The Continental Group, Inc. *and* Local 11, Service Employees International Union

The Continental Group, Inc. and Sunset Harbour South Condominium Association, Inc., Joint Employers *and* Local 11, Service Employees International Union

The Continental Group, Inc. and The Executive Condominium Association, Inc., Joint Employers *and* Local 11, Service Employees International Union

Sunset Harbour South Condominium Association, Inc. and Local 11, Service Employees International Union. Cases 12–CA–24045, 12–CA–24196, 12–CA–24448, 12–CA–24070, 12–CA–24097, 12–CA–24132, and 12–CA–24447

August 11, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND HAYES

On September 30, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 353 NLRB 348.[1] Thereafter, the Respondent, The Continental Group (Continental), filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions, to modify his remedy, and to adopt the recommended Order, as modified and set forth in full in the prior decision, to the extent and for the reasons stated in the decision reported at 353 NLRB 348 (2008), which we incorporate herein by reference, except as modified below.[4]

In his decision below, the judge concluded, inter alia, that Respondents Continental and Sunset Harbour violated Section 8(a)(1) of the Act by promulgating and maintaining an unlawfully overbroad no-access rule. In addition, relying on *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006), the judge concluded that Respondent Continental violated Section 8(a)(1) when it issued a written warning to employee Phillip Gonzalez for "frequenting the property" and "loitering on the property" in violation of the unlawfully overbroad no-access rule.[5]

For the reasons set forth in the decision reported at 353 NLRB 348, which we have incorporated by reference, we adopt the judge's conclusion that the Respondents violated Section 8(a)(1) by promulgating and maintaining the unlawfully overbroad no-access rule. However, we reverse the judge's further conclusion that the written warning provided to employee Gonzalez pursuant to the rule was unlawful. Contrary to the judge, and as we explain in greater detail below, we find that the principles reflected in *Double Eagle* are not applicable to this proceeding.

I. THE FACTS

The facts are set forth in detail in our prior decision in this case. 353 NLRB 348 (2008). For present purposes, these facts are sufficient.

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

[2] Consistent with the Board's general practice in cases remanded from the courts of appeals, and for reasons of administrative economy, the panel includes the remaining member who participated in the original decision. Furthermore, under the Board's standard procedures applicable to all cases assigned to a panel, the Board Member not assigned to the panel had the opportunity to participate in the adjudication of this case at any time up to the issuance of this decision.

[3] For institutional reasons, Member Hayes joins his colleagues in affirming the judge's finding that the Board's assertion of jurisdiction over a residential condominium association is appropriate.

[4] In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. Also, we shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[5] Specifically, management had received reports from residents that Gonzalez had been sleeping in a common area of the building, living out of his car, and "hanging around" the facility, both inside and outside the building.

Continental maintained an employee manual for front-desk employees at Sunset Harbor Condominium. The manual contained the following rule.

> Employees are only permitted to be on property while on duty unless you are picking up a paycheck or otherwise advised by the property manager or the Front Desk Coordinator. If you are coming on property while off duty, we expect that you will still follow guidelines and dress neatly. Once again, remember you represent the building and the company. Employees who violate this policy are subject to disciplinary action.

On August 16, 2004, front-desk employee Phillip Gonzalez was served with court papers seeking a restraining order against him in connection with an allegation of domestic violence. Gonzalez showed the papers to his supervisor and later discussed his situation with one of the condominium residents. With the help of management, Gonzalez was given time off for the remainder of that day and through August 29. On August 17, Gonzalez came to the facility and informed his supervisor that he had obtained an attorney to represent him in the domestic violence matter and that he was looking for a place to stay. Director of Front-Desk Services David Miller, who was present, told Gonzalez that he had been told that Gonzalez had been "hanging around the facility" and "loitering" there. Miller further stated that it had been reported that Gonzalez had been sleeping in a common area of the condominium and living out of his car. Miller informed Gonzalez that he could not come to the condominium while on vacation and that he could not loiter in the building when he was not on duty. Miller also told Gonzalez that he should not be discussing his personal affairs with condominium residents.

