplinary action as necessary. The clause further provided that the USMS code of conduct would "provide the Contractor guidance in developing a standard for employees under this contract" and that the USMS could require the contractor to remove any CSO from CSO duties for disregard of the code of conduct. The USMS code of conduct was set forth in an attachment to the contract. Additionally, a contract clause concerning the contract manager enforce CSOs' adherence to the "Standards of Conduct" clause.

Laporte testified that the Respondent had terminated CSOs at the "implied or express direction" of the USMS and that the Respondent had no private contracts in northern California during 1988 through 1989 (the period during which the events at issue in this case occurred), although it did have a private contract in that area in 1991. Deputy United States Marshal Donald Davey, who was the USMS' district court security coordinator in San Francisco, testified that on two or three occasions the USMS had directed the Respondent to "let one of the CSOs go."

<sup>4</sup> 41 U.S.C. § 351 et seq.

<sup>5</sup> The judge found that upon the USMS's acceptance of the Respondent's bid, the wage and benefit schedule contained in that bid became fixed, subject to increase only on DOL adoption of an area prevailing wage exceeding the Respondent's wage and benefit schedule. As indicated above, however, the evidence shows that the wage and benefit schedule set only the Respondent's reimbursement rate from the USMS; it did not bar the Respondent from paying its CSOs a higher rate.

### B. Discussion

As established in *National Transportation Service*, 240 NLRB 565 (1979), the Board will assert jurisdiction over an employer providing services to a governmental entity that is itself exempt from the Board's jurisdiction unless the employer lacks sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative. In *Res-Care, Inc.*, above, the Board reaffirmed and clarified the *National Transportation* test. The Board stated that it would "examine closely not only the control over essential terms and conditions of employment retained by the employer, but also the scope and degree of control exercised by the exempt entity over the employer's labor relations." 280 NLRB at 672. The Board noted a core group of basic bargaining subjects and stated that "if an employer retains control over decisions affecting those subjects, meaningful bargaining is possible." *Id.* at 674.

Finding that the exempt governmental entity retained control over the primary elements of wages and benefits as well as other aspects of the employer's personnel policies, the Board in *Res-Care* declined to assert jurisdiction.<sup>6</sup> In a companion case, *Long Stretch Youth Home*, 280 NLRB 678 (1986), the Board distinguished *Res-Care* and asserted jurisdiction based on that employer's retention of sufficient control over the essential terms and conditions of employment.<sup>7</sup>

Subsequently, in *Community Transit Services*, 290 NLRB 1167 (1988), the Board clarified that *Res-Care* did not "stand for the proposition that the employer must retain control over each of the economic aspects of its labor relations if meaningful bargaining is to be possible." *Id.* at 1170 fn. 5. The Board indicated in *Community Transit*, however, that control over solely noneconomic terms would not be sufficient.

It is well established that "[a]n employer seeking to avoid the Board's exercise of jurisdiction carries the burden of showing that it is not free to set the wages,

<sup>6</sup>The employer in *Res-Care* had a contract with the U.S. Department of Labor (DOL) to operate a residential Job Corps center. The employer submitted to DOL a detailed proposal, including a list of job classifications, a labor grade schedule, and a salary schedule setting minimum and maximum wage rates for each labor grade. DOL also asked the employer to submit its personnel policies, including fringe benefits. Once the employer's contract proposal was accepted, the employer could not change wage ranges or fringe benefits without DOL approval. DOL also retained substantial control over other aspects of the employer's personnel policies.

<sup>7</sup>The employer in *Long Stretch* had a contract with a state agency to operate a juvenile residential facility. The state agency reviewed the salaries paid by the employer as part of the annual budget process and issued general cost guidelines suggesting salary ranges for each job classification. The state agency's actual involvement in setting the wages paid by the employer was limited, however, to rare investigation and discussion of whether the employer was paying "grossly unfair" salaries. The state agency also reviewed the employer's benefits but only to insure that certain types of benefits were provided, without regard to amount.

fringe benefits, and other terms and conditions of employment for its employees." *R. W. Harmon & Sons*, 297 NLRB 562, 563 (1990), citing *Firefighters*, 292 NLRB 1025, 1026 (1989). We find that the Respondent has failed to satisfy this burden.

We find that the Respondent is largely free to set the wages and benefits of its CSOs. In formulating its contract proposal, the Respondent chose the wage rates that were incorporated in the contract. Once adopted, these wage rates became a minimum but did not prohibit the Respondent from compensating its CSOs at higher rates. That the Respondent "as a rule" did not increase wage rates above the reimbursement rate provided in its contract with the USMS does not establish that the Respondent was prohibited from doing so but only that it preferred not to do so. Thus, unlike in *Res-Care*, no maximum limits were imposed on wages the Respondent could pay.<sup>8</sup> Similarly, the Respondent's contract required a certain minimum level of benefits, but the Respondent was not prohibited from exceeding that level. Even with regard to the mandated health and welfare benefits, the Respondent had the option of providing either the benefits themselves or a cash equivalent.

Additionally, the Respondent's contract with the USMS was subject to the Service Contract Act of 1965. In several prior cases, the Board has found that the Service Contract Act does not bar meaningful bargaining but, rather, accommodates it. As the Board explained in *Dynalectron Corp.*, 286 NLRB 302 (1987), the Service Contract Act provides for substitution of collectively bargained wages and benefits for the prevailing compensation rates set forth in wage determinations. See *Koba Associates*, 289 NLRB 390, 393 (1988); *Old Dominion Security*, 289 NLRB 81 (1988); see also *FKW, Inc.*, 308 NLRB 598 (1992). Thus, "if during the term of the contract, the [Respondent] were to enter into a collective bargaining agreement . . . the collectively bargained rates would become the new wage determination at the next renewal period." *Koba Associates*, *supra* at 394 (fn. omitted). As noted above, the Respondent's contract with the USMS provided for annual renewal periods, with the wage determination current at the beginning of each period to apply to the renewal.

There is an exception to the Service Contract Act's requirement that collectively bargained wage rates and benefits be incorporated in the wage determination. The DOL will not adopt such rates if they are not the result of arm's-length negotiations or if the Secretary of Labor finds, after a hearing, that the wages and benefits clearly are "substantially at variance" with those

<sup>8</sup>*PHP Healthcare Corp.*, 285 NLRB 182 (1987), cited by the Respondent, is distinguishable in that there, as in *Res-Care*, the governmental entity directly controlled the minimum and maximum wages and step increases of the contractor's employees.

prevailing in the area. See *Dynalectron Corp.*, supra at 304. The Board has found that Congress considered such circumstances to be unusual. It has noted, however, that even if a government contractor were forced to absorb collectively bargained wage increases, this situation would be no different from that facing any private company working on a fixed-price contract at the time a new collective-bargaining agreement is negotiated and that, in any event, the contractor could bargain for language in the collective-bargaining agreement protecting it if the rates were not incorporated in a revised wage determination.<sup>9</sup> Id. at 305. Moreover, in the present case, there is no evidence that collectively bargained wage and benefit increases would not have been incorporated in the wage determinations here. See *Old Dominion Security*, supra at 82.<sup>10</sup>

The Respondent also has failed to show that it did not retain control over many of its CSOs' non-economic terms and conditions of employment. Thus, the Respondent solicited, screened, and interviewed job applicants and decided which applications to forward to the USMS for security checks. The Respondent had supervisors present at facilities where its CSOs were stationed, and the Respondent's supervisors, rather than USMS personnel, normally directed and supervised CSO activities. Under the contract, the Respondent was responsible for maintaining standards of employee competency, conduct, appearance, and integrity and taking disciplinary action to enforce these standards. While the USMS could disapprove the hiring of an applicant as a CSO and could order the Respondent to remove a CSO, this did not preclude the Respond-

ent's retaining that individual in another capacity, such as to perform guard service for another client. Moreover, the Board has found a governmental entity's possession of authority to request a contractor to dismiss an employee did not preclude the Board's assertion of jurisdiction over the contractor. See *FKW, Inc.*, 308 NLRB 598 (1992); *Old Dominion Security*, 289 NLRB at 83; *Dynalectron Corp.*, 286 NLRB at 305. The Respondent's argument that the USMS's control over matters such as employment qualifications, dress codes, security clearances, work shifts, and CSOs' duties precludes the Respondent from engaging in meaningful collective bargaining is unpersuasive. In *Old Dominion Security*, the Board found similar restrictions to be operational controls necessary to "ensure contract compliance and maintenance of security measures at a secure facility," 289 NLRB at 83, and not to negate the employer's ability to engage in meaningful collective bargaining.<sup>11</sup>

We also find without merit the Respondent's arguments that the Board should not assert jurisdiction over the Respondent because the USMS and the Respondent are joint employers and because of the essential Federal role performed by the CSOs. As the Respondent acknowledges, it is well established that, in determining whether to refrain from asserting jurisdiction over a government contractor, the Board does not look to whether there is a joint employer relationship between the employer and the governmental entity. *Res-Care*, 280 NLRB at 673 fns. 12 & 14. Similarly, the Board long ago rejected the approach of refraining from asserting jurisdiction based on whether the employer's operations were intimately related to a governmental function. See *National Transportation Service*, 240 NLRB 565 (1979). Indeed, from the perspective of whether a governmental function is being performed, the role performed by the Respondent's CSOs is indistinguishable from the security services the employer performed for the U.S. Navy in *Old Dominion Security*, above, a case in which the Board asserted jurisdiction over the employer. And, more generally, the Board has repeatedly asserted jurisdiction over employers providing security services for the Federal Government. See *Champlain Security Services*, 243 NLRB 755 (1979); *Atlas Guard Service*, 237 NLRB 1067 (1978); *Federal Services*, 115 NLRB 1729

<sup>9</sup>The court of appeals in *Hicks v. NLRB (Ebon Research Systems)*, 880 F.2d 1396, 1399 (D.C. Cir. 1989), rejected the Union's contention there that the Service Contract Act would automatically incorporate into an existing contract any wage increases derived from collective bargaining. We need not pass on that proposition here. Regardless of whether the Service Contract Act requires incorporation of subsequently negotiated wage increases into an existing contract, that Act clearly provides for incorporation of such increases into subsequent contracts. Thus, under the Respondent's contract, such increases could be included in future 1-year contract renewals, which would occur within a fairly short period of time. In any event, the court's concern that adopting into government contracts the wage terms of subsequently negotiated collective-bargaining agreements would provide a means "to milk the government without limit" at no cost to the contractor is addressed by the above-noted exception to the Service Contract Act providing that the DOL will not incorporate wage rates substantially at variance with those prevailing in the area or not the product of arm's-length negotiations. See *Dynalectron Corp.*, 286 NLRB at 304.

