United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 30, 2003

TO : Rosemary Pye, Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Brattleboro Daily Reformer
Case 1-CA-40957

506-6080-0800
506-6090-4000
512-5012-0100
512-5012-0133-5000
524-8393-0166
524-8393-5076

This case was submitted for advice on whether a newspaper reporter lost the protection of the Act by contacting his U.S. Senator's press secretary to obtain the Senator's support in a union campaign among the reporter's fellow employees.[1]

We conclude that the reporter's conduct did not lose the protection of the Act. Even assuming that the contact with the press secretary created a prohibited conflict of interest under a generally accepted principle of journalistic ethics against contacting news sources for personal favors or objectives, there was no such conflict of interest here. Thus, the reporter did not seek a personal favor from the press secretary, but rather sought the Senator's assistance in connection with the organizing campaign. Further, we conclude that the unwritten ethics principle would be unlawful as applied here because it was not narrowly tailored to avoid infringement on rights protected under the Act. Accordingly, the Employer was not privileged to discharge the reporter based upon the contact with the press secretary.

FACTS

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[1] Although the Region has determined that it can prevail under Wright Line by demonstrating that the reporter was discharged for union activity, it has submitted this case in the event the Board finds that the sole reason the Employer discharged the reporter was for contacting a press secretary in violation of a rule restricting contacts with news sources.

The Brattleboro Daily Reformer (the Employer) is a small 6-day newspaper covering primarily local events in a number of cities and towns in Southeastern Vermont and Southwestern New Hampshire. The Reformer is owned by New England Newspapers, Inc. (NENI), which is a subsidiary of MediaNews Group (MNG), a large Denver-based newspaper publishing company. In late 2002, Paper, Allied Industrial, Chemical & Energy International Union (PACE or the Union) began an organizing campaign among the Employer's 40-45 employees, including its 5-6 staff reporters.

Reporter Eesha Williams worked for the Employer from June 2002 until his discharge in May 2003,[2] and dealt directly with Managing Editor Kathryn Casa. He covered a number of local topics, including local government affairs and Vermont Yankee, a regional nuclear power plant. Williams never received any written Employer ethics rules or rules regarding conflicts of interest.[3] He was a prolific writer and numerous stories were published under his byline, frequently on the front page.[4] Occasionally, Casa verbally corrected his conduct and, in February, issued him a written warning for soliciting a response from an outside source to an unpublished letter to the editor.

Williams made the initial contact with the Union and was the principal employee organizer. In December 2002, Williams attended three poorly attended off-site employee organizing meetings and, over the ensuing months, spoke with employees at work about the Union.[5] Managing editor Casa admits knowing about the Union campaign in March.

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[2] All dates are in 2003, unless otherwise indicated.

[3] Williams recalls only that shortly after joining the Reformer, Casa told him not to sign any petitions regarding Vermont Yankee. She told him that Vermont Yankee management had complained to the Reformer's publisher when she had once signed a petition for a referendum concerning the power plant.

[4] Prior to the discharge, the Employer submitted several of Williams' articles to a statewide journalism contest. Subsequently, Williams won an investigative journalism award.

[5] The Union ultimately obtained sufficient authorization cards to file Case 1-RC-21639. Notwithstanding this charge concerning Williams' May 20 termination, on June 26, the Union went forward with and lost the election, but did not file objections.

As the organizing campaign progressed, Williams did some background research on Employer owner MNG's labor relations record and became concerned that the Employer's corporate parent would try to have him fired for his Union activity. To protect himself, Williams hand delivered to Casa a May 12 letter in which he announced the Union campaign and identified himself as a Union supporter. He also told Casa that he was going to take a ten-minute break to hand out some Union literature and did not want there to be any question that he had done so on his own time. Casa e-mailed the Employer Publisher and NENI President to notify them of the Union activity.

