BMW Manufacturing Co. *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America. Case 10–CA–178112

December 10, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On December 1, 2017, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed separate reply briefs.

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,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by discriminatorily prohibiting conversation about the Union during worktime while permitting conversation about other nonwork subjects,[4] by creating the impression that employees' union activities were under surveillance,[5] and by maintaining an overbroad no solicitation/distribution rule.[6]

As discussed below, however, we reverse the judge and dismiss allegations that the Respondent violated Section 8(a)(1) by maintaining certain rules or provisions in an Associate Guidebook for its employees. In finding the maintenance of these facially neutral provisions unlawful, the judge applied the "reasonably construe" prong of the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Shortly after the judge's decision issued, the Board in *Boeing* overruled the "reasonably construe" prong in *Lutheran Heritage* and held that

> when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and

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

[2] We have amended the judge's conclusions of law consistent with our findings herein.

[3] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

[4] This violation took place during a single-day sequence of conversations between Section Leader Roger Youngblood and employees Johnnie Gill, Ricky Deese, and Jason Evans, all of whom were open union supporters. However, we disagree with the judge and our dissenting colleague that Youngblood also violated Sec. 8(a)(1) during these conversations when he repeatedly demanded that Gill "give [him] the papers." Contrary to the judge, the credited evidence provides no support for the General Counsel's theory that this demand constituted coercive interrogation about the union activities of those employees or of other employees who had signed petitions for the Union that Gill was circulating. In particular, there is no basis for finding that Gill or his coworkers understood at the time that the papers Youngblood asked for were the petitions, much less that they would reasonably understand he wanted them in order to find out who supported the Union instead of wanting to confiscate them based on a mistaken belief that Gill was soliciting during working time. We note that the General Counsel did not present any alternative theory of violation for Youngblood's demands. Accordingly, we reverse the judge and dismiss this allegation.

[5] In adopting the finding that Section Manager Chris Kirby created an impression that employees' union activities were under surveillance, we rely on the judge's finding that Kirby's statements revealed that he had seen photographs—posted on an invitation-only Facebook page for employees supporting unionization—of a specific employee engaging in union activity, and that he knew the identities of the employee administrators of that site. Although employees suspected that managers had gained access to the Facebook page, Kirby's statements confirmed as much and thus created the impression that management was spying on employees' union activities. Moreover, his comments revealed that he was "taking note of who is involved in union activities, and in what particular ways," reinforcing that impression. *Flexsteel Industries*, 311 NLRB 257, 257 (1993). We do not rely, however, on the judge's statements regarding the rumors about Manager Rich Morris. The evidence established that those rumors were widely known and disseminated throughout the Respondent's facility.

Member Emanuel would not find that the Respondent unlawfully created the impression of surveillance of employees' union activity by discussing some details of an ostensibly private Facebook page for employees supporting unionization. At the time of the statements, union activity had been open and ongoing for several years and well-known throughout the Respondent's plant, including the commonplace use of social media and that Facebook page, which employees understood was in fact accessible by multiple parties other than pro-union employees. The Respondent's discussion of employees' activity with open union supporters in otherwise non-coercive conversations is not unlawful.

[6] In adopting the judge's finding that the Respondent's solicitation and distribution policy was unlawfully overbroad, we note that the Board's holding in *Boeing Co.*, 365 NLRB No. 154 (2017), did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests. *UPMC, UPMC Presbyterian Shadyside, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital*, 366 NLRB No. 142, slip op. at 1 fn. 5 (2018).

> extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.

365 NLRB No. 154, slip op. at 3 (emphasis in original). In conducting this evaluation, the Board will "'strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy.'" Id. (emphasis omitted) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967)).

With this balancing in mind, and to provide further guidance, the Board created the following categories of work rules:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because ([a]) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or ([b]) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
>
> *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. . . .