<sup>10</sup>Thus, *Southwest Ambulance of California*, 295 NLRB 125 (1989), cited by the Respondent, is inapposite. In that case, the Board found that the contractor had little or no flexibility regarding personnel costs and that the governmental entity had rejected the contractor's proposed wage increase for its current contract. The Board distinguished *Old Dominion Security*, 289 NLRB 81 (1988), where, as here, there was no evidence that the exempt entity would have disallowed expenditures for higher wages and fringe benefits arrived at through collective bargaining.

<sup>11</sup>The Respondent's reliance on *Thums Long Beach Co.*, 295 NLRB 101 (1989), is misplaced. There the Board declined to assert jurisdiction over a contractor that could not engage in meaningful collective bargaining because the governmental entity had the "final say" over the wages and benefits of the contractor's employees and retained control of the very matter over which the contractor was alleged to have unlawfully refused to bargain, the subcontracting of work. In the present case, however, we have found that the Respondent is largely free to set the wages and benefits of its CSOs and there is no refusal-to-bargain allegation because the employees are unrepresented.

(1956); see also *U.S. Corrections Corp.*, 304 NLRB 934, 937 at fn. 32 and accompanying text (1991).

Based on the foregoing, we find that the Respondent has failed to prove that it did not retain sufficient control over its CSOs' wages, benefits, and other terms and conditions of employment to engage in meaningful collective bargaining. Accordingly, we will assert jurisdiction over the Respondent.<sup>12</sup>

## II. LAWFULNESS OF PARTICULAR RULES IN THE RESPONDENT'S CODE OF CONDUCT

In his decision, the judge found, inter alia, that rules 8, 23, and 29 of the Respondent's code of conduct violated Section 8(a)(1) of the Act. We agree that rules 8 and 29 are violative, but we reverse as to rule 23.<sup>13</sup> Rule 23 required the Respondent's CSOs to:

Not make statement(s) about fellow employees or officials with knowledge of the falseness of the statement or with ruthless disregard of the truth which would be a defamatory falsehood made with malice.

The judge did not find rule 23 to have played any part in the Respondent's discipline of CSOs Brady and Clarke or its discharge of Brady, all of which the judge found unlawful. Rather, he found the Respondent's maintenance of rule 23 to be unlawful per se. The cases on which the judge relied in finding the rule violative establish that "within the area of concerted activities, false and inaccurate employee statements are protected so long as they are not malicious," *Wabeek Country Club*, 301 NLRB 694, 699 (1991), quoting *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131

<sup>12</sup>Indeed, we note that the Board has asserted jurisdiction over the Respondent in two prior cases concerning its operations under contracts with the USMS similar to that in the present case. See *Central Security Systems*, 21-RC-18978 (June 11, 1992) (unpublished order denying request for review of Regional Director's Decision and Direction of Election); *Central Security Systems*, Case 1-RC-19384 (1990) (same). Although the case captions indicate a slightly different name for the employer in those cases, it is clear from the record that the Respondent is the same entity as that employer.

Member Browning agrees that the Respondent has not met its burden of proving that it is not subject to the Board's jurisdiction under the test set forth in *Res-Care, Inc.*, supra, 280 NLRB 670. In doing so, however, Member Browning does not pass on the continuing validity of the *Res-Care* test.

<sup>13</sup>The Respondent excepts to the judge's finding the Respondent's rules 8, 23, and 29 "void and unenforceable." As indicated above, we are dismissing the complaint allegation regarding rule 23. With respect to rules 8 and 29, we note that while the judge used the "void and unenforceable" phraseology in his analysis, he did not do so in his conclusions of law, remedy, recommended Order, or notice to employees. Rather, his recommended Order requires the Respondent to cease and desist from maintaining and enforcing rules which interfere with, restrain, or coerce employees in the exercise of their Section 7 right to engage in concerted activities for mutual aid or protection. Accordingly, the judge's decision does not order the voiding of these rules in their entirety. We find this remedy appropriate in the circumstances of this case.

(1978), and that, therefore, work rules prohibiting merely false statements violate Section 8(a)(1). It is also well established, however, that "false statements that are knowingly false and therefore malicious are unprotected." *Radisson Muehlebach Hotel*, 273 NLRB 1464 (1985).

The Respondent's rule 23 did not prohibit statements that were merely false. Rather, the prohibition of that rule was much narrower. It prohibited only those statements made "with knowledge of the falseness of the statement or with ruthless disregard of the truth which would be a defamatory falsehood made with malice." Because such statements are not protected, see *Radisson Muehlebach Hotel*, above, we dismiss the allegation that rule 23 violated Section 8(a)(1) of the Act.<sup>14</sup>

The judge found that the Respondent's rule 29 violated Section 8(a)(1). Rule 29 provided that "[o]nce on duty, the carrying and reading of any type of literature is strictly forbidden." We adopt the judge's finding, but only on the basis that the rule was overbroad in that it reasonably could be understood to mean that CSOs were prohibited from carrying or reading literature concerning union or other protected concerted activity from the time that they came on duty or began their shift, including during breaks or meal periods. Cf. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992) (ambiguity in work rule resolved against promulgator of rule); *Southeastern Brush Co.*, 306 NLRB 884 fn. 1 (1992) (rule overbroad as "company time" could reasonably be construed as encompassing both working and nonworking time).

We find unpersuasive the Respondent's contention that its rules cannot be found to violate the Act because the Respondent was required to adopt the USMS' code of conduct, of which two of the rules at issue are a part. (The Respondent's rule 29 is not contained in the USMS' code of conduct.) The Respondent fails to cite any statute mandating that it adopt the USMS' code of conduct. Rather, the Respondent's asserted obligation to adopt the USMS' code of conduct is based solely on its contract with the USMS into which the Respondent entered voluntarily.

As noted above, the Respondent's contract with the USMS required the Respondent to maintain "standards of employee competency, conduct, appearance, and integrity" and stated that the USMS code of conduct, contained in an attachment to the contract, would "provide the Contractor guidance in developing a standard for employees." (Emphasis added.) This provision did not require that the Respondent adopt the USMS's code of conduct but only that the USMS code of conduct would give the Respondent "guidance" in developing employee standards. While the contract also reserved to the USMS the right to require the Re-

<sup>14</sup>The judge's conclusions of law are modified accordingly.

spondent to remove any CSO for disregard of the code of conduct, this provision did not require the Respondent itself to adopt the USMS's code of conduct.

Additionally, the Respondent notes that the USMS code of conduct contained the following introductory statement:

The integrity of the Marshals Service is dependent upon the conduct of its individual employees. A minimum Code of Conduct is set forth below to provide guidance in achieving a greater individual standard.

It is clear from its context and language that this statement was addressed to Marshals Service employees. Thus, its reference to a "minimum" code of conduct did not constitute a requirement that the Respondent adopt at a minimum the USMS' code of conduct. Rather, it was an exhortation to Marshals Service employees to achieve even a "greater individual standard" than the "minimum" code of conduct set forth therein.

In sum, while the contract required the Respondent to maintain standards of employee conduct and required that the USMS code of conduct serve as guidance to the Respondent, it did not require the Respondent simply to adopt the USMS code of conduct, which is what the Respondent largely did. Indeed, there is no indication that the Respondent made any effort to tailor its code of conduct rules so as to take cognizance of its employees' Section 7 rights.<sup>15</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Central Security Services, Inc., San Francisco, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer John E. Brady immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. In addition, notify the United States Marshals Service in the manner set forth in the remedy section of the judge's decision."

2. Substitute the attached notice for that of the administrative law judge.

<sup>15</sup> The Respondent required its CSOs to acknowledge in writing that they had received the Respondent's code of conduct for CSOs and that any violation of the code of conduct rules could result in reprimand, suspension, or "loss of pay on termination." However, the record does not support the judge's statement that "[u]nder terms of the contract, USMS required each CSO to acknowledge and agree to comply with a code of conduct issued by USMS."

#### 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 interrogate you concerning the identity of other employees engaged in concerted activities for employees' mutual aid or protection or the extent of other employees' engagement in those activities.

WE WILL NOT tell you that you cannot engage in concerted activities for employees' mutual aid and protection or that an employee has been discharged for engaging in those activities.

WE WILL NOT maintain and enforce rules which interfere with, restrain, or coerce you in the exercise of your right under the Act to engage in concerted activities for employees' mutual aid or protection.

WE WILL NOT disparately enforce rules against you for engaging in concerted activities for employees' mutual aid or protection.

WE WILL NOT warn, place on probation, suspend, discharge, or otherwise discipline you for engaging in concerted activities for employees' mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer John E. Brady immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, WE WILL notify the United States Marshals Service that we erroneously advised them that John E. Brady abandoned his duty post to solicit an employee's signature on a letter, and WE WILL request the United States Marshals Service approve John E. Brady's reinstatement and redeputization.

WE WILL make John E. Brady whole for any loss of earnings and other benefits resulting from the discrimination we practiced against him for engaging in

concerted activities for employees' mutual aid or protection, less any net interim earnings, plus interest.

WE WILL remove from our records any record of the discipline we levied against John E. Brady and Edward Clarke for engaging in concerted activities for employees' mutual aid or protection and advise Brady and Clarke in writing that this has been done and that their engagement in those activities shall have no effect on their employment.