That evening, Williams was assigned to cover a meeting of a local government select board concerning the Vermont Yankee nuclear power plant. Casa also attended the meeting. At one point during the meeting, an official responded to a citizen's question about evacuation plans in the event of a nuclear accident by suggesting that people who lived on unpaved roads should not try to evacuate. The room apparently erupted in laughter at this remark, including Williams. Williams' article about the meeting was published the next day. The chair of the select board subsequently wrote a letter to the editor complaining about the tone of Williams' article about the meeting. That letter appeared in the Reformer on May 16. Casa never mentioned having any problems with Williams' article and did not discuss the letter with him prior to its publication.

On the morning of May 16, Williams placed telephone calls to the Washington, D.C. offices of Congressman Bernard Sanders and Senators Patrick Leahy and James Jeffords and left messages for each representative's press secretary. Williams called the press aides because they were the only staff members Williams knew. Each message gave Williams' name, stated that he was "from the Reformer" and was calling from his home telephone, and requested a return call at that number.

All three messages were returned within an hour or two, beginning with Leahy press aide David Karl. At the outset, Williams said he was unsure that Karl was the right person to talk to and explained that the Reformer employees were trying to form a union and that they had reason to believe that the Employer would violate federal labor law. Williams asked Karl if Senator Leahy would write a letter to the Employer saying that he knew what was going on and was watching the situation. Karl replied that he knew what the employees were asking for, said that there did not appear to be any problem and that he would check with the Senator and get back to Williams.

Next, as he had in the conversation with Karl, Williams introduced himself and posed the same question to Sanders' press spokesperson Joel Barkin and got a virtually identical response. Williams also asked Barkin if Representative Sanders would be willing to give a speech to the employees. Like Karl, Barkin said there did not appear to be a problem and that he would get back to Williams.

Later the same morning, Jeffords' press secretary Derby returned Williams' call. As before, Williams began by stating that he was unsure whether Derby was the right person for him to talk to. He said that the employees were trying to get a Union at the Reformer and that a majority of the employees had signed Union cards. Williams also stated that based on the track record of the Employer's corporate owner, the employees had reason to believe that the owner would violate federal law to keep the Union out. Williams said that he would like a letter from the Senator stating that he knew what was going on and that he was watching the situation to make sure the Company obeyed the law. Derby replied that she did not know whether it was something they could do. Williams told Derby that he was surprised that the Senator would be unwilling to help constituents against an out-of-state company that might be about to violate federal law. According to Williams, Derby asked in a loud and angry voice whether Williams was trying to tell the Senator what he should do and said that he should not be telling her what they should do. Williams responded that he had just spoken to Leahy and Sanders' offices and that they had said there did not appear to be a problem. Williams said that he was surprised that Derby's answer was so different, that he was only trying to convey a simple message to the Employer's owners to please obey federal law. Derby rejoined that she had worked at the Burlington (Vermont) Free Press for many years, that she had experience with a union there and that Williams did not have to tell her about it. Williams finally said that it seemed clear that Derby was not the right person for him to talk to and ended the call.[6] Williams, who had spoken to

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[6] About an hour after ending the conversation with Derby, Williams called Jeffords' office and left another message stating that he was a constituent calling about a union matter and asking for a staff member to call him back. About a week later, a member of Senator Jeffords' staff called Williams at home. Williams framed his request to this staffer along the lines of his earlier requests to the three press secretaries. The staffer said that he had been in touch with Senator Leahy's office and that the two

Derby before to obtain quotes for articles from Senator Jeffords, insists that he did not state or imply to Derby that he was writing an article for the Reformer. He reported to work around noon that day. Everything seemed normal to him.