When Gonzalez reported for work on August 30, Miller informed him that it had been reported that Gonzalez had continued to discuss his personal problems with residents and that he had been loitering on the property. Miller told Gonzalez that he was being removed from Sunset Harbor and to report to Continental's office the next day.

When Gonzalez did so, he was issued two written warnings. One of them stated that, despite being told to keep his personal matters to himself and to refrain from frequenting the property while off duty, Gonzalez had been seen loitering on the property on August 21 and 22. The other warning focused on Gonzalez' giving false information to residents and continuing to speak to them about his personal problems.

After Gonzalez signed the warnings, Miller offered him a position as a floater who would work at various properties managed by Continental as needed. Gonzalez rejected the offer, stating that he wanted to remain at Sunset Harbor. Miller told Gonzalez that he could not, and then asked him if he wanted to resign. Gonzalez did so.

On those facts the judge found, inter alia, that the handbook rule was unlawfully overbroad, as it infringed on employee access rights under *Tri-County Medical Center*, 222 NLRB 1089 (1976); that the written warning issued to Gonzalez for "frequenting the property" and "loitering on the property" was issued pursuant to that rule; and therefore, citing *Double Eagle*, supra, that the warning was also unlawful, because it was "[d]iscipline imposed pursuant to an unlawful rule . . . ."

II. CLARIFICATION OF THE *DOUBLE EAGLE* RULE

The Board has long adhered to and applied the principle that discipline imposed pursuant to an unlawfully overbroad rule is unlawful (the "*Double Eagle* rule"). See, e.g., *Double Eagle*, 341 NLRB at 112 fn. 3; *Saia Motor Freight Line*, 333 NLRB 784, 785 (2001); *Opryland Hotel*, 323 NLRB 723 (1997); *A.T. & S.F. Memorial Hospitals*, 234 NLRB 436 (1978); *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974). Notwithstanding the longevity of this principle, however, and although the rule has often been stated in absolute terms, the Board has never expressly set forth a rationale for the rule nor a description of its scope. After examining the purposes underlying the rule and considering the interests it seeks to balance, we conclude that it is appropriate to set limits on its application. For this reason, and because questions concerning the scope of the rule are otherwise likely to persist, a clarification of the *Double Eagle* rule is warranted.[6]

[6] Our clarification of the *Double Eagle* rule will also distinguish those situations in which an employer imposes discipline pursuant to an unlawfully overbroad rule from situations in which an employer imposes discipline pursuant to a rule that is unlawful for reasons other than overbreadth. Cf. *Opryland Hotel*, 323 NLRB 723, 728 (1997) (citing decisions involving employer discipline of employees pursuant to no-solicitation rules that had been either discriminatorily promulgated or applied, in support of a conclusion that discipline imposed on employee pursuant to an overbroad rule was unlawful).

A workplace rule—and any discipline imposed pursuant to that rule—may violate the Act for a number of different reasons. For example, a rule may be facially unlawful; it may have been promulgated for discriminatory reasons or enforced in a discriminatory manner; or it may be overbroad, i.e., it restricts or prohibits some protected, in addition to unprotected, activity. In recognition of the fact that different considerations underlie the conclusion that each of the above-described rules (and any attendant discipline) violates the Act, we emphasize that our analysis here is expressly limited to cases involving discipline imposed pursuant to an unlawfully overbroad rule. Similarly, we note that our clarification of the *Double Eagle* rule has no bearing on, and

In defining the proper scope of the *Double Eagle* rule, we are guided by the policies underlying the rule. As an initial matter, the Board and the courts have long held that the existence of an overbroad rule violates the Act based on its potential chilling effect on employees' exercise of their Section 7 rights. See, e.g., *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968); *Cardinal Home Products*, 338 NLRB 1004, 1005–1006 (2003) (citations omitted). Indeed, the mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline. See *NLRB v. Beverage-Air Co.*, 402 F.2d at 419; *J.C.Penney Co.*, 266 NLRB 1223, 1224 (1983); see generally Note, *The First Amendment Overbreadth Doctrine,* 83 Harv. L. Rev. 844, 853 (1970) ("By definition, an overbroad statute covers privileged activity, and to the extent that the statutory burden operates as a disincentive to action the result is an *in terrorem* effect on conduct within the protection of the first amendment.").