#### CENTRAL SECURITY SERVICES, INC.

*Jonathan J. Seagle*, for the General Counsel.  
*Roger Jeanson, Esq. (Berman, Berkley & Lasky)*, of San Francisco, California, for Central Security.

#### DECISION

##### STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On August 15, 16, and 19, 1991, I conducted a hearing at San Francisco, California, to try issues raised by a complaint issued on April 3, 1989, based on a charge filed by John E. Brady, an individual, on February 17, 1989, and amended on March 31, 1989.<sup>1</sup>

The complaint alleged Central Security Services, Inc. (Respondent) at pertinent times was an employer engaged in a business affecting interstate commerce as defined in Section 2 of the National Labor Relations Act (the Act) and committed various violations of Section 8(a)(1) of the Act.

The Respondent in its answer to the complaint contended the National Labor Relations Board (the Board) should refrain from exercising its jurisdiction in this case on the ground it and its affected employees were engaged in rendering security services to an entity exempted from the coverage of the Act (United States Marshals Service—USMS hereafter) which exercised pervasive control over the core employment conditions of those employees.

The Respondent in its answer also denied committing any violation of the Act.

The issues created are: (1) whether the Board should refrain from exercising its jurisdiction in this case and (2) if not, whether the Respondent committed the alleged acts, thereby violating the Act. The General Counsel and the Respondent appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Both counsel filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

#### FINDINGS OF FACT<sup>2</sup>

##### I. JURISDICTIONAL ISSUE

At all pertinent times the Respondent, a New York corporation headquartered in New York, has been engaged in

the business of providing security services for profit. Its major business has been providing those services, by contracts with USMS, at Federal district and appellate courthouses within the jurisdiction of the First, Second, Third, Ninth, Eleventh, and District of Columbia Circuit Courts of Appeal.

In 1988 the Respondent supplanted Wackenhut Corporation as the supplier of those services within the jurisdiction of the Court of Appeals for the Ninth Circuit, which encompasses courthouses in northern California housing United States district courts and the Ninth Circuit Court of Appeals in San Francisco, Oakland, Santa Rosa, and San Jose, California.

It is undisputed the Respondent satisfies the normal standard for the exercise of the Board's jurisdiction under Section 2 of the Act, for at all pertinent times the Respondent was a private, for-profit corporation which received in excess of \$50,000 annually for the services it provided to an entity engaged in interstate commerce—USMS.

The Board has refrained from exercising its jurisdiction over such private, for-profit employers when the control exercised by the entity exempt from the Act's coverage over the core employment conditions of those employer's employees was of such a degree, a labor organization representing those workers could not bargain meaningfully with those employers over those conditions,<sup>3</sup> and has exercised its jurisdiction over such employers when the employers had discretion over those core employment conditions.<sup>4</sup>

All but two of the cases just cited involved representation; i.e., a private, for-profit employer's objection to proceeding to an election based on a union petition for certification as the exclusive collective-bargaining representative of the employees of that employer, on the ground an entity exempt from coverage under the Act exerted such control over its employees' core employment conditions the employer could not engage in meaningful bargaining with respect thereto.

In one exception,<sup>5</sup> the Board refrained from exercising its jurisdiction in a case involving an alleged unfair labor practice complaint alleging the private, for-profit employer violated Section 8(a)(5) of the Act by failing to bargain with the union representing a subcontractor's employees over the effect on the subcontractor's employees of its cancellation of the subcontracting. The Board refrained from exercising its jurisdiction on the ground the exempt entity (the city of Long Beach, California) controlled what subcontractors the employer could engage. In the other, the Board exercised jurisdiction over a case alleging the private for-profit employer

demeanor while testifying, and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

<sup>3</sup>*Associated Charter Bus Co.*, 261 NLRB 448 (1982); *Res-Care, Inc.*, 280 NLRB 670 (1986); *PHP Health Care Corp.*, 280 NLRB 182 (1987); *Southwest Ambulance of California*, 295 NLRB 125 (1989); *Thum's Long Beach Co.*, 295 NLRB 101 (1989); *Career Systems Development Corp.*, 301 NLRB 436 (1991).

<sup>4</sup>*Long-Stretch Youth Home.*, 280 NLRB 678 (1986); *ARA Services*, 283 NLRB 602 (1987); *Dynalectron Corp.*, 286 NLRB 302 (1987); *Old Dominion Security*, 289 NLRB 81 (1988); *Career Systems Development Corp.*, 301 NLRB 434 (1991); *U.S. Corrects Corp.*, 304 NLRB 934 (1991); *Hicks v. NLRB*, 964 F.2d 11 (D.C. Cir. 1992), affg. sub nom. *Ebon Research Systems*, 302 NLRB 762 (1991), and 290 NLRB 751 (1988).

<sup>5</sup>*Thum's Long Beach Co.*, id.

<sup>1</sup> Read 1989 after further date references omitting the year.

<sup>2</sup> While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses'

violated Section 8(a)(1) and (3) by discharging an employee for engaging in union activities and interfering in employee engagement in union activities.<sup>6</sup>

In an apparent application of the latter cases in a case involving this employer,<sup>7</sup> while the General Counsel refused to issue a complaint based on portions of a charge alleging Central Security violated Section 8(a)(5) and (1) of the Act by changing the hours of employment of security personnel performing services under a Central Security-USMS contract, on the ground USMS had and exercised the power to require the change—the General Counsel reserved ruling on whether to issue a complaint on the balance of the charge, alleging violations of other sections of the Act.

In this case, the complaint alleged the Respondent violated Section 8(a)(1) of the Act by: (1) giving the impression it was surveilling concerted employee activity protected by the Act; (2) telling employees they could not engage in concerted activities protected by the Act; (3) interrogating employees concerning concerted activities protected by the Act; (4) telling employees an employee had been terminated for engaging in concerted activities protected by the Act; (5) maintaining and enforcing an unlawful no-solicitation, no-distribution rule; (6) suspending and discharging an employee for engaging in concerted activity protected by the Act; and (7) disciplining another employee for engaging in concerted activity protected by the Act.

Under the contract between the Respondent and USMS governing the services provided by the Respondent at the northern California courthouses, USMS determined:

1. The number and location of the posts to be manned by the court security officers (CSOs) employed by the Respondent.
2. The duties performed by the CSOs.
3. The CSOs' duty hours and break times.
4. The number of CSOs the Respondent employed to render the services required.
5. The CSOs satisfaction the following requirements:
  - (a) Graduation from a certified federal, state, county or local law enforcement training program, Military Police training program or the equivalent.
  - (b) Completion of 3 years of employment as a certified law enforcement officer.
  - (c) Satisfaction of specified physical standards, including height and weight requirements.
  - (d) Demonstrates proficiency in weapons handling.
  - (e) Compliance with a specified dress code and specified personal grooming standards.
  - (f) Passing of a background security check.<sup>8</sup>

USMS also exercised sole and unilateral authority to grant, deny or rescind deputization of the CSOs as Deputy United States Marshals (and the issuance, refusal of issuance, and required return of badges or other forms of credentials establishing such status).<sup>9</sup>

Under terms of the contract, USMS required each CSO to acknowledge and agree to comply with a code of conduct

issued by USMS and empowered its agents, and reserved, unilateral and final power to direct the termination of any CSO on the basis of a unilateral determination by USMS the CSO engaged in misconduct, nonperformance, or failure to comply with its rules and regulations.

With respect to wages and benefits, USMS required the Respondent to submit a wage and benefit schedule for the 5-year contract term<sup>10</sup> and, upon USMS' acceptance of the Respondent's bid, that wage and benefit schedule became fixed, subject to increase only upon United States Department of Labor (DOL) publication of an area prevailing wage and benefit schedule exceeding the contract wage and benefit schedule,<sup>11</sup> and then only upon USMS approval of the change necessitated by the DOL determination.

Under the contract, the Respondent was responsible for the recruitment, screening, and hire of its prospective hires for work in the northern California courthouses, subject to a security check and approval by USMS, but avoided the time and expense associated with that procedure by simply hiring, with USMS' approval, the employees of its predecessor.

The Respondent was also responsible under the contract for "maintaining satisfactory standards of employee competency, conduct, appearance and integrity and . . . responsible for taking such disciplinary action with respect to his employees as may be necessary."

In this case USMS revoked Brady's deputization as a United States Marshal, required his surrender of his credentials, and advised that the Respondent Brady "had to go" on the basis of information provided by the Respondent and the Respondent alone engaged in the alleged unlawful acts of surveillance, interrogation, utterances of coercive statements, and impositions of discipline (including suspension, discharge, and reduction to probationary status) set forth as unfair labor practices in the complaint, as well as the enforcement of rules allegedly violative of the Act.

Were this a case in which a union was seeking, through a Board-conducted election, certification as the exclusive collective-bargaining representative of the Respondent's northern California employees—or a bargaining order based on an alleged violation of Section 8(a)(5) of the Act—Board refusal to exercise its discretionary jurisdictional powers in this case might be warranted.

This case, however, involves the alleged violation by the Respondent of Section 8(a)(1) of the Act by interference with, restraint and coercion of its employees, including discipline and discharge, for engaging in concerted activities protected under Section 7 of the Act and the promulgation

<sup>10</sup>The contract contemplated a 5-year term. USMS, however, reserved the unilateral right to cancel the contract at each anniversary date during the term of the contract.

<sup>11</sup>The benefit schedule included a paid vacation benefit based upon years of service. The Respondent interpreted the requirement as limited to years *in its service*; USMS disagreed and insisted the Respondent grant paid vacations based on each CSO's previous service for all contractors to whom USMS awarded contracts for the Northern California courts. The Respondent accepted the USMS interpretation, though USMS refused to reimburse the Respondent for the additional and unanticipated additional cost to the Respondent (which based its bid on its interpretation of the benefit provision). The contract provision relied upon by USMS stated the Respondent would not be reimbursed for labor costs exceeding those set forth in the wage and benefits schedule.