At some point after the conversation with Williams, Derby telephoned Casa to let her know that Williams had called her about the Union campaign at the Reformer. According to Casa,[7] Derby said that it was unclear to her whether Williams was writing a story about the Union campaign or trying to get the Senator's support. Derby told Casa that Williams identified himself as a reporter for the Reformer and, according to Casa's notes taken during the conversation, Derby also said that he was calling as a constituent. Derby said that, in her opinion, it was a conflict of interest for Williams to contact her and identify himself as a reporter if he was seeking support for the Union. Derby told Casa that when she tried to explain to Williams that he was engaging in a conflict of interest by contacting her rather than a constituent services staffer, Williams became belligerent and asked if Derby meant that the Senator supported corporate interests over the working class. Derby said she felt that Williams was trying to put words in Senator Jeffords' mouth. Derby also told Casa that Williams said he had obtained the support of Senator Leahy and Representative Sanders, but that Derby had checked and this claim was not accurate.[8]

At 5:00 p.m., Casa told Williams that he was being suspended indefinitely without pay because he had contacted a Senator's office that morning to solicit support for a union. Casa did not tell Williams how she knew he had done so, but asked whether it was true. She said nothing about Derby's call. Williams was stunned and said very little as Casa proceeded to instruct him to clean out his desk and

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Senators were inclined to issue a joint statement, which they later did.

[7] Derby declined the Region's request to be interviewed, based on an apparent Senate rule prohibiting staff members from giving statements in connection with litigation.

[8] On May 22, Senators Leahy and Jeffords sent a joint letter to the Employer indicating their support of workers' right to choose unionization and that they trusted the Employer would cooperate in the holding of a free and fair election among the employees. Congressman Sanders sent the Union a statement in support of the organizing drive and encouraging the employees to unionize.

told him that he could not use the Company e-mail system or represent himself as a Reformer reporter.

On May 19, Casa asked Williams to come to a meeting that afternoon and stated he could bring a non-participating witness. At 2:00 p.m., Casa and MNG Vice President for Human Resources Charles Kamen met with Williams, who was accompanied by a PACE representative. Kamen said that Casa would tell Williams why he was suspended and that he would then have a chance to defend himself. Casa stated that there were two reasons for the suspension. First, Williams' call to Senator Jeffords' office compromised the Reformer because the paper would have to cover the Senator in the future and, according to Derby, Williams had been aggressive and confrontational and had led Derby to believe that he was calling as a reporter writing an article for the Reformer. Second, Casa said that Williams was being suspended based on a letter from the select board chair complaining about Williams' coverage of the May 12 select board meeting. At that point, Williams said that Casa had not said anything about the select board meeting when he was suspended on May 16. Casa apparently conceded that she had not mentioned it at the time of the suspension, but added that his conduct at the May 12 meeting was inappropriate and that his laughter reflected badly on the paper.

Kamen interjected that as a reporter, Williams' job was not to participate but to be a blank slate and report events, and that the suspension was based on concern for maintaining the Reformer's professional quality. Williams protested that that was a lie and that Kamen had come to Brattleboro to get rid of the Union. Kamen noted that Williams was showing his aggressive nature. Williams requested and was given time to respond to the charges in writing and the meeting ended.

On May 20, Williams e-mailed Kamen and Casa a three-page written response. Williams protested the addition of complaints about his article about the May 12 select board meeting as a new reason for the suspension and asserted that the Employer was groping for an excuse to fire him.[9] He pointed out that the Employer had been demonstrably

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[9] Contrary to Williams' understanding, the Employer was not concerned with the complaints about Williams' article, but only about his conduct at the meeting itself. In this regard, Casa denies mentioning any complaints about the article at all, and claims that she told Williams that his inappropriate conduct and the unethical call to Derby were more in a series of incidents.

happy with his work for 11 months until he disclosed his support for the Union on May 12 and charged that his suspension, four days later, was a flagrant violation of the NLRA. Regarding the Employer's specific reasons for the suspension, Williams denied telling Derby that he was calling as a reporter rather than a constituent, and pointed out that unlike his prior calls to Derby, this was the first time he had asked her to call him at his home telephone number. Williams also disputed the charge that the phone call to Jeffords' office would present a conflict of interest when covering the Senator in the future, arguing that at some point, most reporters have contacted their senators as constituents seeking help for non-work related reasons. With respect to the Employer's reliance on Williams' conduct at the May 12 select board meeting, Williams noted that Casa had not mentioned having any problems with his article prior to the receipt of the select committee chair's letter to the editor and the events of May 16,[10] asked rhetorically how many reporters had never laughed in public, and noted that Casa should know that virtually everyone in the room had laughed when he did.