Id., slip op. at 3–4 (emphasis in original). However, these categories "represent a classification of *results* from the Board's application of the new test" and "are not part of the test itself." Id., slip op. at 4 (emphasis in original).

In *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), the Board provided further guidance regarding how it will determine the legality of work rules under *Boeing*.[7] As explained in *LA Specialty*, the General Counsel has the initial burden to prove that a facially neutral rule would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights. Id., slip op. at 2. If that burden is not met, then the Board does not need to address the employer's legitimate justifications for the rule; the rule is lawful and fits within *Boeing* Category 1(a). Id. The outcome of this inquiry should be determined by reference to the perspective of an objectively reasonable employee who is aware of his or her legal rights but who also interprets work rules as they apply to the everydayness of that employee's job. The reasonable employee does not view every employer policy through the prism of the Act. Id.

If the General Counsel does meet the initial burden of proving that an objectively reasonable employee would interpret a rule as potentially interfering with the exercise of Section 7 rights, the Board will balance that potential interference against the employer's legitimate justifications for the rule. Id., slip op. at 3. When the balance favors the employer's interests, the rule at issue will be lawful and will fit within *Boeing* Category 1(b). When the potential interference with Section 7 rights outweighs any possible employer justifications, the rule at issue will be unlawful and fit within *Boeing* Category 3. Finally, "in some instances, it will not be possible to draw any broad conclusions about the legality of a particular rule because the context of the rule and the competing rights and interests involved are specific to that rule and that employer." Id. These rules will fit within *Boeing* Category 2.

We now apply the *Boeing* standard to the Guidebook provisions in dispute.[8]

A. Attitude Towards Company

The Respondent's Guidebook includes a Standards of Conduct section enumerating 32 "general standards for behavior" that employees must follow. The third and fourth standards require employees to "[d]emonstrate respect for the Company" and "[n]ot engage in behavior that reflects negatively on the Company." As noted above, the judge found the Respondent's maintenance of these facially neutral rules unlawful based on precedent decided under the now-overruled "reasonably construe" prong of *Lutheran Heritage*. Those cases held that requirements of respect or prohibitions of negativity were so ambiguous that employees would reasonably view them to interfere with their exercise of Section 7 rights, which could include the protected concerted expression of negative or disparaging comments to each other or to third parties about the company's terms and conditions of employment. In *Motor City Pawn Brokers, Inc.*, 369 NLRB No. 132, slip op. at 6–7 (2020), the Board recently held that *Boeing* "superseded" those cases because the *Lutheran Heritage* standard applied in each of them "did not take into

[7] The Board also redesignated the subdivisions of *Boeing* Category 1 as (a) and (b). Id., slip op. at 2 fn. 2.

[8] Although the judge analyzed the Guidebook provisions under *Lutheran*'s "reasonably construe" standard, the Respondent, General Counsel, and Charging Party have presented arguments under *Boeing* in their briefs to the Board.

Unsurprisingly, our dissenting colleague adheres to the view that *Boeing* and *LA Specialty* were wrongly decided and further contends that the application of the standard set forth in those cases to a variety of employer work rules and policies is impermissible. For the reasons fully set forth in those cases, we adhere to the view that the *Boeing* standard represents a permissible construction of the Act as well as a more reasonable balancing of competing employee rights and legitimate employer interests that facilitates labor relations stability.

consideration the legitimate justifications associated with the rules."[9]