<sup>6</sup>*Hicks v. NLRB*, supra.

<sup>7</sup>*Central Security Systems*, Case 1-CA-28380 (1991).

<sup>8</sup>The Respondent, as was customary, avoided time delays and recruitment costs by simply retaining all the CSOs employed by its predecessor.

<sup>9</sup>Such deputization was necessary for the performance of CSO duties, i.e., carrying weapons, effecting arrests, etc.

and enforcement of rules inhibiting their exercise of their Section 7 rights.

There are no reported cases where the Board has refrained from exercising its jurisdiction to determine the merits of a complaint alleging such unfair labor practices on the ground an entity exempt from Act coverage, acting on the basis of information supplied by the employer accused of committing the unfair labor practices in question, played a role in the commission of those alleged unfair labor practices, nor would it be reasonable to so refrain here, enabling the Respondent to escape liability for its acts.

I therefore find and conclude at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act (based upon jurisdictional facts recited heretofore) and further find and conclude this is a case in which the Board should exercise its plenary jurisdiction to determine whether the Respondent committed the unfair labor practices alleged in the complaint, and, if so, determine the appropriate remedy therefor.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Issues*

The issues raised by the complaint and the Respondent's answer thereto are whether the Respondent violated Section 8(a)(1) of the Act by:

1. Giving employees the impression it was surveilling their engagement in concerted activities protected by the Act.
2. Interrogating employees concerning such engagement.
3. Telling employees they could not engage in such activities.
4. Telling employees an employee had been terminated for engaging in such activities.
5. Maintaining and enforcing unlawful no-solicitation, no-distribution rules.
6. Issuing a disciplinary warning to an employee and placing him on probationary status for engaging in concerted activities protected by the Act.
7. Suspending and discharging an employee for engaging in such activities.

### B. *Facts*

As noted above, in 1988, the Respondent succeeded Wackenhut Corporation as the provider of CSO services to USMS in buildings housing Federal courtrooms in northern California and hired the Wackenhut employees previously performing those services to provide those services. James Perkins was retained by the Respondent as its site supervisor in overall charge of its northern California operations and liaison with the United States Marshal in overall charge of security at the northern California Federal courtrooms and courthouses. As required by the USMS-Respondent contract, the Respondent also designated a "lead CSO" as the immediate supervisor of the CSOs employed by the Respondent at each of the northern California courthouses. Perkins' immediate supervisor, headquartered in southern California and in overall charge of all the Respondent's operations within the Ninth Circuit, was Fred Vilella.<sup>12</sup> John Brady and Edward

Clarke were two of the CSOs formerly employed by Wackenhut who were employed by the Respondent when it succeeded Wackenhut on the USMS contract covering the northern California courthouses.

In 1988 both Brady and Clarke were employed at the Federal building housing the United States District Court in San Francisco and were close friends. Perkins maintained his office in the same building.

In 1988 Perkins transferred Brady to the building housing the Ninth Circuit Court in San Francisco after Brady wrote a letter to the Respondent's vice president complaining about Perkins' reversal of an agreement by the lead CSO to an exchange between Brady and another CSO of their posts for an hour in the afternoon, Perkins' refusal to grant him a requested transfer to fill a post and placing a CSO junior to him in the requested post, whether there was a grievance procedure and whether the Respondent had a policy regarding the application of seniority to requests for transfers. Neither the vice president to whom he addressed the letter nor any other management representative ever responded to Brady's letter.

Though the USMS-Respondent contract was effective in June 1988, by January 1989, the CSOs employed by the Respondent were still unaware of many terms of their present and future employment, and began questioning their immediate supervisors for that information, without success.

After discussions among a number of the CSOs concerning their dissatisfaction over their inability to secure the desired information, in late January 1989 Brady drafted a letter based on those discussions, setting forth the information the CSOs wanted, made copies of the draft, circulated copies to CSOs at the northern California courthouses (including the lead CSOs) for discussion and suggestion, and discussed what the final version of the letter should be with CSOs and lead CSOs at the various courthouses, including Clarke.

Clarke was an early supporter of the idea of appealing to the Respondent's president for the desired information and supported its preparation and sending, in discussions with other CSOs at his station.<sup>13</sup>

The draft read as follows:

Mr. Nicholas F. Pastorella  
President  
Central Security Systems, Inc.  
Staten Island, N.Y. 10306  
Mr. Pastorella:

This letter is being sent to you as a last resort. Several members of the court security unit have made numerous attempts using the chain of command to get answers to the following questions with no results. The questions we would appreciate you answering are as follows:

the Respondent acting on its behalf within the meaning of Sec. 2 of the Act. It was undisputed the lead CSOs exercised supervision and direction of the work of the CSOs at their respective locations and I therefore find and conclude the lead CSOs at all pertinent times also were supervisors and agents of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

<sup>13</sup> Clarke testified all such discussions occurred while he and those with whom he discussed the draft were off duty. His testimony is undisputed and is credited.

<sup>12</sup> The complaint alleged, the answer admitted, and I find at all pertinent times Vilella and Perkins were supervisors and agents of

1. How many vacation days are we entitled to? Are they prorated?
2. If so are they beginning with what contract? The first one or the current one.
3. How many sick days are we entitled to? Are they pro-rated?
4. Do we have Personal days? If so how many? Are they prorated?
5. Are we permitted to accrue our vacation and sick days?
6. Are we entitled to re-imbusement for shoes? sweaters that we purchase?

We are interested in learning of the health and benefit plan the company offers. Please advise us of the grievance policy of CSSI, a letter was mailed to Mr. Paul Haughom Vice-President requesting information on the matter on August 20, 1988, however, Mr. Haughom has not acknowledged the letter as of this date.

We will appreciate, whenever a change in the amount of money is made on our paychecks, whether greater or less, an explanation accompanying the check by way of an Inter-office memo. It has become extremely difficult at times for us to know exactly what we are getting and what we are supposed to get.

I do not know if you are aware of it or not but some of the personnel do not have a complete uniform.

Some of the CSOs have brought some of these questions to the attention of Mr. Fred Vilella, California contract manager, it appears the questions have been heard with deaf ears or ignored. Requests for personnel to meet with Mr. Vilella to discuss these questions when he is in San Francisco also have not been honored.

The undersigned members of the Court Security Unit of San Francisco, Oakland & the San Jose area will be grateful for your expeditious reply to this letter.

Copies of the letter are to be mailed to the following people:

Honorable Alfred T. Goodwin  
Chief Judge, U.S. Court of Appeals

Honorable William A. Ingram  
Chief Judge Federal Court  
450 Golden Gate Avenue  
San Francisco, CA

Honorable Stanley Wiegel  
Senior Judge  
Federal Court  
450 Golden Gate Avenue  
San Francisco, CA

Glen Robinson  
United States Marshall  
Federal Bldg.  
450 Golden Gate Ave.  
San Francisco, CA

The attached "ROUGH DRAFT," is for your perusal. If you have any thoughts that you would like to have mentioned please write them and attach them to this letter for inclusion in the final letter.

It has been suggested that the letter be signed in the following manner. Each person will print (legibly) his/her name then sign above it. The site worked at, will then be affixed by the signee.

EXAMPLES:

[Signature] John A. Doe  
JOHN A. DOE  
U.S. Court of Appeals  
San Francisco, CA

[Signature] Mary Anderson  
MARY ANDERSON  
Federal Building  
San Jose, CA

[Signature] Tom Horne  
TOM HORNE  
Federal Bldg.  
Oakland, CA

[Signature] Ed Brown  
ED BROWN  
Federal Bldg.  
San Francisco, CA

[Resp. Exh. 10]

The lead CSO at the San Jose courthouse informed Perkins that Brady had prepared and was circulating and discussing the draft among the CSOs and furnished Perkins a copy of the draft.

Perkins contacted Clarke, told Clarke he knew about the letter draft, identified Brady as its author, and asked if he was its coauthor. Clarke denied he was its coauthor. Perkins labelled Brady a "shit-disturber" and stated he had to transfer Brady once previously for "stirring up the troops." Clarke asked Perkins to secure the information requested in the draft. Perkins replied he worked for the company, not for the CSOs, he wasn't going to ask for the requested information, but he thought the Respondent was going to supply some information.<sup>14</sup>

Perkins supplied the copy of the draft he had received to Chief Deputy United States Marshall Richard Bippus, whose office was also in the Federal building housing the United States District Court in San Francisco.<sup>15</sup>

Bippus summoned Clarke to his office and told Clarke the letter could "cause problems" if it was sent to the judges listed as potential recipients of the letter and Davey, in a letter dated January 31 addressed to Vilella, stated:

This office is concerned that direct personal contact with officers of the courts, for whose security this office and your employees are responsible, may be attempted in a manner inconsistent with the procedures normally utilized for such personnel matters. This office would view any such personal contact as outside the recognized chain-of-command for Court Security Offi-

<sup>14</sup> Clarke's testimony to the foregoing was uncontradicted and is credited.

<sup>15</sup> The United States Marshall in charge of security for the northern California Federal courts, Glen Robinson, and the Deputy United States Marshall designated as the contract liaison officer between the Respondent and USMS with respect to the northern California courthouses, Donald Davey, were also housed in the building.

cers, and demonstrating questionable standards of conduct.

Please look into this matter, and either disabuse this office of the notion that such unprofessional contact is being undertaken by an employee of Central Security Systems, Inc., or identify the person or persons that authored the unsigned note and/or letter.