The Employer converted the suspension to a discharge later the same day. According to Casa, she was unpersuaded by Williams' letter. She found immaterial the fact that he had called Derby from his home and credited Derby's account of what Williams said and her characterization of his demeanor during the May 16 telephone call.[11] Casa stated that she had contacted Leahy and Sanders' press aides in connection with her investigation, but that she thereafter consulted Kamen and they jointly decided to terminate Williams' employment before she had spoken to either aide.

The Employer has not presented a written position statement but has, [*FOIA Exemptions 6, 7(C), and 7(D)*,] explained that its principal concern was Williams' failure to clarify that he was calling Derby, who had been a news source for Williams and other Reformer reporters, for personal reasons, and that "it is a violation of journalistic ethics to contact a source to pursue personal goals or to seek a personal favor." The Employer concedes that this ethical precept is not contained in any specific Employer document, but asserts that it should be understood by all reporters. The Employer also concedes that it would

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[10] As noted above, Casa denies mentioning the letter to the editor at the May 19 meeting.

[11] Casa claimed that Derby's account was consistent with her own past experience with Williams.

have been acceptable for Williams to seek support for the Union campaign as a constituent by calling the Senator's constituent services staff and that it would not have disciplined Williams had he done so. Thus, the problem was not that Williams called a senator's office, but that he called a news source (i.e., Derby) on a personal matter and was unclear about the purpose of the call.

ACTION

We conclude that a Section 8(a)(1) and (3) complaint should issue, absent settlement, alleging that the Employer discharged Williams because of his protected, concerted conduct in support of the Union. The Employer's reliance on the purported ethics rule is unavailing as a matter of fact and law, for Williams sought protected assistance from Senator Jeffords, not a prohibited personal favor from a news source, and, in any event, the unwritten rule itself is overly broad and unlawfully impinges upon Section 7 rights.

The Region has determined that there is a prima facie case demonstrating that Williams was discharged because of his Union activity, that the Employer's asserted reasons are all pretextual, and that the Employer has not met its burden of demonstrating that it would have discharged Williams in the absence of his Union or other protected activity. The essential issue here is whether the protections afforded to Williams under the Act are more limited than other employees because of his position as a newspaper reporter, and the Employer's unique interest in maintaining its professional integrity.

The protections of Section 7 of the Act extend to employee efforts to improve working conditions even when employees resort to channels outside the immediate employment relationship, including contacts with administrative, political, and judicial forums.[12] The Act

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[12] Eastex, Inc. v. NLRB, 437 U.S. 556, 565-566 (1978). See also Petrochem Insulation, Inc., 330 NLRB 47, 49 (1999), enfd. 240 F.3d 26 (D.C. Cir. 2001) (union intervention in state environmental agency proceedings to oppose employer's permit requests, protected); Alaska Pulp Corp., 296 NLRB 1260, 1261 (1989), enfd. 944 F.2d 909 (9th Cir. 1991) (Table) (employee testimony before Congress in support of legislation that employer considered inimical to its interests, protected); Kaiser Engineers v. NLRB, 538 F.2d 1379, 1385 (9th Cir. 1976) (engineers' lobbying of Congress to deny another company's request for visas for foreign engineers, protected).

also protects employee communications with third parties, including employer customers.[13] Such communications to third parties may lose the protection of the Act if they do not relate to labor practices of the employer, or if they disparage the employer's reputation or the quality of its product, or if the communications are maliciously motivated.[14] However, otherwise protected communications do not lose the protection of the Act merely because the employer finds them distasteful or offensive.[15]