Moreover, because the mere maintenance of an overbroad rule creates a potential chilling effect on the exercise of protected rights, it is reasonable to infer that the enforcement of such a rule would have a similar, or perhaps even greater, chilling effect on the exercise of protected rights, even if it is enforced against activity that could have been proscribed by a properly drawn rule. As the Tenth Circuit Court of Appeals explained in *Double Eagle*, by analogy to the Federal judiciary's endorsement of constitutional overbreadth challenges to laws impinging upon protected First Amendment activity:

> An individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Double Eagle Hotel & Casino v. NLRB, 414 F.3d at 1258 (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 503 (1985)).

A second justification for the Board's *Double Eagle* rule is the principle that, in the absence of a *valid* employer rule prohibiting the employee conduct at issue, the conduct maintains its protected status. This rationale begins with the premise that the Act grants to employees a statutory right to self-organization, including the right to engage in (or refrain from) solicitation and discussion of terms and conditions of employment. These rights, however, are not absolute, as they must be balanced against an employer's right to maintain production and discipline. In recognition of those competing rights, the Supreme Court has held that an employer lawfully may implement rules that place limited restrictions on employee Section 7 rights in the workplace and during worktime for the purpose of maintaining production or discipline. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945).[7] Notwithstanding the existence of authority lawfully to restrict employees' Section 7 activity, however, if an employer fails to exercise that authority—either by failing to promulgate any rule, or by promulgating an invalid rule—the employee activity that *could* otherwise be prohibited retains its protected character. See *Trico Industries,* 283 NLRB 848, 848 fn. 1, 851–852 (1987) (holding that employee's brief conversations with union president during worktime did not lose the protection of the Act, where the conversations did not violate any published rule or interfere with production); accord: *Greentree Electronics Corp.*, 176 NLRB 919, 919 (1969) (stating that "discharge based on worktime distribution of cards in the absence of a valid rule is suggestive that the employer was reacting to the protected aspect of the employee's conduct, rather than considerations of plant efficiency"), enfd. 432 F.2d 1011 (9th Cir. 1970).[8]

The above-described purposes and rationale underlying the *Double Eagle* rule necessarily inform our delineation of the scope of the rule and guide us in its interpretation and application. To begin, in situations in which the conduct for which an employee is disciplined under an overbroad rule clearly falls within the protection of Section 7 of the Act (e.g., concerted solicitation, distribution, or discussion of terms and conditions of employment)—

does not in any way alter, the principles reflected in decisions such as *St. John's Community Services–New Jersey*, 355 NLRB No. 70 (2010), and *Southern Mail, Inc.*, 345 NLRB 644 (2005), holding that discipline resulting from an employer's unilateral implementation of a stricter interpretation of existing disciplinary policies violates the Act.

[7] Of course, the Board has developed a series of presumptions to assist in its analysis (and provide guidance to employers and employees) as to whether restrictions on employee statutory rights in a given case are justified by employer concerns of productivity or discipline. See *Peyton Packing Co.*, 49 NLRB 828, 843–844 (1943) (holding that a rule prohibiting union solicitation during working hours is presumptively valid, and a rule prohibiting solicitation by employees outside of working hours is presumptively invalid as an unreasonable impediment to self-organization), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944); see also *Tri-County Medical Center*, 222 NLRB 1089 (1976) (holding that a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid unless justified by business reasons).

[8] Nevertheless, as discussed more fully below, under the reformulated *Double Eagle* rule, an employer that failed to promulgate a valid rule still would have the opportunity to demonstrate that it was justified in disciplining an employee based on conduct that actually interfered with the employer's operations.

and even though the employer lawfully would be entitled to place restrictions on that conduct via a narrowly tailored rule—both of the above-described justifications for the *Double Eagle* rule apply.[9] Accordingly, in such situations, the Board will apply the rule and find that the discipline violates the Act (unless the employer is able to establish the available affirmative defense outlined below).

