

**K-Mart, d/b/a Super K-Mart and K-Mart and United Food and Commercial Workers Union, Local 870, AFL-CIO, CLC.** Cases 32-CA-15575, 32-CA-15662-1, and 32-CA-15662-2

November 30, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On April 9, 1997, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent's confidentiality provision, which appears in its employee handbook, violates Section 8(a)(1) of the Act. We do not agree.

The Respondent's confidentiality provision states:

Company business and documents are confidential. Disclosure of such information is prohibited.

The judge found that the Respondent did not intend its confidentiality provision to preclude or limit union organizing activity or other protected concerted activity. He also found uncontroverted the Respondent's assertion that its confidentiality provision was not enforced to prohibit employees from discussing the terms and conditions of their employment with others. The judge, nevertheless, found that the Respondent violated Section 8(a)(1) by promulgating the confidentiality provision in its employee handbook. The judge reasoned that employees could reasonably interpret the language "company business and documents" to include not only proprietary information but also employer-employee matters, such as information relayed to employees that might impact wages, hours, and working conditions or documents furnished to employees concerning wage and benefit information.

In our view, this case is controlled by *Lafayette Park Hotel*, 326 NLRB 824 (1998), which issued subsequent to the judge's decision here. In *Lafayette Park*, the employer's standard of conduct 17 prohibited the following conduct:

Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

In finding that this standard of conduct did not violate Section 8(a)(1), the Board found that employees would not reasonably read this rule as prohibiting discussion of wages and working conditions. Rather, employees reasonably

would understand that the rule was designed to protect the employer's legitimate interest in the confidentiality of its private information, such as guest information, trade secrets, and contracts with suppliers. Accordingly, the Board concluded that the rule reasonably was addressed to protecting the employer's interest in confidentiality and did not implicate employee Section 7 rights.

The Respondent's confidentiality provision, which bars disclosure of "company business and documents," is quite similar to the rule in *Lafayette Park* prohibiting disclosure of "Hotel-private information." The Respondent's confidentiality provision, like the rule in *Lafayette Park*, does not by its terms prohibit employees from discussing wages or working conditions. Further, contrary to the judge, we find that here, as in *Lafayette Park*, employees reasonably would understand from the language of the Respondent's confidentiality provision that it is designed to protect the Respondent's legitimate interest in maintaining the confidentiality of its private business information, not to prohibit discussion of wages or working conditions. The fact that the Respondent's confidentiality provision has not been enforced to prohibit employees from discussing their terms and conditions of employment would reinforce this understanding. Consequently, as we find that the Respondent's confidentiality provision reasonably is addressed to protecting the Respondent's legitimate confidentiality interest and does not implicate employee Section 7 rights, we find that the Respondent's promulgation of the confidentiality provision in its employee handbook does not violate Section 8(a)(1).

Contrary to our dissenting colleague, we do not find that the Respondent's confidentiality provision would "chill" employees' rights by requiring employees who wish to discuss information about employment terms and conditions to either (a) discuss such information and risk discipline or (b) forgo discussion and give up a right protected by the Act. In finding such "chilling" effect, our dissenting colleague relies on cases concerning employers' rules that, unlike the Respondent's confidentiality provision here, either prohibited discussion of specific terms and conditions of employment (*L. G. Williams Oil Co.*, 285 NLRB 418, 423 (1987) (barring discussion of salaries); *Medeco Security Locks v. NLRB*, 142 F.2d 733 745 (4<sup>th</sup> Cir. 1998) (barring disclosure of employee's retaking required skill test or disclosure that employee passed drug test); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d Cir. 1992) (barring discussion of wages and terms of employment) or forbade conduct that clearly implicated Section 7 rights (*Ingram Book*, 315 NLRB 515 (1994) (distribution of literature); *Arkansas-Best Freight System*, 257 NLRB 420, 424 (1981) (no-solicitation, no-distribution rule). In contrast to the rules at issue in those cases, the Respondent's confidentiality provision here would be reasonably understood by employees not as restricting discussion of terms and condi-

tions of employment but, rather, as intended to protect solely the legitimate confidentiality of the Respondent's private business information, as it was meant to do.<sup>1</sup> Moreover, unlike our colleague, we do not find the meaning of the terminology employed by the Respondent's rule, "company business and documents," to be significantly different from or broader than the "Hotel-private information" language used in *Lafayette Park Hotel* to describe the information to be kept confidential under the rule.