The Board has balanced these broad protections under Section 7 with an employer's right to maintain reasonable rules of employee conduct that restrict employee communications. An employer may implement such rules provided that they do not "reasonably tend to chill employees in the exercise of their Section 7 rights"[16] and there is no language that reasonably could be read to encompass, or evidence of enforcement against, protected activity.[17]

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[13] See, e.g., Arlington Electric, 332 NLRB 845, 846 (2000) (circulation by an employee of a hospital's subcontractor a flyer urging hospital patrons and employees not to use the hospital because the subcontractor did not provide paid family health care, protected).

[14] See generally NLRB v. Local 1229 IBEW (Jefferson Standard), 346 U.S. 464 (1953); Emarco, Inc., 284 NLRB 832, 833 (1987).

[15] See, e.g., Chromalloy Gas Turbine Corp., 331 NLRB 858, 858, 863 (2000) (rude, argumentative and demeaning nature of employee's remarks about employer manager at staff meeting did not exceed the bounds of permissible protected concerted activity); Brownsville Garment Co., 298 NLRB 507, 508 (1990) (criticism of manager in presence of third parties protected notwithstanding manager resented the remarks as personal and unjust).

[16] Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (to establish that mere maintenance of a rule violates 8(a)(1), General Counsel must prove that the rules can reasonably be interpreted in a way that infringes on Section 7 activity).

[17] Id. at 826, 827 (rules against failing to support employer's objectives and prohibiting outside conduct affecting "employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community" could not reasonably be read as encompassing Section 7 activity and did not violate Sec. 8(a)(1); Board's prior invalidation of similarly worded

In the newspaper industry, the Board has recognized the right of employers to promulgate and maintain rules aimed at protecting editorial integrity. Such employers may be exempt from bargaining about the implementation of rules of conduct aimed at protecting editorial integrity,[18] provided they are "narrowly tailored, unambiguous and designate the category of employees to whom [the rules apply and must not] improperly impinge on the relevant rights of the affected employees."[19] Thus, in Peerless Publications, the Board ordered the rescission of a unilaterally implemented ethics code because the code was, in its entirety, overbroad and not narrowly tailored in terms of its content "to meet with particularity" the employer's legitimate objective in protecting its editorial integrity.[20] With respect to a portion of the ethics code regulating employee political involvement, holding public office and service in community organizations, the Board stated that "preservation of editorial integrity does not necessarily dictate a requirement of employee abstention

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employer rules in Cincinnati Suburban Press (289 NLRB 966, 967-968 (1988)) distinguishable because that employer's enforcement of its rules against union activity provided a "factual basis for reasonable employees to view the rule as prohibiting Section 7 activity"). See also Tradesmen International, 338 NLRB No. 49, slip op. at 2 (2002) (prohibition on "disloyal, disruptive, competitive, or damaging" conduct did not violate 8(a)(1); rule could not reasonably be read as encompassing Section 7 activity because it gave examples of the types of conduct it proscribed and no evidence of employer enforcement against protected activity); Aroostook County Regional Ophthalmology Center, 81 F.3d 209, 212-213 (D.C. Cir. 1996) (relying on context of rule and its location in the manual to conclude that rule was not unlawful on its face).

[18] Peerless Publications, 283 NLRB 334, 335 (1987), remanded by Newspaper Guild Local 10 (Peerless Publications) v. NLRB, 636 F.2d 550 (D.C. Cir. 1980) (although newspaper employer's ethics code affected terms and conditions of employment and was presumptively a mandatory subject of bargaining, the presumption could be overcome and bargaining excused if the rules are designed to prevent employees from casting doubt on editorial integrity because "protection of the editorial integrity of a newspaper lies at the core of entrepreneurial control").

[19] Id. at 336-337, 337.

[20] Ibid.

from [such activities]," observed that "such regulation 'interferes substantially with the civil and economic rights of the employees (and indeed their private lives),'" and that the employer had "not demonstrated on the record that its regulation of such areas was supported by 'clearly defined, directly necessary compensating benefits in terms of the employer's legitimate concerns.'"[21]

The Board has indicated that the standards articulated in Peerless Publications for lawful unilateral implementation of work rules also extend to the validity of a newspaper's ethics rules under Section 8(a)(1). In Cincinnati Suburban Press,[22] the Board upheld the administrative law judge's conclusion that the rules relied upon to support a reporter's discharge were unlawfully maintained. The Board emphasized that the employer was privileged to adopt rules necessary to its credibility and the quality of its product so long as such rules comported with the Peerless Publications standards.[23] We are unaware of any Board decision upholding the application of a rule that meets the Peerless Publications standards to punish a newspaper employee for engaging in conduct that would be protected if engaged in by an employee in any other field.[24]

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[21] Id. at 336, quoting Newspaper Guild Local 10 (Peerless Publications) v. NLRB, 636 F.2d at 563, 563 n. 50.

[22] 289 NLRB 966, 966, n. 2 (1988).

[23] The Board has overruled Cincinnati Suburban Press to the extent footnote 2 suggests that the mere maintenance of the rules in question there would have been unlawful in the absence of the employer's actual application of the rules to protected activity. Lafayette Park, 326 NLRB at 827, n. 13. See fn. 17, supra.

[24] An administrative law judge has applied Peerless Publications in a case strikingly similar to that here involving an unwritten conflict of interest rule. ANG Newspapers, JD(SF)-81-03, 2003 WL 22680916 (November 6, 2003). In ANG, a reporter who did not normally cover city council affairs but who had previously interviewed various city officials, including a council member, attended a city council meeting as a union representative and asked the council to support a resolution in favor of his union's position in protracted contract negotiations with the employer. JD(SF)-81-03, slip op. at 4. The employer subsequently admonished the reporter that his remarks to the city council could create a perception of a conflict of interest arising from asking a favor of a news source and undermine the newspaper's credibility. Id. at 4 and 7. Applying Peerless Publications, the judge concluded that

Nor does any case suggest that Section 7 rights of newspaper employees are inherently abridged due to the nature of the industry.

Applying these principles, we first conclude that Williams' contact with Senator Jeffords' press secretary in connection with the Union campaign was a prima facie protected appeal to a government official under Eastex, and that none of the reasons cited by the Employer are sufficient to remove his conduct from the protections of the Act. Initially, based upon Williams' account of his conversation with Jeffords' press secretary, Derby, he clearly informed her that he was contacting her in his private capacity, not as a reporter, and even that he was unsure whether she was the appropriate contact before he proceeded to request the assistance of a letter from Senator Jeffords. Since Williams did not, as a factual matter, call Derby seeking her assistance, but rather sought assistance from her principal, it follows that even assuming the validity of the unwritten ethics rule against contacting news sources for personal favors or objectives, Williams did not violate the rule by contacting Derby as claimed.[25]

Second, we conclude that, to the extent the Employer relied on a putative ethics rule to justify Williams' discharge, the rule, as characterized by Casa, is deficient under the Peerless Publications standards in several respects. For example, while it may be clear that the rule applies to reporters, reporters are not the only class of newspaper employees likely to contact news sources. Researchers, fact checkers, photographers, editors, and their assistants all might have occasion to contact a source, yet it is unclear whether the unwritten rule would

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the employer violated Section 8(a)(1) because the unwritten conflict of interest rule embodied in the oral admonition was unclear as to whether it applied to all employees or just the reporter, was ambiguous and not sufficiently tailored to meet the employer's legitimate objectives, and therefore improperly impinged on Section 7 rights. Id. at 6-8.