Applying the *Boeing* standard, the Board in *Motor City* found that the employer lawfully maintained a rule that prohibited employees from "communicating . . . to any customer or third party, any disparaging claim, remark, allegation, statement, opinion, comment, innuendo or information of any kind or nature whatsoever, the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing in the community . . . ." Id., slip op. at 3. In so doing, the Board first "acknowledge[d] that the Respondent's nondisparagement rules, similar to the nondisparagement rules the Board had found unlawful under its pre-*Boeing* precedent, would be reasonably interpreted to prohibit or interfere with the exercise of NLRA rights." Id., slip op. at 7. It then undertook the balancing of interests required by *Boeing*. The Board emphasized the Supreme Court's recognition in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), that "notwithstanding the passage of the Act, employers have a legitimate justification in being able to depend on the loyalty of their employees." Id., slip op. at 6. The Board reasoned that "[s]uch fundamental bonds and loyalties integral to the employment relationship underscored by the Court in *Jefferson Standard* cannot be adequately protected if an employer is prohibited from maintaining facially neutral rules against disloyalty and disparagement." Id. Accordingly, the Board determined that the employer's legitimate interests in maintaining the nondisparagement rules at issue were "substantial" and outweighed any potential adverse impact of the rules on the exercise of Section 7 rights. Id., slip op. at 7. Further, the Board observed that "the legitimate justifications associated with the Respondent's nondisparagement rules are self-evident," requiring no case-specific justification. Id., slip op. at 7 fn. 16. Accordingly, the Board placed them in *Boeing* Category 1(b). Id., slip op. at 7 fn. 17.

Here, the justifications for the Respondent's maintenance of the facially neutral Guidebook provisions requiring that employees "[d]emonstrate respect for the Company" and "[n]ot engage in behavior that reflects negatively on the Company" are the same as those deemed substantial by the Board in *Motor City* and similarly self-evident. As in that case, we find that they outweigh any potential adverse impact on employees' exercise of Section 7 rights. We therefore reverse the judge and find that these provisions are lawful, and we place them in *Boeing* Category 1(b).

B. Civility Provision

The Respondent's Guidebook also contains a provision requiring employees to "[n]ot use threatening or offensive language." An objectively reasonable employee would not view this provision as potentially interfering with the exercise of Section 7 rights. Rather, this provision "fall[s] squarely into the category of lawful, commonsense, facially neutral rules that require employees to foster 'harmonious interactions and relationships' in the workplace and adhere to basic standards of civility." *Motor City*, 369 NLRB No. 132, slip op. at 5 (quoting *Boeing*, 365 NLRB No. 154, slip op. at 4 fn. 15). Consistent with *Boeing*, we place the Respondent's civility provision in Category 1(a). Accordingly, we dismiss the allegation.

C. No-Recording Provision

The Respondent's Guidebook additionally states that employees must "[n]ot use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval." In *Boeing*, the Board considered a no-camera rule that prohibited employees from using camera-enabled devices to capture photos and video without a valid business need and an approved camera permit. Applying the new balancing-of-interests framework, the Board found that Boeing's no-camera rule "may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight." 365 NLRB No. 154, slip op. at 17. The Board then found the rule served compelling employer interests in safeguarding proprietary secrets and classified information stemming from Boeing's federal defense contracts. Id., slip op. at 17–18. The Board concluded that Boeing's legitimate interests served by the no-camera rule far outweighed the adverse impact of the rule on employees' exercise of their Section 7 rights. Id., slip op. at 17. It found the rule lawful and placed it, as well as similar rules in two prior cases (including, as here, a no-recording rule),[10] in Category 1(b), requiring no

[9] As examples of the cases superseded by the *Boeing* analysis, the Board specifically cited *First Transit, Inc.*, 360 NLRB 619, 619 fn. 5 (2014), and *Hills & Dales General Hospital*, 360 NLRB 611, 611–612 (2014), cases relied on by the judge to find unlawful the conduct standards at issue here. *Motor City*, supra, slip op. at 6. The same reasoning also applies to the judge's reliance on *University Medical Center,* 335 NLRB 1318, 1321–1322 (2001), and *Boch Honda,* 362 NLRB 706, 715 (2015), enfd. 826 F.3d 558 (1st Cir. 2016).

Our dissenting colleague's criticism of *Motor City* is founded on her disagreement with the *Boeing* standard. As stated above, we adhere to that standard and to its application in *Motor City*. Further, for the reasons explained in that decision and repeated here, we disagree with our colleague's unduly restrictive view of the Supreme Court's language emphasizing the importance of protecting an employer's fundamental right to assure employee loyalty.