Our colleague seeks to distinguish this case from *Lafayette Park* on the basis that the rule there expressly provided that certain employees and others were authorized to receive "Hotel private information." The instant rule contains no such express provision. However, we do not believe that the absence of an express provision in the instant case warrants a result contrary to *Lafayette Park*. Certainly, the absence of an express proviso does not broaden the scope of the primary prohibition. Further, even without an express proviso, employees would reasonably understand that they can share business information with fellow employees and other who have a need to know. Reasonable persons understand that an enterprise can hardly function without such a flow of information.<sup>2</sup>

<sup>1</sup> In contending that the Respondent's confidentiality provision is overbroad and fails to define the impermissible conduct, our dissenting colleague relies on several cases concerning rules issued by employers, all of which presented circumstances significantly different than those before us here. In *Advance Transportation*, 310 NLRB 920 (1993), the employer's issuance of the rule in question was, as noted by the judge, "targeted at the employees' union election activities then underway," 310 NLRB at 925, and, further, occurred in the context of unlawful employee warnings and discharges similarly aimed at the employees' Sec. 7 activities. In *Fremont Mfg. Co.*, 224 NLRB 597, 603-604 (1976), enfd. 558 F.2d 889 (8<sup>th</sup> Cir. 1977), the rule cited by our colleague was issued shortly after both the start of a union organizing campaign and the employer's unlawful discharge of the employee who had initiated the campaign. In *Lexington Chair Co.*, 150 NLRB 1328 (1965), enfd. 361 F.2d 283 (4<sup>th</sup> Cir. 1966), the judge found that the rule in question, "[c]oming as it did on the heels of the opening of an anti-union campaign by Respondent . . . was designed to combat the anticipated expression of union sympathies." 150 NLRB at 1341. Thus, in all three of these cases, the challenged rules were adopted to counter union activity and reasonably would have been understood by employees as having such a purpose. In the present case, however, the Respondent's confidentiality rule was not adopted in response to union activity, and the judge found that the Respondent did not intend to preclude or limit union organizing activity or other protected concerted activity. Further, the rule at issue in *Pontiac Osteopathic Hospital*, 284 NLRB 442, 466 (1987), also cited by our colleague, banned discussion of, inter alia, "employee problems," and thus clearly trenching on employees' Sec. 7 rights. The Respondent's confidentiality provision, on the other hand, bars disclosure only of "company business and documents" and contains no language prohibiting discussion of employee problems or grievances.

<sup>2</sup> Nor do we agree with our colleague (at fn. 4 of her dissent) that the rule here "differs substantially" from the rule found to be permissible in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), which was cited and relied on by the majority in *Lafayette Park*. At the outset, we note that our colleague raised the same argument in her joint dissent in *Lafayette Park* and it is no more

Our dissenting colleague also relies on the fact that the other provisions in the handbook relate to terms and conditions of employment. However, this fact does not aid our colleague's position. The ban on disclosure of confidential information is itself a condition of the employees' employment. Thus, the ban is properly in the handbook. But, this does not mean that the phrase "company business and documents" relates to terms and conditions of employment.

For all the foregoing reasons, we shall dismiss the complaint.

#### ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

Contrary to my colleagues, I agree with the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad confidentiality rule in its employee handbook. I rely on the judge's reasoning and on the rationale in the dissenting opinion in *Lafayette Park Hotel*,<sup>1</sup> which was issued subsequent to the judge's decision herein.

Since August 1994, the Respondent has distributed a company handbook to each new employee. The handbook includes, inter alia, provisions about employee benefits,<sup>2</sup> and company rules and regulations.<sup>3</sup> The handbook's "Confidentiality" rule states, in full: "Company business and documents are confidential. Disclosure of such information is prohibited." Employees must sign an acknowledgment of receipt of the handbook.

The judge found, and the General Counsel and the Charging Party do not dispute, that the confidentiality

persuasive here than it was there. In *Aroostook*, the Board had found a violation of the Act in a rule which stated that "no office business is a matter for discussion with spouses, families or friends." The court reversed. In doing so, the court, inter alia, noted the employer's argument that the rule was designed only to prevent employees from discussing patient medical information with persons outside of the office. The court indicated "[t]his construction of the rule is supported by the rule's placement" in the manual at the end of a long discussion where "office business" was used to refer to confidential patient medical information. But the rule's placement in the manual was not the sine qua non of the court's holding. Rather, it is clear, as described at fn. 11 of the majority opinion in *Lafayette Park* that "[i]n denying enforcement [the court concluded] that the rule on its face was not unlawful and finding that, absent evidence that the employer was imposing an 'unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary [was] unjustified.'" 81 F.3d at 212-213. That same parity of reasoning is applicable here and the court's decision in *Aroostook* fully supports the result we reach.