Conversely, in situations in which the conduct for which an employee is disciplined is wholly distinct from activity that falls within the ambit of Section 7 (e.g., sleeping on the Employer's premises when off duty), the second justification for the *Double Eagle* rule—that employee conduct maintains its protected character in the absence of a valid employer rule—is simply inapplicable. Moreover, notwithstanding the fact that an employer's discipline of an employee for such conduct in reliance on an overbroad rule might produce *some* chilling effect merely by invoking the overbroad rule, the chilling effect is much less significant than it would be if the employee's conduct were not wholly unprotected. Based on the justifications underlying the *Double Eagle* rule, we are of the view that its application in such situations would expand the rule beyond its appropriate boundaries. Accordingly, we conclude that the rule does not apply, and it is not unlawful for an employer to discipline an employee pursuant to an overbroad rule, in situations in which the employee's conduct is not similar to conduct protected by the Act in the manner we proceed to explain.

Finally, there are situations in which an employer disciplines an employee pursuant to an overbroad rule for conduct that touches the concerns animating Section 7 (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted.[10] In such situations, it cannot be said that the employee's conduct would be protected in the absence of a lawful employer rule; accordingly, the second rationale for the *Double Eagle* rule discussed above does not apply. However, in comparison to the situation involving employee conduct that is neither for mutual aid and protection nor concerted (e.g., sleeping on the employer's premises while off duty), there is a much greater risk that employees would be chilled in the exercise of their Section 7 rights. That is, the "chilling effect" rationale for the *Double Eagle* rule applies to a greater extent when an employee is disciplined for conduct that is "protected" but not "concerted."[11] For this reason, we are convinced that application of the *Double Eagle* rule in such instances is appropriate and necessary to fully effectuate the rights guaranteed by Section 7 of the Act.

In sum, as outlined above, the *Double Eagle* rule provides that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. *Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. on other grounds sub nom. *NLRB v. Daylin, Inc.*, 496 F.2d 484 (6th Cir. 1974); see also *Switchcraft, Inc.*, 241 NLRB 985 (1979), enfd. 631 F.2d 734 (7th Cir. 1980); *Wayne Home Equipment Co.*, 229 NLRB 654 (1977); *Singer Co.*, 220 NLRB 1179 (1975). It is the employer's burden, not only to assert this affirmative defense, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. In this regard, an employer's mere citation of the overbroad rule as the basis for discipline will not suffice to meet its burden. Rather, assuming that the employer provides the employee with a reason (either written or oral) for its imposition of discipline, the employer must demonstrate that it cited the employee's interference with production and not simply the violation of the overbroad rule. See, e.g., *Gerry's I.G.A.*, 238 NLRB 1141, 1151 (1978) ("It is impossible, of course, for the employer . . . to establish [that the employee was discharged based on interference with production] when interference with work is not the reason given in the discharge letter and the discharge letter instead is in the lit-

[9] An example of this situation is an employer who disciplines an employee for soliciting support for a union during working hours, in reliance on a rule that prohibits all solicitation on the employer's premises.

[10] *NLS Group*, 352 NLRB 744 (2008), incorporated by reference in 355 NLRB No. 169 (2010), enfd. ___ F.3d ___, 2011 WL 2465457 (1st Cir. 2011), serves as a prime illustration of such a situation. In *NLS Group*, the Board found that an employer confidentiality rule prohibiting employees from disclosing terms of employment, including compensation, to "other parties" was unlawfully overbroad, in violation of the Act. In addition, relying on *Double Eagle*, the Board concluded that the employer's discharge of an employee for violating the overbroad confidentiality rule by complaining to a client *about an individual compensation issue* violated the Act.