[10] *Flagstaff Medical Center*, 357 NLRB 659 (2011) (rule prohibiting the use of cameras to record images of patients or hospital equipment,

case-specific justification and balancing of interests for such rules, as would be required for Boeing Category 2 rules and policies. Accordingly, based on *Boeing*, we find that the Respondent's no-recording rule is a lawful Category 1(b) rule and dismiss the allegation.[11]

D. Confidentiality of Information Policy

The Respondent's Confidentiality of Information policy states:

> Because of the highly competitive nature of the automotive industry, the protection of confidential business information and trade secrets is vital to the interests and success of BMW MC. Such information includes but is not limited to **personal and financial information**, customer lists, production processes and product research and development.
>
> All BMW MC Associates, suppliers, contractors and third-party vendors must:
>
> - Respect the nature of privileged or confidential information.
> - Not use confidential information for personal gain.
> - Not share such information with persons internal or external to BMW.
>
> Any information that BMW MC has not released to the general public must be treated as confidential. If an Associate has a question about whether certain information should remain confidential, he/she should discuss it with his/her supervisor or a manager. If additional information is needed the entire policy can be viewed on the BMW Intranet.
>
> Violation of these guidelines may result in corrective action up to and including termination of employment. [Emphasis added.]

In *Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (2020), the Board held that an employer's policy that prohibited employees from disclosing confidential information, including the employer's "earnings" and "employee information," was lawful. The Board reasoned that an employee would not reasonably interpret the policy to potentially interfere with the exercise of Section 7 rights because "[r]ead as a whole, and from the perspective of an objectively reasonable employee . . . [it] clearly applies only to the Respondent's proprietary business information." Id., slip op. at 2. Specifically, the Board noted that the policy expressly stated that employees could not disclose "confidential *Company* information." Moreover, the policy did not "reference *employees'* wages, contact information, or other terms and conditions of employment that would be generally known or accessible from sources other than 'confidential Company information.'" Id. The Board thus concluded that the policy was a lawful Category 1(a) rule. Id., slip op. at 3.

We find the Respondent's confidentiality policy to be materially indistinguishable from the policy in *Argos*. The opening paragraph of the Respondent's policy explicitly states that it is limited to "the protection of *confidential business information* and *trade secrets*." (Emphasis added.) Accordingly, a reasonable employee would understand "personal and financial information" as a specific subset of confidential business information and trade secrets. Moreover, as in *Argos*, the policy does not refer to *employees'* personal and financial information, contact information, or other terms and conditions of employment that would be generally known or accessible from sources other than "confidential business information."[12] Accordingly, we dismiss the Section 8(a)(1) allegation because the General Counsel has failed to show that an objectively reasonable employee would interpret the policy, when read as a whole, to potentially interfere with Section 7 rights. We place this policy in *Boeing* Category 1(a).

AMENDED CONCLUSIONS OF LAW

1. The Respondent, BMW Manufacturing Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union, Automobile, Aerospace & Agricultural Implement Workers of America, is a

property, or facilities), enfd. in relevant part 715 F.3d 928 (D.C. Cir. 2013), and *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015) (two rules, a no-camera rule and a no-recording rule). *Boeing* overruled the Board's holding in the latter case that the rules were unlawful.

[11] Even if *Boeing* required a fresh balancing of interests with respect to the Respondent's provision, we would reach the same result. Here, the Respondent's strong business justifications for maintaining the provision—including the protection of trade secrets and new designs—far outweigh the relatively slight impact on Sec. 7 rights. Further, we reject the view shared by the judge and our dissenting colleague that the provision is unlawful because it was not narrowly tailored to the Respondent's interests. See *Boeing*, 365 NLRB No. 154, slip op. at 9 fn. 41 (explaining that employers need not anticipate and exempt every conceivable Sec. 7 activity when drafting work rules). Moreover, by definition, all Category 1(b) rules potentially interfere to some extent with Sec. 7 rights. In other words, all Category 1(b) rules are overbroad. If a rule is unlawful whenever it could have been more narrowly tailored, there would be no such thing as a lawful Category 1(b) rule, and *Boeing* would be effectively overruled. See *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147, slip op. at 3 fn. 6 (2020). That, of course, is the outcome advocated by our dissenting colleague.