<sup>1</sup> 326 NLRB 824 (1998).

<sup>2</sup> The 17-page handbook contains 86 separate sections. The handbook's table of contents is set forth in full in sec. III,B,2 of the judge's decision. There are sections on, inter alia, work hours and work schedule; timecards, rest periods, paychecks, wage reviews, pay grade level structure, wage increases, overtime, safety, savings and pension plans, disability income, various forms of leave, vacation, life insurance, and health insurance.

<sup>3</sup> There are sections on, inter alia, personal appearance, tardiness and absenteeism, leaving the work area, honesty and integrity, disciplinary procedures, and confidentiality.

rule is intended only to prevent disclosure of what the Respondent considers proprietary information, such as sales reports, costs for goods, marketing strategy, profits, computer software and programming, and pricing information. None of those proprietary subjects, however, is even mentioned, much less discussed, in the employee handbook. Rather, the handbook discusses almost exclusively terms and conditions of employment, and the confidentiality rule appears in the midst of those provisions.<sup>4</sup>

Moreover, as the judge noted, the Respondent has never told the employees that the confidentiality rule is intended only to prevent disclosure of proprietary information. More pointedly, the Respondent has never told its employees that the confidentiality rule does not prohibit them from discussing their terms and conditions of employment with anyone else or engaging in union organizational or other protected concerted activity. Under these circumstances, I agree with the judge that the employees could reasonably interpret the confidentiality rule as prohibiting them from discussing information provided to them (either verbally or in writing) by the Respondent about their terms and conditions of employment.

To illustrate, the Respondent might inform the employees that it has become dissatisfied with their health care insurance provider because of administrative deficiencies and has decided to change to a different insurance company. The Respondent might provide the employees with written information about the new company and comparisons of the rates and coverages under the old and new plans. Confronted by the confidentiality rule, employees could quite reasonably believe that they were prohibited, individually or collectively, from showing that information to an outside health care insurance consultant to obtain an explanation and guidance about their new plan.

In upholding the rule here, my colleagues rely on the majority opinion in *Lafayette Park Hotel*, supra. There, the employer maintained a rule in its employee handbook that expressly prohibited employees from “[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that

information.”<sup>5</sup> The majority found that maintenance of that rule did not interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act. In agreement with the employer, the majority held that (1) the rule was in furtherance of the employer’s substantial and legitimate interest in maintaining the confidentiality of private information, including hotel guest information, trade secrets, contracts with suppliers, and a range of other proprietary information, and (2) the rule unambiguously prohibited employees only from disclosing private, confidential business records and information, and not from discussing terms and conditions of employment.<sup>6</sup> Thus, the majority found that, although the term “Hotel-private” was not defined in the rule, employees would reasonably understand that the rule was designed to protect the employer’s interest in maintaining the confidentiality of private information. Nor, according to the majority, would employees reasonably interpret the rule as prohibiting discussion of wages and working conditions among employees or with a union.<sup>7</sup>

The majority in this case analogizes that “Hotel-private” rule with the confidentiality rule at issue here on the grounds that neither rule expressly prohibits employees from discussing wages or other working conditions. Further, in their view, employees would reasonably understand from the language of these rules that they were designed to protect an employer’s legitimate interest in maintaining the confidentiality of private business information, and not to prohibit discussion of wages or other working conditions.

In my view, the confidentiality rule suffers from the same infirmity as the “hotel private rule” in *Lafayette Park Hotel*. Its blanket prohibition on disclosing “company business and documents” is overbroad and fails to define or delimit the impermissible conduct. See *Advance Transportation*, 310 NLRB 920, 925 (1993) (rule prohibiting employees from discussing “company affairs, activities, personnel, or any phase in operations with unauthorized persons” is unlawful on its face); *Fremont Mfg. Co.*, 224 NLRB 597, 603–604 (1976), enfd. 558 F.2d 889 (8<sup>th</sup> Cir. 1977) (rule prohibiting employees from “making any statement or disclosure regarding company affairs, whether expressed or implied as being official, without proper authorization from the company” is unlawful restriction on employee rights); *Lexington Chair Co.*, 150 NLRB 1328 (1965), enfd. 361 F.2d 283, 287 (4<sup>th</sup> Cir. 1966) (rule prohibiting employees from “criticizing Company rules and policies so as to cause confusion or resentment between employees and management” is unlawful). In affirming the Board in *Lexington Chair*, the court stated:

<sup>5</sup> 326 NLRB 824, supra (Standard of Conduct 17).