[11] Employees, we recognize, might have difficulty appreciating the distinction between a discharge based on the discussion of an individual wage dispute with a client, and a discharge based on the discussion of (and appeal for support regarding) a unit-wide compensation grievance with a client.

eral language of the overly broad rule."), enfd. 602 F.2d 1021 (1st Cir. 1979).

This formulation of the *Double Eagle* rule, including our allocation of the burdens of proof, reflects a deliberate balancing of employees' Section 7 rights and employers' legitimate interest in establishing work rules for the purpose maintaining discipline and production. Moreover, in our judgment, the available affirmative defense described above properly acknowledges the employer's legitimate interests, yet simultaneously discourages post-hoc rationalization of disciplinary decisions, and minimizes the likelihood of a chilling effect on employees' Section 7 rights.

III. THE *DOUBLE EAGLE* RULE DOES NOT APPLY TO THE WARNING ISSUED TO GONZALEZ

Having clarified the scope of the Board's *Double Eagle* rule, we now consider its applicability in the context of this case. As set forth above, Continental maintained at Sunset Harbour an unlawfully overbroad employee rule prohibiting off-duty employees from coming on to the property except to collect their paychecks or when "otherwise advised by" designated managers. At a time when the rule was in force, Continental received reports that employee Phillip Gonzalez had been sleeping in a common area of the building, living out of his car, and "hanging around" the facility, both inside and outside the building; Gonzalez did not deny those reports. As a result, Continental issued a written warning to Gonzales for "frequenting the property" while off duty and "loitering on the property" on his vacation days.

Notwithstanding the fact that Continental disciplined Gonzalez pursuant to an unlawfully overbroad rule restricting off-duty employees' access to the Respondent's property, we conclude, contrary to the judge, that the *Double Eagle* rule is not implicated. The conduct for which Gonzalez was disciplined—sleeping on the Respondent's premises and living out of his car in the Respondent's parking lot—was not protected concerted activity; indeed, his conduct was wholly distinct from activity that falls within the ambit of Section 7. As we have explained above, application of the *Double Eagle* rule to conduct of this sort does not materially advance the policies on which the rule is premised. Accordingly, we conclude that the rule is simply inapplicable to such conduct.

Therefore, we reverse the judge's conclusion that Continental violated Section 8(a)(1) by disciplining Gonzalez pursuant to the unlawfully overbroad no-access rule, and we dismiss the allegation. Because Continental did not violate the Act in this regard, we also dismiss the allegation as to Sunset Harbour.

AMENDED REMEDY

The Respondent, The Continental Group, having unlawfully discharged employees for engaging in union activities or protected concerted activities, must offer those employees reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, computed on a quarterly basis from the date of the discharges to the date of a proper reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

ORDER

The National Labor Relations Board adopts the recommended order of the administrative law judge as modified in 353 NLRB 348 and as further modified below, and orders that

A. The Respondent, Sunset Harbour South Condominium Association, Inc., Miami Beach, Florida, its officers, agents, successors, and assigns shall take the action set forth in the recommended Order as modified.

Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its Miami Beach, Florida facility, in English and Spanish, copies of the attached notice marked 'Appendix A.'[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall by posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2004."

B. The Respondent, The Continental Group, Inc., Hollywood, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

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

"(c) Make Marvin White and Leydis Borrero whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision."

2. Substitute the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its offices in Hollywood, Florida, and at the Executive Condominium, Sunset Harbour South Condominium, and Sands Pointe Condominium, all of which are located in Miami Beach, Florida, in English and Spanish, copies of the attached notice marked 'Appendix B.'[10] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2004."

Dated, Washington, D.C. August 11, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring in part.

I agree with my colleagues' conclusion that Respondent Continental did not violate Section 8(a)(1) of the Act when it issued a written warning to employee Phillip Gonzalez for violating an unlawfully overbroad no-access rule. I further agree that the *Double Eagle* rule should not apply in these circumstances, where the discipline is imposed for employee conduct that is clearly unprotected. I find no need in this case to consider the validity of the *Double Eagle* rule's application in other circumstances or the allocation of evidentiary burdens under the rule.

Dated, Washington, D.C. August 11, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD