

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

Advice Memorandum

DATE: January 29, 2013

TO: Irving E. Gottschalk, Regional Director
Region 30

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

SUBJECT: Verso Paper
Case 30-CA-089350

512-5012-0133-2200

The Region submitted this case for advice regarding whether an Employer's confidentiality rule unlawfully interferes with employees' Section 7 rights by precluding employees from disclosing information about ongoing investigations into employee misconduct. We agree with the Region that the rule is unlawfully overbroad per the Board's decision in *Banner Health*¹ and that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining this unlawful rule.

Verso Paper ("Employer") operates paper mills across the country. The Employer maintains a Code of Conduct which sets forth the Employer's expectations for employee conduct in various situations, including a provision which prohibits employees from discussing ongoing investigations. The provision states:

Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

We agree with the Region that this rule is overbroad because the Employer cannot maintain a blanket rule regarding the confidentiality of employee

¹ 358 NLRB No. 93 (2012).

investigations, but must demonstrate its need for confidentiality on a case-by-case basis.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights.² Employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.³ An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right.⁴ In *Banner Health*, the Board held that an employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must "determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, and there [was] a need to prevent a cover up."⁵ Thus, a blanket rule prohibiting employee discussions of ongoing investigations is invalid because it does not take into account the employer's

² *E.g.*, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

³ *Caesar's Palace*, 336 NLRB 271, 272 (2001); *see also Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 14-15 (2011) (finding an employer violated Section 8(a)(1) by routinely requiring confidentiality of employees involved in investigations without demonstrating a legitimate and substantial justification for adversely impacting that Section 7 right).

⁴ *Banner Health System*, 358 NLRB No. 93, slip op. at 2 (2012) (citing *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15; *compare Caesar's Palace*, 336 NLRB at 272 (finding an employer established a business justification for requiring confidentiality in an investigation involving employee use of illegal drugs and a possible management cover-up, retaliation, and threats of violence) *with Phoenix Transit System*, 337 NLRB 510, 510 (2002) (finding unlawful a confidentiality rule which prohibited employees from discussing their sexual harassment claims with one another where the employer did not establish a business justification for the rule, especially in light of the fact that the employer gathered the employees together to obtain information about their complaints).

⁵ *Banner Health*, 358 NLRB No. 93, slip op. at 2 (brackets in original) (quoting *Hyundai Shipping*, 357 NLRB No. 80, slip op. at 15) (finding an employer's oral rule precluding employees from discussing ongoing investigations unlawful because the employer did not show it had a legitimate business justification for confidentiality in any given investigation).

burden to demonstrate a particularized need for confidentiality in any given situation.⁶

The rule in this case violates Section 8(a)(1) because it does not take into account the Employer's burden to show in each particular situation that the Employer has a business justification for confidentiality that outweighs employees' Section 7 rights. The Employer may not avoid this burden by asserting its need to protect the integrity of every investigation, but rather must establish this need in the context of a particular investigation that presents specific facts giving rise to a legitimate and substantial business justification for interference with the employees' Section 7 right.

Accordingly, the Region should issue complaint, absent settlement.⁷

/s/
B.J.K.

⁶ See *Banner Health*, 358 NLRB No. 93, slip op. at 2.

⁷ We note that the first two sentences of the Employer's rule lawfully sets forth the Employee's interest in protecting the integrity of its investigations. Consistent with *Banner Health*, the Employer could modify the remainder of the rule to lawfully advise employees that:

Verso may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If Verso reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.