[12] Significantly, the "personal and financial information" category appears alongside other items such as "customer lists, production processes and product research and development"—all of which are quintessential categories of proprietary information that are stored in nonpublic records. See *LA Specialty*, supra, slip op. at 4. This reinforces that the policy is concerned only with the Respondent's proprietary business information.

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 discriminatorily prohibiting employees from talking about the Union, but not other nonwork-related subjects, during worktime.

4. The Respondent, by Associate Relations Manager Corey Epps and Section Manager Chris Kirby, has violated Section 8(a)(1) of the Act by creating the impression of surveillance of its employees' union or other protected concerted activities.

5. The Respondent has violated Section 8(a)(1) of the Act by promulgating and maintaining an overbroad Solicitation and Distribution policy in its Associate Guidebook.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, BMW Manufacturing Co., Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from talking about the Union while allowing other nonwork-related discussions by employees.

(b) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(c) Promulgating and maintaining an overly broad rule that prohibits employees from engaging in solicitation in work areas.

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

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

(a) Rescind or revise the rule in the Associate Guidebook that prohibits employees from engaging in solicitation in work areas.

(b) Furnish employees with an insert for the current Associate Guidebook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees a revised Associate Guidebook that (1) does not contain the unlawful provision, or (2) provides a lawfully worded provision.

(c) Post at its Spartanburg, South Carolina facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 members 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. If 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 January 1, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 10, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

[13] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its members by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting in part.

In *Boeing Company*, over my dissent, a Board majority claimed that its comprehensive overhaul of work-rules jurisprudence was necessary to "permit the Board to engage in a more refined evaluation"[1] of employees' rights under the National Labor Relations Act. But today's ruling again validates my suspicion that *Boeing* is hardly adding precision to the Board's analysis of workplace rules—to the contrary, *Boeing* is a blunt instrument that the current majority is using to force aside the statutory concerns of the National Labor Relations Act and clear a path for employers to promulgate workplace rules without regard to their impact on employees' statutory rights.

Here, applying its recent decision in *Motor City Pawn Brokers Inc.*,[2] the majority upholds an employer's sweeping non-disparagement provisions—which broadly require employees to "[d]emonstrate respect for the Company" and "[n]ot engage in behavior that reflects negatively on the Company." It does so with no mention of how such rules might reasonably tend to discourage Section 7 activity, which—because it typically involves dissatisfaction with working conditions—is *not* about "demonstrating respect" for employers, and often will "reflect negatively" on them.

Even more problematic than upholding the challenged rule in this case, the majority then summarily affirms that non-disparagement rules like the ones at issue will *always* be lawful—here and going forward—"regardless of how a reasonable employee would read the particular work rule in question, or what chilling effect the rule might have on workers' exercise of their Section 7 rights."[3] Instead of engaging in reasoned decision-making, case-by-case, the majority simply exempts a broad and important category of workplace rules from future oversight. The result is that those rules that are *most* likely to deter employees from exercising their statutory rights are now subject to the *least* scrutiny.[4]

I.

Section 8(a)(1) of the National Labor Relations Act makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." As I explained in my dissent in *Boeing*, the problem before the Board in cases like this one is how to address the fact that some facially-neutral work rules maintained by employers tend to discourage their employees from engaging in activity that is protected by the Act. When an employer directive that subjects employees to discipline or discharge is overbroad, "employees would likely refrain from engaging in certain Section 7 activity due to a reasonable concern that their conduct could be perceived as running afoul of the rule."[5] The rule thus unlawfully coerces workers because it has a chilling effect on their ability to exercise their rights.

Non-disparagement provisions like the ones at issue here—which require employees to demonstrate respect and refrain from behavior that reflects negatively on the employer—present a case study in how overbroad rules can meaningfully chill the exercise of protected rights under the Act. There is no question that employers have a legitimate and lawful interest in disciplining certain

[1] 365 NLRB No. 154, slip op. at 10 (2017).

[2] 369 NLRB No. 132 (2020). I was not a member of the Board when the decision issued; otherwise, I would have dissented.

[3] *LA Specialty Produce Co.,* 368 NLRB No. 93, slip op. at 8 (2019) (McFerran, dissenting).

[4] I agree with the majority that the Respondent violated Sec. 8(a)(1) by (1) prohibiting employees from talking about the Union, but not other nonwork-related subjects, during work time; (2) creating an impression of surveillance during a conversation between Associate Relations Manager Corey Epps and Dean Lawter; and (3) creating an impression of surveillance during a meeting between Section Manager Chris Kirby and Willie Pearson.

Contrary to the majority, I would find that the Respondent violated Sec. 8(a)(1) when Section Leader Roger Youngblood demanded repeatedly that Johnnie Gill and two other employees "[g]ive [him] the papers." Gill was an open supporter of the Union who had presented employees with union petitions before the start of work that day; employees would have reasonably understood Youngblood's demand for the "papers" as a reference to those union petitions. In addition, Youngblood's stated interest in acquiring those documents from Gill would have reasonably suggested to employees that Youngblood wanted to see the names of the employees who had signed them.

With regard to the other work rule allegations in this case, I adhere to my dissent in *Boeing Company*, 365 NLRB No. 154 (2017), and therefore reject the majority's application of that standard. Nonetheless, applying the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the pre-*Boeing* standard, I would find that the Respondent could lawfully maintain its rule prohibiting "threatening or offensive language" and its confidentiality policy that expressly referred to the Respondent's "confidential business information and trade secrets." See 343 NLRB at 647 (finding lawful rule that prohibited "abusive or profane language"); *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 6 (2016) (finding lawful similarly-worded confidentiality rule). Accordingly, I agree with the majority's conclusions that the Respondent did not violate Sec. 8(a)(1) by maintaining these rules.

Consistent with my dissent in *Boeing*, I would find, contrary to the majority, that the Respondent violated Sec. 8(a)(1) by maintaining its rule prohibiting personal recording devices in the Respondent's facilities. 365 NLRB No. 154, slip op. at 41–42 (Member McFerran, dissenting).

Finally, I agree with the majority that the judge correctly found that the Respondent violated Sec. 8(a)(1) by maintaining its Solicitation and Distribution policy.

[5] *Valley Health System, LLC*, 363 NLRB No. 178, slip op. at 2 (2016). As the Supreme Court has held, "assessment of the precise scope of employer expression . . . must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

employee conduct that is insubordinate,[6] maliciously motivated,[7] or disparaging of an employer's product.[8] What the majority ignores, however, is that lawful Section 7 activity almost always entails conduct that can be called negative or disrespectful to the employer—a fact that is surely not lost on the participating employees whose livelihoods are at stake.[9] Court and Board decisions have long recognized that "labor relations often involve heated disputes likely to engender ill feelings and strong responses."[10] And as the Board has explained more recently, the exercise of protected rights frequently "involves controversy, blunt criticisms, and disagreements that may well be deemed 'offensive' by management or fellow employees."[11]