<sup>6</sup> Supra.

<sup>7</sup> Id.

<sup>4</sup> In this respect, the rule in this case differs substantially from the rule which the court found to be permissible in *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996). In that case, the employer had a rule in its office policy manual which stated that “no office business is a matter for discussion with spouses, families or friends.” The court found that this rule was not overbroad, relying in particular on its placement in the policy manual, following a long section about patient confidentiality in which the term “office business” was used to refer to confidential patient information. Id. at 213. In contrast, in this case there is no such context for the Respondent’s rule. In fact, the context, an employee handbook that discusses only terms and conditions of employment, could reasonably lead an employee to believe that information and documents concerning terms and conditions of employment are within the reach of the Respondent’s rule.

[M]anagement was not entitled to promulgate a rule so general in its terminology and so broad in its apparent coverage as to inhibit legitimate organization activity by pro-union employees. To the average employee the rule might well have meant that any criticism of management, resulting in aid to the Union campaign, would bring swift and severe reprisal. "The true meaning of the rule might be the subject of grammatical controversy. However, the employees . . . are not grammarians. The rule is at best ambiguous and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it." [Citing *NLRB v. Miller*, 341 F.2d 870, 874 (2d Cir. 1965).]

The majority's attempt to distinguish these cases is unavailing. The dispositive consideration in ultimately finding each of the rules to be unlawful was that the rules on their face, regardless of the impetus for their promulgation, had a reasonable tendency to inhibit employees in the exercise of their Section 7 rights. Thus, notwithstanding the judge's finding in *Advance Transportation* that the rule in question was "calculated" to cause employees to refrain from engaging in any protected activities, 310 NLRB at 925, he ultimately found that the rule was "unlawful on its face . . . because it fails to define the area of permissible employee conduct." *Id.* In *Fremont Mfg.*, the judge, without speculating on the employer's motivation, found (and the Board affirmed) that the rule in question was ambiguous, "subject to various constructions, one of which is that it would restrict or stultify employee debate during the union campaign," and was thus an invalid restriction on the employees' rights. 224 NLRB at 604. Finally, in *Lexington Chair*, while acknowledging that the rule in question was promulgated against a background of expressed hostility to the union, the court nevertheless found that the rule was unlawful, not because of its antiunion motive, but because it was "at best ambiguous" and "so general in its terminology and so broad in its apparent coverage as to inhibit legitimate organization activity by pro-union employees." 361 F.2d at 287. See also *Pontiac Osteopathic Hospital*, 284 NLRB 442, 466 (1987) (rule banning discussion of "hospital affairs and employee problems . . . could reasonably be construed by employees to preclude discussing information concerning terms and conditions of employment, including wages, which could fall under the broad categories of hospital affairs and employee problems. While Respondent might have a substantial and legitimate interest in limiting or prohibiting discussion of some aspects of its affairs, or of its employees' personal problems . . . it has offered no justification for the broad policy stated in its confidential information rule").

My colleagues' analysis in this case also suffers from the same infirmity as the majority's analysis in *Lafayette Park Hotel*. It fails to recognize the tendency of a rule like the one in question here to chill employees' exercise

of protected rights simply because of the breadth of the conduct that is potentially prohibited by the rule. Confronted with this rule, employees, contemplating discussion of wage and benefit or other information obtained from the Respondent concerning terms and conditions of employment, would have to choose between discussing the information, and risking discipline, or foregoing the discussion and giving up a right protected by the Act. The Act prohibits an employer from forcing employees to make that choice. Either way, their Section 7 rights are infringed, for the threat of discipline obviously interferes with, restrains, and coerces employees in the exercise of a protected right. That is the essence of "chilling" of protected rights long recognized by the Board and the courts.<sup>8</sup> By failing to adequately define what conduct is encompassed, this is precisely what this nondisclosure rule does.

Indeed, if anything, the confidentiality rule at issue here may be even more overbroad than the *Lafayette Park Hotel* "hotel private" rule. My colleagues' attempt to analogize these two rules actually underscores the overbreadth of the confidentiality rule. Thus, the *Lafayette Park Hotel* rule expressly prohibited outside disclosure of only so-called "Hotel-private" information and only to employees or other individuals or entities not "authorized" to receive it. The confidentiality rule here, on the other hand, expressly applies to "company business and documents" without limitation or description, declares this unlimited, undescribed information to be confidential, and expressly prohibits any disclosure. Having found the "Hotel-private" rule in *Lafayette Park Hotel* to be overly broad and fatally ambiguous,<sup>9</sup> I find, a fortiori, that the even more broadly worded confidentiality rule here is unlawful for the same reasons.