Villella responded by issuing a February 1 rule or directive addressed to CSOs employed by the Respondent throughout the buildings housing Federal courts within the jurisdiction of the Ninth Circuit Court ordering all CSOs employed by the Respondent at those courthouses to process any “[r]equests for information, assistance or lodging complaints . . . through the Lead CSOs”; “the Lead CSOs will refer CSO initiated communications directly to the Contract Manager, Supervisor or Marshall representative, as appropriate”; and “if this channel is not satisfactory to individuals, communications may be addressed in writing through the Lead CSO to the following: Fred J. Villella, area Contract Manager, Central Security Systems, Inc., 531 Encinitas Blvd., Encinitas, CA 92024.”; “CSOS ARE REMINDED THAT, AS EMPLOYEES OF CENTRAL SECURITY SYSTEMS, THEY MUST COMPLY . . . AND CONFORM WITH THE PROVISIONS PRESCRIBED FOR SUCH COMMUNICATIONS THROUGH THE CSSI CHANNELS. COMPLAINTS OR REQUESTS . . . RELATED TO CSO PERFORMANCE AND CONDITIONS UNDER THIS CONTRACT ARE TO BE CONDUCTED THROUGH THE CHANNELS DESCRIBED ABOVE.”

After participating in discussions of the views and suggestions of various CSOs concerning the draft and Clarke’s report Bippus thought it would be inadvisable to send copies of the letter to the judges, over the weekend of February 4-5, Brady prepared a revised, final version of the letter, eliminating the proposed sending of the letter to the judges and making other changes in line with the views and suggestions he had received.

Brady dated the final version of the letter February 15, in order to provide time within which to secure signatures thereto of the CSOs who were interested in securing the requested information and in the hope the Respondent might furnish the requested information prior to that date (in view of Perkins’ comment to Clarke in late January that he thought the Respondent was going to supply some information), in which case it would be unnecessary to send the letter.

Brady began contacting CSOs (including lead CSOs) at the northern California courthouses on Monday, February 6, to solicit the lead CSOs and CSOs stationed at the various courthouses to read and sign the letter. He signed the letter, secured the signatures of three other CSOs stationed at the courthouse where he was assigned, and secured the signature of CSO David Banda on February 7 at the Federal building housing the district court in San Francisco. He visited the building housing the Federal bankruptcy court in Oakland prior to shift starting time on February 9, but was unsuccessful in securing any signatures thereto when the lead CSO there (Leonard Bullock) declined his invitation to read and sign the letter (in the presence of two CSOs), stating Perkins had received the information the CSOs were seeking, with

Brady replying in that case there was no need to send the letter and departing.<sup>16</sup>

Brady brought the letter to Clarke; Clarke signed it, gave it to another CSO for his reading and signing if he desired, and he signed it as well. The final letter, then, by February 9 had seven CSO signatures thereon. The letter read as follows:

February 15, 1989

Mr. Nicholas F. Pastorella  
President  
Central Security Systems, Inc.  
84 New Dorp Plaza  
Staten Island, N.Y. 10306  
Mr. Pastorella:

This letter is being sent to you as a last resort. Several of the members of the court security unit have made numerous attempts using the chain of command to get answers to the following questions with no results. The questions we would appreciate you answering are as follows:

1. How many vacation days a year are we entitled to? Are they pro-rated?
2. How many sick days are we entitled to? Are they pro-rated?
3. Do we have personal days? Are they pro-rated?
4. Are we permitted to accrue our vacation, sick days and personal days?
5. Are we entitled to re-inbursement for shoes and sweaters that we purchase as part of our uniform requirements?
6. Will we receive an increase in our hourly wage at the end of the contractual year, if so how much?

We are interested in learning of the health and benefit plan the company is offering.

Please advise us of the grievance policy of CSSI, a letter was mailed to Paul Haughom Vice-President requesting information on the matter August 20, 1988 however, Mr. Haughom has not acknowledge the letter as of this date.

We will appreciate, whenever a change in the amount of money is made on our paychecks, whether greater or less, an explanation accompany the check by way of an inter-office memo explaining the adjustment. At times it is difficult to determine what we are getting and what we are supposed to have.

I do not know if you are aware of it or not but some personnel do not have complete uniforms.

Some of the CSO’s have brought a few of these questions to the attention of Mr. Fred Villella, California Contract Manager, requesting for personnel to meet with Mr. Villella to discuss these matters when he is in San Francisco have not been honored.

It does not seem unreasonable to request a copy of benefits we are entitled to under the existing contract.

We will appreciate a timely response to our inquires.

Please note to whom we are sending copies of this letter.

<sup>16</sup>Brady’s testimony to this effect was uncontradicted and is credited.

Glen Robinson  
 United States Marshal  
 Northern District of California  
 Mr. Fred Vilella  
 California Contract Manager  
 Deputy Jim Davey  
 Liaison Office U.S.M.S.  
 Mr. Jim Perkins  
 Supervisor  
 Court Security Unit  
 Mr. Jim Hicks  
 Supervisor  
 U.S. Court of Appeals

In closing we ask that all information we are entitled to along with benefits for the part time personnel be sent to us in the same manner that the Code of Conduct was.

Personnel requesting this information have affixed their signatures below and on the attached sheet.

[G.C. Exh. 4]

Neither Perkins nor the USMS officials were aware of the changes in the final letter from the draft, including the elimination of the proposal to send copies of the letter to the judges.

While Brady and Clarke were circulating, discussing, and soliciting CSO signatures to the final letter, Perkins was summoned by Robinson and Bippus and asked what he was doing about complying with Davey's request either for assurance the CSOs were not preparing to send copies of their letter to the judges or identification of the author or authors of the letter. Perkins replied he hadn't done anything yet.

On February 9, Bullock reported to Perkins that Brady had been at the Oakland courthouse that morning, soliciting signatures to the letter. Perkins also received reports from other lead CSOs and CSOs to the same effect. He relayed that information to Marshals Robinson and Bippus; they stated they would like to see Brady "go away."<sup>17</sup> Perkins consulted with Vilella, related his information concerning the activities of Brady and Clarke vis-a-vis the letters (he still suspected Clarke was a coauthor as well as a circulator of the letters) and his interpretation of the Marshals' views. The two decided to suspend Brady while Perkins developed evidence concerning the activities of Brady and Clarke and Vilella traveled to San Francisco for determination of what final action to take against the two.

Perkins went to Brady's duty station prior to Brady's February 9 shift starting time (9:30 a.m.), stopped Brady from going to work and sought Brady's admission he had circulated a petition among the CSOs. Brady denied he was circulating any petition. Perkins stated then Clarke must be lying to him, Brady then admitted he had been circulating a letter among the CSOs addressed to the Respondent's president. Perkins told Brady he could not do that and was suspended, pending Vilella's arrival in San Francisco.

Perkins returned to the building housing his and the marshals' offices, reported to the latter Brady was the author and circulator of the letter and had been suspended pending fur-

ther review and Vilella's arrival; the marshals repeated their earlier view they would like to see Brady "go away."

Perkins began interrogating lead CSOs and CSOs who previously supplied him with reports concerning the activities of Brady vis-a-vis the preparation, circulation, discussion, and solicitation of signatures to the letters. He secured a written statement from the Oakland lead CSO (Bullock) on February 13, in which Bullock confirmed his February 9 oral report Brady came to the Oakland courthouse at about 8:35 a.m. (prior to starting time) and, in the presence of two CSOs, asked him to read and sign the letter; that he refused; and that neither of the other CSOs present read or signed the letter after hearing his refusal. Bullock gave no further details in his statement and was not called to testify. Perkins secured a second written statement from CSO David Banda on February 15, in which Banda confirmed an earlier oral report Brady contacted him in the basement of the building housing the San Francisco District Court at about 12:30 p.m. on February 7, asked him to read and sign the final letter, and that he complied with Brady's request. Banda testified, corroborating his written statement.

Perkins testified, but did not relate what other lead CSOs told him in the course of his interrogations. The Respondent did not produce any statements taken from those interviewees.

The Respondent produced Brady's February 7 work schedule, calling for a lunchbreak between 1 and 2 p.m. and also produced Brady's work record on February 7 showing he worked his scheduled 7-1/2 hours that day. The Respondent contended this evidence established Brady was AWOL (absent without leave) from his duty post; i.e., abandoned his duty post during scheduled working hours.

Brady corroborated Bullock's statement and Banda's statement and testimony, with one exception. He testified he solicited Banda's reading and signing of the letter during his lunchbreak, commenting it only took 5 minutes to travel between his and Banda's post. He also testified from time to time his lead CSO, James Hicks, permitted the CSOs under his supervision to vary from their schedules, covering their posts during such authorized departures from their schedule (by authorizing exchanges between CSOs, etc.). Brady's work schedule for his February 7 shift, initialed by Brady and signed by Hicks, shows Brady worked his full 7-1/2-hour shift that day, and Hicks was not called to testify, which supports my finding and conclusion the Brady-Banda encounter occurred either during Brady's scheduled lunch hour or during a Brady departure therefrom authorized by Hicks. I therefore find and conclude the Respondent failed to establish Brady was AWOL during the Brady-Banda encounter.

Even if I were to find and conclude to the contrary, undisputed testimony established the lead CSOs and the CSOs during working hours regularly and frequently discussed non-work topics; lead CSOs and CSOs circulated and discussed greeting cards, etc. and solicited signatures thereto; and lead CSOs solicited CSOs to attend various functions; all without censure, contrary instruction, or discipline, warranting my further finding and conclusion that prohibition or discipline for circulation, discussion, and solicitation of signatures to the letters here concerned constituted disparate treatment of employees engaged in those activities from the treat-

<sup>17</sup> Perkins interpreted the comment as a request for Brady's removal.

ment of employees engaged in the similar conduct just described.

Perkins supplied the Bullock and Banda statements to Marshals Robinson, Bippus, and Davey on securing the latter statement (on February 15). The marshals reiterated the view Brady "had to go."

On February 17, Vilella and Perkins summoned Brady to a meeting. Perkins asked Brady if he knew why he was there. Brady replied all he knew was that he had been suspended. Perkins stated Brady had circulated a petition during working hours, he could not do that, and that he was discharged for doing so. Brady responded he would see them in court and departed.

Clarke was summoned to meet with Vilella and Perkins following the Brady discharge. Clarke was handed a written, disciplinary warning for circulating the letters and requested to sign the warning notice, which he did. The notice read as follows:

February 13, 1989  
TO: CSO Edward R. Clarke  
U.S. Courthouse, San Francisco, CA  
FROM:SCSO James Perkins  
San Francisco, CA  
RE: Continued Employment

This memo, containing your signed acknowledgment, is a confirmation of a meeting we had this date concerning your continued employment as a Court Security Officer with Central Security.

You have been told that your retention is conditional, and you have been placed on probationary status for a period of at least three (3) months.

Among the areas of concern that were discussed today, and you have agreed to correct are:

\* You will obey all rules, regulations and lawful instructions of the contract employer (Central Security), U.S. Marshal's Service and Court Security Supervisory personnel.

\* Observe and abide by the "chain of command" rule, recognizing the need to *first* contact and communicate with the on-side [sic] Court Security Supervisor for advice, instructions, clarification on policy, shift/assignment changes, grievances or any other work related problems *before* proceeding *up or down* the chain of command.

\* I understand that failure to correct and/or adhere to the foregoing will be considered insubordination and may effect my continued employment with Central Security.

/s/ Edward R. Clarke

cc: Central Security file  
[GC Exh. 5]

During the meeting it was made clear to Clarke his circulation of the letters prompted his discipline and Brady's drafting and circulating the letters was the cause of his discharge, with Vilella commenting Brady previously wrote a letter to the Respondent's vice president, had again caused trouble with his current letter circulation, such action violated the rules, Brady wasn't the kind of employee the Respondent

wanted, and Brady had been discharged for preparing and circulating the current letter(s).

Pursuant to the USMS-Respondent contract, the Respondent promulgated and maintained a Code of Conduct containing, inter alia, the following rules:

Each Court Security Officer (CSO) of the contractor must manifest the following behavior conduct. The CSO must:

8. Not engage in any discussion concerning Department of Justice or United States Marshals Service (USMS) internal matter, policies, grievances or personalities and financial, personnel or family members with jury members, prisoners, witnesses, protectees, family members, the public or any known associate of the above.

23. Not make statement(s) about fellow employees or officials with knowledge of the falseness of the statement or with ruthless disregard of the truth which would be a defamatory falsehood made with malice.

24. Report serious violations of prescribed rules and regulations. Report violations of statute law to appropriate management officials.

29. Once on duty, the carrying and reading of any type of literature is strictly forbidden.

30. Neglect of duty, including sleeping while on duty, unreasonable delays or failure to carry out assigned tasks, conducting personal affairs during official time and refusing to render assistance or cooperate in upholding the integrity of the security program at the work sites.

Any violation of the above rules and regulations could result in a formal reprimand, suspension from duty and loss of pay or termination.

The day he was discharged, Brady filed the charge which led to this proceeding. Sometime following its receipt of a copy of the charge, the Respondent requested USMS' reaction to Brady's reinstatement.

On July 3, Marshall Robinson addressed a written reply to the Respondent's request containing, inter alia, the following statement:

Be advised this office will not approve Mr. Brady for any employment in the United States Marshals Service, nor will it accept him as a contract employee as a Court Security Officer in this district. His special deputization was removed following his termination by Central Security Systems, Inc., and is in accordance with the contract provision ". . . conducting personal affairs during official time . . ." as cited in subparagraph 8.1.2 of Section C-8 "removal from duty/replacement of CSO'S."<sup>18</sup>

<sup>18</sup>Sec. C-8 of the USMS-Respondent contract provides:

8.1. The contracting officer or his representative may request the contractor to immediately remove any employee(s) from the worksite(s) should it be determined that individuals are being assigned to duty who have been disqualified for either suitability or security reasons, or who are found to be unfit for the per-

*Continued*

The Respondent has not offered to reinstate Brady to his former or a substantially equivalent position since his discharge at any of the northern California courthouses nor offered him employment at any other facility where it provides security services.

Neither the original nor the final letter drafted by Brady, circulated among the CSOs by Brady and Clarke and discussed by Brady and Clarke with other CSOs were ever sent to the judges or to any other persons.

Marshal Davey testified USMS considered Brady's draft and circulation of the proposal that copies of the original letter be sent to the judges violated rule 8 and section 8.1 and 2 of the USMS-Respondent contract, irrespective of the fact the proposal was abandoned and no letter was ever sent to the judges, stating the drafting and circulation of the proposal among the CSOs violated the rule and warranted Brady's discharge (and, presumably, Clarke's discipline).

### C. Analysis and Conclusions

#### 1. Preliminary

All the Respondent actions alleged to constitute unfair labor practices in the complaint recite the complained of actions interfered with, restrained, or coerced employees in the exercise of their right under Section 7 of the Act to engage in concerted activity for their mutual aid or protection.

The initial question for determination, then, is whether CSO preparation, circulation, and discussion of the letter draft and CSO preparation, circulation, and solicitation of signatures to the final letter constituted such activity.

I find and conclude that it was; i.e., I find and conclude by Brady's preparation of a draft letter to the Respondent's president requesting information he and other CSOs desired concerning their rates of pay, wages, hours, and working conditions during the term of the Respondent-USMS contract—after their efforts to obtain that information from their immediate superiors were unsuccessful—his and Clarke's circulation of the draft among CSOs for review and suggestions, his and Clarke's discussion with CSOs of the draft and revisions or additions thereto, his preparation of the final letter containing revisions, changes, and additions derived from CSO discussion of the draft, his and Clarke's circulation of the final letter among CSOs and requests or solicitations other CSOs read the final letter and sign it, both Brady and Clarke were engaged in concerted activities for the mutual aid or protection of the CSOs employed by the Respondent in northern California within the meaning and application of Section 7 of the Act.<sup>19</sup>

formance of security duties during their tour(s) of duty. The Contractor must comply with these requests. For clarification, a determination of unfitness may be made from, but not limited to, incidents involving the most immediately identifiable types of misconduct or delinquency as set forth below: . . .

8.1.2 Neglect of duty, including sleeping while on duty, unreasonable delays or failure to carry out assigned tasks, *conducting personal affairs during official time*, and refusing to render assistance or cooperate in upholding the integrity of the security program at the work sites.

<sup>19</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989); *NLRB v. Henry Colder Co.*, 907 (7th Cir. 1990); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84

#### 2. The alleged late January violations (Perkins)

The complaint alleged and the Respondent denied in about the last week of January the Respondent violated Section 8(a)(1) of the Act when Perkins gave employees the impression the Respondent was surveilling the protected concerted activities of employees by telling employees he knew of their composing a letter to management concerning their terms and conditions of employment and by telling employees they could not engage in protected concerted activities.

These allegations are based on Perkins' statements to Clarke on January 31, in which he told Clarke he knew about Brady's preparation and distribution of the letter draft, knew its contents, asked Clarke if he was its coauthor and identified Brady as a "shit disturber," "stirring up the troops" by his preparation, circulation, and discussion of the letter with other CSOs.

While I find and conclude Perkins' announcement he knew the contents of the draft letter and that Brady had prepared and was circulating it does not support the conclusion Perkins thereby gave Clarke the impression the Respondent was surveilling CSO involvement in the preparation of the letter draft,<sup>20</sup> and the record fails to establish in the course of the conversation Perkins told Clarke he could not engage in its preparation, circulation, or discussion, Perkins' interrogation of Clarke concerning his suspected role in preparing the draft and characterization of Brady as an undesirable employee by virtue of his role in preparing, circulating, and discussing the draft violated Section 8(a)(1) of the Act, which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activities for their mutual aid or protection, including Brady's right to prepare, circulate, and discuss the draft letter.<sup>21</sup>

I therefore find and conclude by Perkins' questioning of Clarke regarding authorship of the draft and his derogatory remarks to Clarke over Brady's role in its preparation, circulation, and discussion, the Respondent violated Section 8(a)(1) of the Act.

#### 3. The alleged February 7 violations (Perkins)

The complaint alleged and the Respondent denied on about February 7 the Respondent violated Section 8(a)(1) of the Act by Perkins' interrogation of employees concerning the identity of the author of the draft and the extent of his activities with respect to its circulation and discussion.

This allegation is based on Perkins' admitted interrogation of CSOs who previously reported Brady's circulation and discussion of the draft letter to him, in order to secure firm

(2d Cir. 1990); *Meyers Industries*, 281 NLRB 1882 (1986), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977); *Independent Stations Co.*, 284 NLRB 394 (1987); *TLT-Babcock*, 293 NLRB 163, 167 (1989); *Chinatown Planning Council*, 290 NLRB 1091 (1988); *Korea News*, 297 NLRB 537 (1990); *Aspen*, 298 NLRB 401 (1990); *Wabeek Country Club*, 301 NLRB 694 (1991).

<sup>20</sup> *Page Avjet*, 278 NLRB 444 (1986); *Times Wire & Cable*, 280 NLRB 19 (1986); *Checker, Inc.*, 247 NLRB 85 (1980).

<sup>21</sup> *Hoytuck Corp.*, 285 NLRB 904 (1987); *American Poly-Therm Co.*, 298 NLRB 1057 (1990); *Garrison Valley Center*, 246 NLRB 701 (1979); *A & R Transport v. NLRB*, 601 F.2d 311 (7th Cir. 1979); *EDM of Texas*, 245 NLRB 934 (1979); *Robert Bosch Corp.*, 256 NLRB 1036 (1981).

identification of Brady as the initiator and circulator of the draft.<sup>22</sup>

The Board and reviewing courts consistently have held employer interrogation of employees to identify other employees who have engaged in concerted activities protected by the Act and to learn the extent and nature of those activities is violative of the Act.<sup>23</sup>

I therefore find and conclude Perkins' February interrogation of CSOs for the purposes just expressed violated Section 8(a)(1) of the Act, since those interrogations were designed to identify Brady as the author and circulator of the draft and to develop information concerning Brady's engagement in concerted activities protected by the Act.

#### 4. The alleged February 9 violations (Perkins)

The complaint alleged and the Respondent denied on about February 9 that the Respondent violated Section 8(a)(1) of the Act by Perkins' exchanges with Brady prior to suspending him.

On February 9, Perkins sought and secured from Brady an admission he circulated the letter among the CSOs, followed by a statement Brady could not do that and that he was suspended for doing so.

Perkins' elicitation from Brady of an admission he circulated the letters, followed by Perkins' statement he could not do that, certainly interfered with, restrained, and coerced Brady in his exercise of his Section 7 right under to engage in such circulation; I therefore find and conclude by those actions the Respondent violated Section 8(a)(1) of the Act.<sup>24</sup>

#### 5. The alleged February 17 violations (Vilella)

The complaint alleged and the Respondent denied on about February 17 the Respondent violated the Act when Vilella told Clarke that Brady was discharged for authoring and distributing the letters and called Brady a troublemaker for authoring that and a previous letter sent to the Respondent's headquarters.

Findings have been entered that Brady was engaged in protected, concerted activities when he authored, circulated, and discussed the letters, and solicited signatures thereto. The Board has held an employer's telling an employee another employee was discharged for engaged in such activity is coercive, violates Section 8(a)(1) of the Act, and an employer's identification of an employee who engages in such activity as a troublemaker is also a violation.<sup>25</sup>

<sup>22</sup> Perkins and USMS unawareness of the contents of the final letter was undisputed.

<sup>23</sup> *Behring International v. NLRB*, 675 F.2d 83 (3d Cir. 1982); *Bill Johnson's Restaurants v. NLRB*, 660 F.2d 1335, 1337 (9th Cir. 1985); *NLRB v. Pizza Crust Co.*, 862 F.2d 49 (3d Cir. 1988); *Faulkner Hospital*, 259 NLRB 364 (1984); *Union Carbide Corp.*, 259 NLRB 974 (1982); *CNA Financial Corp.*, 264 NLRB 619 (1982); *Glenoaks Convalescent Hospital*, 273 NLRB 488 (1984); *Garrison Valley Center*, 277 NLRB 1422 (1985); *United Merchants*, 284 NLRB 135 (1987); *Sorenson Lighted Controls*, 286 NLRB 969 (1987); *Brookshire Grocery Co.*, 294 NLRB 462 (1989); *Rikal West*, 266 NLRB 551 (1983); *Club Monte Carlo*, 280 NLRB 257 (1986).

<sup>24</sup> *Hoytuck Corp.*, supra; *American Poly-Therm Co.*, supra; *Faulkner Hospital*, supra; *Brookshire Grocery Co.*, supra; *Rikal West*, supra.

<sup>25</sup> *NLRB v. S. E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988); *NLRB v. Wells Dairy*, 865 F.2d 175 (8th Cir. 1989); *Overnite Transpor-*

I therefore find and conclude by Vilella's identifying Brady to Clarke as a troublemaker who had been discharged for engaging in concerted activities protected by the Act, the Respondent violated Section 8(a)(1) of the Act.

#### 6. The alleged rule violations

##### a. Rule 8 and the February 1 rule

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing code of conduct rule 8 and by promulgating, maintaining, and enforcing the February 1 Vilella rule.

Rule 8 prohibits each CSO from engaging in any "discussion" of "Department of Justice or USMS . . . personnel . . . matters" with "protectees" and the February 1 rule promulgated and maintained by the Respondent required that "[c]omplaints or requests . . . related to CSO . . . conditions . . . are to be conducted through the channels described above" and defined those channels as the Respondent's managerial personnel.

In a strained interpretation of rule 8, Marshal Davey identified the judges served by the CSOs as protectees within the meaning of the rule and the proposed sending of copies of the original letter draft requesting the Respondent furnish information concerning the CSOs' wages and benefits to such protectees as a "discussion" of "USMS personnel matters" and thus barred by the rule.

Since the letter was never sent to the judges, Brady never engaged in a "discussion" with the judges, presuming sending of a copy of the letter to the judges would constitute a "discussion."

I therefore find and conclude neither Brady nor Clarke violated rule 8 by the drafting and circulation among the CSOs of the original letter draft.

Were I to accept Davey's interpretation of the rule, the rule itself is contrary to Federal public policy embodied in Section 7 of the Act and therefore void and unenforceable, since the proposed sending of copies of the letter to the judges obviously was a hopeful attempt to cause the Respondent to supply the information concerning wages, etc., requested in the letter, Brady's 1988 letter never was answered, and the Board and reviewing courts consistently have held employees have a right under Section 7 of the Act to address appeals to third persons in an effort to secure a satisfactory response from their employers to their complaints, requests, etc., concerning their wages, hours, or working conditions and therefore any employer prohibition or restraint on the exercise of that right through a rule, order, threat, or direction violates Section 8(a)(1) of the Act.<sup>26</sup>

Referring to an employer requirement its employees refrain from contacting parents and discussing with those parents their dissatisfaction over their wages, etc., in the hope

*tation Co.*, 254 NLRB 132 (1981); *Bohemia, Inc.*, 266 NLRB 761 (1983); *N & T Associates*, 273 NLRB 270 (1984); *Murd Industries*, 287 NLRB 864 (1987); *Robert Bosch Corp.*, supra.

<sup>26</sup> *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990); *Cincinnati Suburban Press*, 289 NLRB 966 (1988); *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989); *NLRB v. Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990); *NLRB v. Auto Workers Local 980*, 819 F.2d 1134 (3d Cir. 1987); *Dougherty Lumber Co.*, 299 NLRB 295 (1990).

the parents might help resolve their complaints, the Board stated:

[T]his requirement . . . has no basis in either the language or the policy of the Act—reasonably tends to inhibit employees from bringing work-related complaints to, and seeking redress from, entities other than the Respondent, and restrains the employees' Section 7 rights to engage in concerted activities for . . . mutual aid or protection.<sup>27</sup>

On the basis of the foregoing, I find and conclude the Respondent's maintenance and enforcement of rule 8 violates and violated Section 8(a)(1) of the Act and is therefore void and unenforceable.

The same reasoning applies to the Respondent's February 1 rule, which required and requires the CSOs to channel their requests for information or complaints concerning their wages, etc., through the Respondent's managerial chain of command. Speaking to this issue, the Board stated:

The Respondent's rule that employees must first take any work-related complaint to the Respondent tends to inhibit employees from banding together by requiring that, in every such case, an employee must approach the Respondent . . . even before discussing the issue with other employees. Faced with such a requirement, some employees may never invoke the right to act in concert with other employees . . . because they are unwilling first to run the risk of confronting the employer on an individual basis (noting, in a footnote, an individual employee who complains to his employer without first involving other employees may be found not to have engaged in concerted activity, and thus lose the protection of the Act).

Accordingly, we conclude that this portion of the Respondent's . . . rule violated Section 8(a)(1).<sup>28</sup>

On the basis of the foregoing, I find and conclude the Respondent's promulgation, maintenance, and enforcement of its February 1 rule violates and violated Section 8(a)(1) of the Act and is therefore void and unenforceable.

#### b. Rule 23

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing code of conduct rule 23.

Rule 23 bars each CSO from making statements about fellow employees or officials with knowledge of the falseness of the statement or with ruthless disregard of the truth which would be a defamatory falsehood made with malice.

The Board has consistently held such rules unlawful per se "because they were overly broad, forbidding utterances made in the course of protected, concerted activity off working time and off the employer's property and second, because they punished the merely false, as opposed to the malicious and vicious."<sup>29</sup>

<sup>27</sup> *Kinder-Care Learning Centers*, supra at 1172.

<sup>28</sup> *Kinder-Care Learning Centers*, Also see *Safeway Stores*, 266 NLRB 1124 (1983).

<sup>29</sup> *Wabeek Country Club*, 301 NLRB 694, 699 (1991); also see *St. Joseph Hospital Corp.*, 260 NLRB 691 fn. 2 (1982); *American Cast*

On the basis of the foregoing, I find and conclude the maintenance and any enforcement of rule 23 violates and has violated Section 8(a)(1) of the Act and is therefore void and unenforceable.

#### c. Rule 24

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing code of conduct rule 24.

Rule 24 requires that each CSO report serious violations of prescribed rules and regulations and to report violations of statute law to appropriate management officials.

Counsel for the General Counsel appears to have abandoned the allegation this rule violated the Act, for he neither adduced any evidence nor advanced any argument with respect to complaint allegation.

I therefore recommend dismissal of those portions of the complaint alleging by its maintenance and enforcement of rule 24, the Respondent violated the Act.

#### d. Rule 29

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing code of conduct rule 29.

Rule 29 "strictly prohibits" any CSO from "carrying" and "reading" "any type of literature" "once on duty."

The rule is patently too broad; while the Respondent may justifiably bar each CSO from reading newspapers, novels, articles, etc., while "on duty," on its face each CSO would be barred from reading work-related material and each CSO would be barred from carrying on his person material such as copies of the letters here concerned, for discussion during his breaks, before and after his work shift.

I therefore find and conclude by its maintenance and any enforcement of rule 29 except as applied to reading non-work-related material violates and has violated Section 8(a)(1) of the Act and is void and unenforceable.

#### e. Rule 30

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing code of conduct rule 30.

Rule 30 prohibits each CSO from conducting personal affairs during official time.

"Official time" is not defined in the rule or any accompanying material, but a reasonable interpretation is the hours each CSO has an assigned duty post and duties. The Respondent has a legitimate business interest in maintaining and enforcing a rule barring its employees from conducting personal affairs during those hours and I therefore so find and conclude.

I therefore further find and conclude the Respondent did not violate Section 8(a)(1) of the Act by maintaining and enforcing rule 30.

*Iron Pipe Co.*, 234 NLRB 1126 (1978); *Independent Stations*, 284 NLRB 394, 396 (1987); *Standard Motor Products*, 265 NLRB 482 (1982); *Spartan Plastics*, 269 NLRB 546 (1984).

f. *The alleged nonapplicability of the Act to the rules*

The Respondent contends it cannot be held to have violated the aforementioned code of conduct rules because USMS promulgated, and required the Respondent to maintain and enforce its “code of conduct.”