[25] The consistency of Williams' accounts of his contacts with Congressman Sanders and Senator Leahy's press representatives, particularly with respect to how he introduced himself and stated the purpose of his call, sheds light on and tends to corroborate his account of what he said to Derby.

also apply to them.[26] The rule is also impermissibly ambiguous.[27] Thus, there are no definitions to clarify what the Employer means by the terms "personal," "favors" and "objectives," or examples of the type of contacts contemplated by the rule from which employees could glean that the rule does not apply to union or other protected conduct.[28] Nor has the Employer identified any "clearly defined, directly necessary compensating benefits in terms of [its] legitimate concerns" that would justify regulating employee contacts with news sources under such a broad and ambiguous rule.[29] Accordingly, the Employer was not privileged to discharge Williams' in reliance on the unwritten ethics rule because the rule is invalid under Peerless Publications.

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[26] See Peerless Publications, 283 NLRB at 336 (code of ethics deficient, inter alia, for failing to designate to which categories of employees it applied).

[27] The Board routinely construes ambiguity in work rules against the employer. See Altorfer Machinery, 332 NLRB 130, 133 (2000) (ambiguity that puts in doubt employees' right to engage in union solicitations is construed against the employer who formulated the offending provision); Grouse Mountain Lodge, 333 NLRB 1322, 1332 (2001) (ambiguity that puts in doubt employees' right to engage in union solicitation without fear of punishment is construed against employer); and Baptist Medical Center, 338 NLRB No. 38, slip op. at 13 (2002) ("[w]here, as here, the language of a no-solicitation rule is ambiguous and can reasonably be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights, the rule is deemed to be invalid . . . .").

[28] Compare Tradesmen International, 338 NLRB No. 49, slip op. at 2 (where employer rule set forth examples of the types of conduct it prohibited, employees reading the rule in context "would recognize that it was intended to reach conduct similar to the examples given in the rule not conduct protected by the Act"). See also Cardinal Home Products, Inc., 338 NLRB No. 154, slip op. at 3 (2003) (citations omitted) (overly broad or ambiguous rules "inhibit or threaten employees who desire to engage in legally protected activity but refrain from doing so rather than risk discipline" under the employer's rules).

[29] See Peerless Publications, 283 NLRB at 336 (employer failed to demonstrate how rule restricting employee involvement in political activities or community affairs was necessary to preservation of its editorial integrity).

The Employer's reliance on the unwritten rule is also suspect because the Employer, by its own admission, was not concerned about Williams' contacts with Karl and Barkin, and it would have had no quarrel with Williams' conduct had he contacted a constituent services staff member in Senator Jeffords' office rather than Derby. This suggests that the Employer was less concerned that Williams made contact with, or sought an arguably personal favor from, a news source than it was with his alleged misrepresentation to Derby that he was contacting her as a reporter covering the Union campaign. Any attempt to rely on Derby's claim that Williams misrepresented his status as a reporter is unavailing. As noted above, Williams emphatically denies telling Derby that he was calling her as a reporter for the Reformer or that he was writing a story about the Union campaign. Further, Casa's notes from her conversation with Derby demonstrate that Derby admitted that Williams said he was calling as a constituent. Finally, the Employer has proffered no evidence that any assertedly offensive demeanor of Williams during the telephone conversation with Derby would have formed the sole basis for his discharge. In this regard, we note that the Employer's rule itself does not differentiate offensive contacts from any other contacts with news sources. Thus, even under the Employer's version of the facts, there is insufficient evidence to support the Employer's contention that Williams' conduct was so rude or maliciously untrue that it lost the protection of the Act.[30]

For all of these reasons, we conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) and (3) by discharging Williams for engaging in protected concerted activity.

B.J.K.

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[30] See, e.g., Emarco, 284 NLRB at 833-834 (subcontractor employees' remarks to general contractor that their employer never paid its bills, was "no damn good," that the job was "too damn big for them" and that the subcontractor was "a son of a bitch," even if biased or hyperbolic, were not so "disloyal, reckless, or maliciously untrue as to lose the Act's protection").