*Virginia Jordan, Esq.*, for the General Counsel.  
*Scott D. Rechtschaffen, Esq. (Littler, Mendelson, Fastiff, Tichy, and Mathiason)*, of San Francisco, California, for the Respondent.

<sup>8</sup> See, e.g., *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (mere possibility of enforcement of rule against protected activity is coercive); *L. G. Williams Oil Co.*, 285 NLRB 418, 523 (1987) (implication that employee could be disciplined for violation of rule against discussing salaries has chilling effect on exercise of statutory rights); *Arkansas-Best Freight System*, 257 NLRB 420, 424 (1981), *enfd.* 673 F.2d 228 (8<sup>th</sup> Cir. 1982) (employees are not required to speculate, at risk of possible disciplinary action, whether employer will enforce unlawfully broad rule; rule has chilling effect on exercise of Section 7 rights, without regard to manner of enforcement). *Accord:* *Medeco Security Locks v. NLRB*, 142 F.3d 733, 745 (4<sup>th</sup> Cir. 1998) (Sec. 8(a)(1) reaches employer conduct which can have a deterrent effect on protected activity, even if an employee has yet to engage in protected activity or exercise a protected right); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d Cir. 1992) (promulgation of overly broad rule that could reasonably be read as prohibiting employees from making statements about wages and terms of employment has a likely chilling effect on employees' exercise of Section 7 rights, even absent evidence of actual enforcement of rule).

<sup>9</sup> 326 NLRB at 834 (dissent).

Michael T. Anderson, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Union.

## DECISION

### STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Oakland, California, on January 21, 1997. Following the filing of various charges between July 23 and September 10, 1996, by United Food and Commercial Workers Union, Local 870, AFL-CIO, CLC (the Union), the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing on December 19, 1996, alleging various violations by K-Mart and Super K-Mart Center (each the Respondent) of the National Labor Relations Act (the Act). Thereafter, various cases were settled and severed from the instant matter, and the current consolidated complaint alleges violations by the Respondent of Section 8(a)(1) of the Act. The Respondent's answers to the complaint deny the commission of any unfair labor practices as alleged.

The parties were afforded a full opportunity to be heard, to call, examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel, counsel for the Union, and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent is a Michigan corporation engaged in the retail sale of general merchandise and related products via stores, warehouses, offices, and other facilities throughout the United States, including a store located in Oakland, California. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of \$500,000, and annually purchases and receives goods valued in excess of \$50,000 which originate outside the State of California. It is admitted, and I find, that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. The Issues

The principal issues raised by the complaint are whether the Respondent at its Oakland, California Super K-Mart Center, unlawfully relocated its employee break area from outside the employee entrance to the garden center of the store in order to limit the access of union representatives to its employees during breaktimes, in violation of Section 8(a)(1) of the Act; and whether the Respondent, on a nationwide basis, has promulgated an unlawful "Confidentiality" provision in its employee handbook which would reasonably tend to inhibit employees from engaging in lawful union and/or protected concerted activity, in violation of Section 8(a)(1) of the Act.

## B. The Facts

### 1. Case 32-CA-15575

Terrence Burnell is the store director of the Oakland, California Super K-Mart center. He has been a store director of about five different K-Mart stores prior to assuming his current position in August or September 1995, prior to the store's opening on November 13, 1995. There were some 40 to 60 employees in August and September 1995, and over 1000 employees as of the date the store opened for business. At his other stores, which had no separate employee entrances, Burnell established the policy of locating the employee's smoking area in the garden center, an outdoor fenced-enclosed area connected to the store, which was set aside for the sale of plants and related garden materials. Burnell testified that matters of this nature were left to the discretion of the store directors, and for safety and security reasons, as well as for the sake of appearance, he preferred to have the employees take their breaks in designated areas inside the confines of the store. Explaining, Burnell testified that some of the stores were in "rougher neighborhoods" and he believed that employees would be safer inside the store rather than outside where they could have a potential problem with outsiders. The instant store, according to Burnell, was located in such a neighborhood. In addition, he believed that the less ingress and egress to and from the store during the employees' shifts would assist in minimizing employee theft.<sup>1</sup>