Section 7 of the Act is the public policy of the United States. Since at least 1940, the Board has been empowered to invalidate those portions of a private contract which interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.<sup>30</sup>

I therefore reject the Respondents contention and find void and unenforceable those portions of the USMS-Respondent contract mandating the maintenance and enforcement of code of conduct rules 8, 23, and 29.

7. The Clarke discipline

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act on February 17 by issuing and requiring Clarke to acknowledge, sign, and agree to comply with the terms of a written, disciplinary warning notice.

The notice informed Clarke he was being placed on probationary status for 3 months, with his continued employment contingent upon his: (1) obeying all rules, regulations, and instructions of the Respondent, the USMS and court security supervisory personnel; (2) observance and abiding by the Respondent’s February 1 chain-of-command rule, i.e., “the need to *first* contact and communicate with the on-side [sic] Court Security Supervisor for advice, instructions, clarifications on policy, shift/assignment changes, grievances or any other work related problems *before* proceeding *up or down* the chain of command.”

It is clear this discipline was levied upon Clarke for his circulation and discussion of the letters among and with the CSOs (including his solicitation of CSOs to read and sign the final letter, if so inclined). It is further established Clarke and the CSOs among whom he circulated and discussed the letters were off duty at the time of the circulations, discussions, and solicitations.

The Respondent did not advance any basis for Clarke’s discipline other than his role in the circulation, discussion, and solicitation of the letters, relying on the contention that activity, even if concerted, was unprotected because it violated the Respondent’s February 1 chain-of-command rule and code of conduct rules.

I have concluded the February 1 rule interferes with employee exercise of a Section 7 right to engage in the activities in question and is therefore void and of no force and effect; I have reached a similar conclusion with respect to any of the code of conduct rules which would inhibit Clarke’s engagement in the activities I have outlined above. I have also concluded Clarke’s activities—circulating the letters among CSOs, discussing the letters with CSOs, and soliciting CSOs to read and sign the final letter, if so inclined—are concerted and protected activities within the meaning of Section 7 of the Act.

<sup>30</sup> *National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940); *Machinists Local 35 v. NLRB*, 311 U.S. 72, 81 (1940).

I therefore find and conclude by disciplining Clarke for engaging in those activities, the Respondent violated Section 8(a)(1) of the Act.<sup>31</sup>

8. The Brady discipline

The complaint alleged and the Respondent denied the Respondent violated Section 8(a)(1) of the Act by suspending and discharging Brady.

There is no question the Respondent suspended Brady on February 9 and discharged him on February 17 for drafting, circulating among other CSOs, discussing with other CSOs, and soliciting other CSOs to read and sign the letters.

Again, as in Clarke’s case, the Respondent contends those activities were neither concerted nor protected within the meaning of the Act and, presuming they were concerted, were nevertheless unprotected because they violated its February 1 rule and the code of conduct.

I have entered findings and conclusions above Brady’s activities were both concerted and protected. I have also entered findings and conclusions the Respondent failed to establish Brady violated code of conduct rules 8, 23, 24, or 30 and that, in any event, code of conduct rules 8, 23, 29, and the Respondent’s February 1 rule are void and unenforceable.

As to code of conduct rule 29, I would further note the rule is unenforceable in any event under the circumstances of this case—the disciplining of Brady and Clarke for activities condoned and participated in by their immediate superiors, i.e., the circulation, discussion, and solicitation of signatures to nonwork-related material which did *not* involve CSO concerns over their wages, hours, and working conditions.<sup>32</sup>

I therefore find and conclude by suspending Brady on February 9 and discharging him on February 17 for engaging in concerted activities within the meaning of the Act, the Respondent violated Section 8(a)(1) of the Act.<sup>33</sup>

I further find and conclude *Wright Line*,<sup>34</sup> is inapplicable, inasmuch as the Respondent did not advance any reason or reasons for the Brady (and Clarke) disciplines other than their roles in the circulation, discussion and solicitation of signatures to the letters.

CONCLUSIONS OF LAW

1. Because at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act, this case warrants the Board’s exercise of its plenary jurisdiction to determine whether the Respondent committed the unfair labor practices alleged in the complaint and, if so, the appropriate remedy therefor.

2. At all pertinent times Villella and Perkins were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. In drafting, circulating among other employees, discussing with other employees, and soliciting other employees to read and sign letters containing requests for information concerning the employees’ wages, hours, and working condi-

<sup>31</sup> See the cases cited under 1 and 6 above.

<sup>32</sup> *NLRB v. S. E. Nichols, Inc.*, supra; *Polynesian Hospitality Tours*, 297 NLRB 228 (1989).

<sup>33</sup> See the cases cited in 1 and 6 above.

<sup>34</sup> 251 NLRB 1083 (1980), affd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

tions, Brady and Clarke were engaged in activities for the employees' mutual aid or protection and therefore were exercising rights under Section 7 of the Act.

4. By Perkins' January interrogation of Clarke concerning his suspected role in the preparation of the original letter draft and characterizing Brady as an undesirable employee for preparing, circulating, and discussing the letter draft with other employees, the Respondent violated Section 8(a)(1) of the Act.

5. By Perkins' February interrogations of employees to identify the preparer(s) of the letter draft and the extent of their circulation and discussion of it with other employees, the Respondent violated Section 8(a)(1) of the Act.

6. By Perkins' February 9 elicitation from Brady an admission he circulated the letter draft among other employees and stating Brady could not engage in that activity, the Respondent violated Section 8(a)(1) of the Act.

7. By Vilella's February 17 identification of Brady to Clarke as a troublemaker discharged for preparing and distributing the letter draft among other employees, the Respondent violated Section 8(a)(1) of the Act.

8. By maintaining and enforcing its February 1 chain-of-command rule and rules 8, 23, and 29 of the code of conduct, the Respondent violated Section 8(a)(1) of the Act.

9. By its disparate enforcement of code of conduct rule 29 vis-a-vis Brady and Clarke, the Respondent violated Section 8(a)(1) of the Act.

10. By its February 17 issuance and enforcement of discipline against Clarke for circulating, discussing, and soliciting the reading and signing of the letters, the Respondent violated Section 8(a)(1) of the Act.

11. By its February 9 suspension and February 17 discharge of Brady for preparing, circulating, discussing, and soliciting signatures to the letters, the Respondent violated Section 8(a)(1) of the Act.

12. The Respondent did not otherwise violate the Act.

13. The aforesaid unfair labor practices affected and affect commerce as defined in the Act.

#### THE REMEDY

Having found the Respondent engaged in unfair labor practices, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act.

Having found the Respondent disciplined Clarke and Brady for engaging in concerted activities protected under the Act, I recommend the Respondent be directed to remove from its records any records reflecting such discipline, advise Clarke and Brady in writing this has been accomplished, and their engagement in the concerted activities herein above described shall not affect their employment. Having found the Respondent suspended Brady on February 9 and discharged him on February 17 for engaging in concerted activities protected under the Act, I recommend the Respondent be directed to offer Brady reinstatement to his former or a substantially equivalent position and make him whole for any wage and benefit losses he may have suffered by virtue of the discrimination against him, less any interim earnings, with the amount due and interest thereon computed in accordance with the formulae of *New Horizons for the Retarded*, 293 NLRB 1173 (1987); *Florida Steel Corp.*, 231 NLRB 651 (1977); and *Isis Plumbing Co.*, 138 NLRB 716

(1962). In view of the fact USMS's July 13 refusal to approve Brady's reinstatement and redeputization was based on the Respondent's erroneous report Brady abandoned his duty post and violated code of conduct rule 30, thereby warranting USMS' actions in reliance of that report under section C-8, subsection 8.1. and 2 of the USMS-Respondent contract, I recommend the Respondent be directed to advise USMS it erroneously advised USMS that Brady abandoned his duty post to solicit Banda's signature to the final letter and request USMS retract its July 13 letter and approve Brady's reinstatement and redeputization. I further recommend, in the event USMS refuses that request, the Respondent be directed to offer Brady employment equivalent to that last held by him with the Respondent and continue to make him whole until such time as he has been reemployed.

On the basis of the foregoing findings of fact conclusions of law and the entire record, I recommend issue the following<sup>35</sup>

#### ORDER

The Respondent, Central Security Services, Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning the identity of other employees engaged in concerted activities for employees' mutual aid or protection or the extent of such engagement.

(b) Telling employees other employees engaged in concerted activities for employees' mutual aid or protection are troublemakers and undesirable employees.

(c) Telling employees they could not engage in concerted activities for employees' mutual aid or protection.

(d) Telling employees an employee had been discharged for engaging in concerted activities for employees' mutual aid or protection.

(e) Maintaining and enforcing rules which interfere with, restrain, or coerce employees in the exercise of their right under Section 7 of the National Labor Relations Act to engage in concerted activities for employees' mutual aid or protection.

(f) Disparately enforcing rules against employees engaged in concerted activity for mutual aid or protection.

(g) Disciplining employees for engaging in concerted activities for employees' mutual aid or protection.

(h) Suspending and discharging employees for engaging in concerted activities for employees' mutual aid or protection.

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

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

(a) Offer reinstatement or reemployment to John E. Brady in the manner set forth in the remedy section of this decision.

<sup>35</sup> 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.

(b) Make John E. Brady whole for wage and benefit losses he may have suffered by virtue of the discrimination practiced against him in the manner prescribed in the remedy section of this decision;

(c) Remove from its records any record of discipline against John E. Brady and Edward Clarke and advise Brady and Clarke in writing this has been accomplished and their engagement in concerted activities herein described shall have no affect on their employment.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount or amounts of money due under the terms of this Order.

(e) Post at its facilities copies of the attached notice marked "Appendix."<sup>36</sup> Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

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<sup>36</sup>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."