Prior to the opening of the store, in accordance with his past practice, Burnell had located the smoking area (which was utilized as an outdoor break area for smokers and nonsmokers alike) in the garden center. However, at about the time the store opened for business, due to the great influx of merchandise in addition to garden center merchandise, the garden center was inundated with overstock merchandise and fixtures and there simply was no room to set aside in the garden center for a break area. At that point, during one of the morning meetings, Burnell told the employees that the smoking area (outdoor break area) was being moved from the garden center to the employee entrance of the store, located near the rear of the building. He further told them that this would be a temporary measure and that as soon as practicable the outdoor break area would be moved back to the garden shop or possibly to a different enclosed area.<sup>2</sup> The overstock problem in the garden center increased in January 1996, when certain garden center merchandise (plants and live goods) began arriving, and it was not until July that the situation became controllable and permitted Burnell to restore the break area to the garden center, where he placed some umbrella tables and set aside a separate isolated area for the employees to take their breaks. This area is not a public area and is off limits to the general public.

Burnell testified that prior to the opening of the store he and others were involved in attempting to obtain public bus service to and from the store for the benefit of the employees and customers, as bus transportation was not conveniently nearby. A private consulting firm was hired to handle the details of this endeavor, which became quite complicated and convoluted, as

<sup>1</sup> Peter Franklin, a private security consultant, essentially corroborated the testimony of Burnell regarding matters of safety and loss control, and testified that for the reasons stated it is always preferable to have employee break area located inside of the confines of store premises.

<sup>2</sup> Under consideration was an option to enclose an area behind the store with a fence for use as an outdoor break area.

well as expensive. Thus, to obtain such service, namely, bus stops on store property located adjacent to the employee entrance and near the customer entrance, the Respondent would be required to pay AC Transit, the public bus service provider, some \$100,000 for the route. Nevertheless, this was deemed acceptable and on about July 11, after making the necessary changes to the property required by AC Transit, Burnell, accompanied by consultant Scott Mommer, president of Lars Anderson & Associates, met with an AC Transit representative. According to Burnell, it appeared that as a result of this meeting bus service would begin as soon as K-Mart completed certain additional improvements on its property, which should have taken only about 2 weeks.<sup>3</sup> Prior to this date the Respondent had already constructed a concrete island adjacent to the employee entrance as a bus stop, and had painted crosswalk lines from the island to the employee entrance; in addition it had completed other improvements required by AC Transit. Burnell testified that from 40 to 50 percent of its associates did not have private vehicles, and door-to-door bus service would have benefited the employees as well as the Respondent.

The record shows that some weeks or months thereafter the Respondent was advised that AC Transit wanted some \$300,000 before it would commence bus service. This was deemed unacceptable although the matter is still being pursued. To date, no bus service has been implemented.

Burnell testified that during one of the regular biweekly morning meetings in mid-July, sometime after the aforementioned July 11, 1996 meeting, he announced to the associates that bus service, with a bus stop located adjacent to the employee entrance, would be beginning and that thereafter the outdoor break area would be relocated to the garden center.<sup>4</sup> Also, a note was posted on the door to the employee entrance specifying that no breaks or lunches would be thereafter be permitted in the employee parking lot. Burnell testified that it had always been his intention to return the break area to the garden center at an appropriate time, as he did not want the employees to take their breaks outside the premises for the reasons stated above. Moreover, having employees congregate around the bus stop area presented further safety concerns. Thus, the freeing-up of garden center space, coupled with, he believed, the imminent arrival of public bus service at the employee entrance, resulted in his decision to designate the garden area as the new outdoor break area for the associates. Burnell testified that the union organizational activity outside the employee entrance, *infra*, had nothing to do with his decision.

This change in the break area from outside the store to inside the store impacted the Union's organizing drive which had commenced in January 1996. Thus, from January to mid-July union representatives would frequently meet with employees outside the store at the employee entrance during their breaks and solicit authorization cards, distribute campaign literature, and engage in related union activities. This was no longer possible after the relocation of the break area, as the garden center was off limits to the public (including union representatives). Therefore, the change limited the Union's ability to solicit to the beginning and ending of work shifts and at lunchtime (when

employees were permitted to leave the store premises for their 1-hour lunch period).

The General Counsel and the Union contend that the change of the break area on about July 19 coincided with the Union's filing of a representation petition on the same date, and an incident on about July 10, during which a confrontation occurred between a union representative and a store security guard who was taking her break outside the employee entrance.<sup>5</sup> Coupled with the fact that bus service has never been established, it is argued that the Respondent's relocation of the break area was more than coincidental, and was contrived as a method to inhibit the Union's ongoing organizational campaign.

## 2. Cases 32-CA-15662-1 and 32-CA-15662-2

Since August 1994, the Respondent has distributed to each new employee throughout the United States a K-Mart Associate handbook entitled "We're Glad You're Here." The handbook is some 17 pages in length, and contains information about the Respondent, and includes provisions regarding employee benefits, and store rules and regulations. Employees who are given the handbook are required to sign an acknowledgment that they have received it. The handbook's table of contents is as follows:

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Wage Reviews	2
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Promotional Increase	3
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Longevity Increase	4
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Parking	4
Personal Appearance	4
Appropriate Dress and Appearance	4
Garden Shop and Processing Center/Departments	4
Eating, Drinking and Chewing Gum	5
Sexual Harassment	5
Smoking	5
Intoxicants and Narcotics	5
Employment of Relatives	5
Tardiness and Absenteeism	5
Leaving Work Area	5
Lockers	5
Gifts from Vendors	6
Salvage Merchandise	6
Associate Purchases	6
Associate Layaway	6
General Store Meetings	6
Merchandise for Store Use	6
Associate Entrance and Exit	6
Safety	6
Firearms and Other Weapons	6
Telephone	6

<sup>3</sup> According to Mommer, however, K-Mart was to complete certain improvements on its property within 1 to 2 weeks, and bus service would begin in September.

<sup>4</sup> Employee Valentina Sherman-Cruz, called as a witness by the General Counsel, essentially corroborated this testimony of Burnell.

<sup>5</sup> As a result of this incident, respective charges were filed by both the Union and the Respondent, and were thereafter dismissed.

Lost and Found	6
Honesty and Integrity	6
Loss Control	7
Unauthorized Discounts	7
Associate Lounge	7
Company Bulletin Boards	7
Transfers	7
Rehired/Re-employed	7
Confidentiality	7
Solicitation and Distribution of Printed Material	7
Disciplinary Procedures	7
Associate Benefits	7
Savings Plan	8
Pension Plan	9
Group Term Life Insurance and Accidental Death or Dismemberment Insurance	9
Travel Accident Insurance	9
Comprehensive Health Plan	9
Dental Assistance Plan	10
Employee Assistance Program (EAP)	10
Prenatal Education Program	11
Health and Fitness Newsletter	11
Adoption Assistance Plan	11
National Child Care Discount Program	11
Disability Income Plan	11
Approved Leave of Absence	12
Medical Leave	12
Personal Leave	12
Family and Medical Leave	12
Military Leave	12
Paid Vacation	13
Paid Sick and Personal Leave Time	13
Paid Holidays	13
Associate's Birthday	14
Associate Discount	14
Funeral Leave Pay	14
Jury Service	14
U.S. Savings Bonds	14
Suggestion Awards	14
Kmerchant (Associate Magazine)	15
Service Recognition	15
Scholarship Program	15
Matching Gifts Program	15
Associate of the Month Program	16
ConCern: Loans for Education	16
K-Notes and Bonus Notes	16

Each of the foregoing headings is placed in a box beneath which appears one or more explanatory paragraphs.

The only section of the handbook at issue herein is a two-sentence provision appearing on page 7 under the heading of "Confidentiality," as follows:

Company business and documents are confidential.  
Disclosure of such information is prohibited.

The record is clear that the Respondent does not and has not intended this rule to preclude or limit union organizational activity or other protected concerted activity. An affidavit submitted by Peter Palmer, Respondent's vice president, labor relations and assistant general counsel, states as follows:

This provision was and is only intended to apply to those items within a K-Mart facility that would properly be considered proprietary information, such as sales reports, costs for goods, marketing strategy, profits, computer software and programming, pricing information, and marketing strategies.

This provision was and is not intended to discourage employees from discussing the terms and conditions of their employment with anyone else.

Since the adoption of this version of the handbook, I have no knowledge of any employee ever being disciplined, terminated or threatened with discipline or termination because this policy was interpreted to mean that employees could not discuss terms and conditions of employment. This provision is not enforced to prohibit employees from discussing the terms and conditions of their employment with others.

With the exception of the matter herein, this provision has never been the subject of a National Labor Relations Board charge, nor have any of K-Mart's 300,000 plus associates ever filed a charge with the NLRB relative to this paragraph.

There is no record evidence that would contradict any of the aforementioned assertions of the Respondent. However, the parties agree that the Respondent has never announced to its employees, either verbally or in writing, that the "Confidentiality" provision should not be interpreted to mean that it is, in any way, designed to preclude their lawful union and/or concerted protected activity.

Accordingly, the Complaint alleges, and the General Counsel and the Union maintain, that the "Confidentiality" provision is *per se* unlawful as the prohibition of the disclosure of "company business and documents" could reasonably be read and understood by employees to encompass matters which pertain to their wages, hours, and conditions of employment, such as information obtained during employer-employee meetings, information contained in wage and benefit documents, and similar matters, the disclosure of which could potentially subject them to discipline.

### *C. Analysis and Conclusions*

#### 1. Case 32-CA-15575

I credit the testimony Store Director Burnell, and find that the relocation of the break area from the employee entrance to the garden center in July, 1996, was not discriminatorily motivated. Thus, assuming arguendo that the General Counsel has presented a *prima facie* case of unlawful motivation, the credible record evidence shows that the break area was initially in the garden center prior to the opening of the store; that Burnell had always intended to return it to that location when business conditions so permitted and initially advised the employees that the move was of a temporary nature; that the rationale for designating the garden center as the break area appears to make a great deal of sense for safety and security and loss prevention purposes; and that Burnell believed as a result of the July 11 meeting with AC Transit that bus service outside the employee entrance would commence several weeks thereafter.<sup>6</sup>

Finally, it is reasonable to presume that if the Respondent was motivated by a desire to interfere with its employees' union activity as alleged, it would have relocated the break area to the garden shop within a short time after the commencement

<sup>6</sup> I am mindful that Scott Mommer, a consultant whom Burnell accompanied to the meeting, testified that he believed the bus service would not begin until some six months thereafter; nevertheless, I credit Burnell's testimony that he was of the opinion that bus service would begin within two weeks, and thus notified the employees that bus service was imminent.

of the union activity, in January 1996, rather than waiting some 6 months thereafter to implement the change. Nor is there any record evidence of union animus by K-Mart managers or supervisors. Accordingly, I conclude that the Respondent has satisfied its burden under *Wright Line*<sup>7</sup> by demonstrating that it moved the break area from outside the employee entrance to the garden center for lawful business considerations, and I shall dismiss this allegation of the complaint.

2. Cases 32-CA-15662-1 and 32-CA-15662-2

Regarding the “Confidentiality” handbook provision that is contained in the current employee handbook and distributed on a nationwide basis to each of the Respondent’s associates upon their being hired, Board law is clear that such provisions, even though ambiguous, are per se unlawful. *Aroostock County Regional Ophthalmology Center*, 317 NLRB 218, 224 (1995), enf. denied in part 81 F3d 209 (D.C. Cir. 1966). In the instant matter the Respondent has taken no action to formally advise employees that the “Confidentiality” provision should not be understood to limit their union or protected concerted activity. See *Our Way, Inc.*, 268 NLRB 394 (1983); *Ichikoh Mfg., Inc.*, 312 NLRB 1022 (1993). Under the circumstances herein, particularly as the “Confidentiality” provision is simply one of many provisions seemingly included in the handbook on a random basis<sup>8</sup> and does not appear in a limiting context which would give it some narrower meaning,<sup>9</sup> it is reasonable to conclude that the provision could be interpreted by employees to proscribe and inhibit their union activity, as alleged. In this circumstance, the intention of the Respondent that the provision was designed to prohibit the disclosure of only proprietary information is not controlling.

Thus, it is clear that employees could reasonably interpret the language “company business and documents” to include

<sup>7</sup> 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

<sup>8</sup> See Associate Handbook topics listed under “Table of Contents,” supra.

<sup>9</sup> Cf. the opinion of the D.C. Circuit in *Aroostock County Regional Ophthalmology Center*, supra.

more than proprietary information: company business could reasonably encompass any employee-employer matters such as, for example, information relayed to employees during store meetings which might impact on their wages, hours, and working conditions; and company documents could refer to any documents furnished to employees such as, for example, confidential wage and benefit information. These are clearly matters which employees have the right to divulge to others in furtherance of union or protected concerted activity. Accordingly, even though the Respondent did not intend that the instant provision preclude permissible union activity, I find that by incorporating this provision in the employee handbook which is disseminated to all new employees the Respondent is violating Section 8(a)(1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(1) of the Act by promulgating, on a nationwide basis, an unlawful “Confidentiality” provision in its employee handbook.
4. The Respondent has not engaged in other violations of the Act, as alleged.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) of the Act, I recommend that it be required to cease-and-desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to rescind the current “Confidentiality” provision from its Associate handbook, and to post at each of its K-Mart Stores and Super K-Mart Centers throughout the United States an appropriate notice, attached hereto as “Appendix.” [Omitted from publication.]

[Recommended Order omitted from publication.]