It follows that expansive prohibitions on disrespectful conduct easily encompass activity that is clearly protected by the Act—"conduct less than actual insubordination, including oppositional Section 7 activity that managers deem uncooperative, such as engaging in a protected protest or strike, encouraging opposition to a contract proposal favored by management, or insisting on processing a grievance on behalf of a worker who management believes it has grounds to fire."[12] Likewise, broad restrictions on behavior that reflects negatively on an employer—such as the one in this case—would "discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment—activity that may not be 'positive' towards the [employer] but is clearly protected by Section 7."[13] Surely the United States Court of Appeals for the District of Columbia Circuit had this in mind when it characterized a handbook rule that proscribed public criticism, ridicule, disparagement, and defamation of the employer as "a sweeping gag order" that "fl[ew] in the teeth of Section 7."[14]

The Board's task in this context has been to protect workers' ability to exercise their rights without coercion by identifying rules that, although facially neutral, nonetheless create an impression that lawful statutory activity is prohibited. To this end, the Board's pre-*Boeing* approach appropriately considered whether "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. On a rule-by-rule basis, with judicial approval,[15] the Board scrutinized the specific wording and placement of each challenged rule.[16] In the non-disparagement context, the Board found that various broad or ambiguous handbook rules—including those prohibiting "derogatory attacks";[17] "negative energy or attitudes";[18] "negative conversations";[19] "disrespectful conduct";[20] "disparaging statements," and "conduct . . . which is detrimental to the best interests of the company"[21]—would cause employees to "refrain from engaging in certain Section 7 activity due to a reasonable concern that their conduct could be perceived as running afoul of the rule."[22]

At the same time, the Board's pre-*Boeing* jurisprudence under *Lutheran Heritage* recognized that employer rules

[6] See, e.g. *Mead Corp.*, 275 NLRB 323, 324 (1985).

[7] See, e.g. *Richboro Community Mental Health Council*, 242 NLRB 1267, 1268 (1979).

[8] See, e.g. *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1241 (2000).

[9] Tellingly, and perhaps unsurprisingly, Board law is replete with instances of employers using ambiguously-worded condemnations as thinly veiled references to employees' protected activity—and always in the context of unlawful retaliation. See, e.g. *Intercon I (Zercom)*, 333 NLRB 223, 223 (2001) ("negative attitude"); *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 458 (1995) (did not work well with his team and had a "bad attitude"); *We Can, Inc.*, 315 NLRB 170, 171 (1994) ("uncooperative"); *Cla-Val Co.*, 312 NLRB 1050, 1050 (1993) ("negative attitude toward management"); *K & E Bus Lines*, 255 NLRB 1022, 1033 fn. 27 (1981) (causing "upset," "nervousness," and "agitation"); *Boyer Ford Trucks, Inc.*, 254 NLRB 1389, 1395 (1981) ("bad attitude" and "disruptive influence"); *Chemical Construction Co.*, 125 NLRB 593, 599 (1959) (causing "dissension" among the employees). An employee could hardly be blamed for fearing that rules like the ones at issue here could be enforced against protected conduct.

[10] *Inova Health System v. NLRB*, 795 F.3d 68, 86 (D.C. Cir. 2015) (quoting *Kiewit Power Constructors*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011)).

[11] *Valley Health System*, supra, slip op. at 2.

[12] *Lytton Rancheria of California*, 361 NLRB 1350, 1352 (2014).

[13] *Hills & Dales General Hospital*, 360 NLRB 611, 612 (2014). See also *NLRB v. Southern Maryland Hosp. Center*, 916 F.2d 932, 940 (4th Cir.1990) ("It may very well be true that derogatory attacks destroy, as the hospital puts it, 'the positive work atmosphere,' but the values of free speech and union expression outweigh employer tranquility in this instance.").

[14] *Quicken Loans v. NLRB*, 830 F.3d 542, 550 (D.C. Cir. 2016), enfg. 361 NLRB 904 (2014).

[15] As I noted in my *Boeing* dissent, the *Lutheran Heritage* test was routinely applied and never questioned by any court of appeals.

[16] See, e.g., *Hills & Dales*, supra at 612 (considering each provision "in context with . . . other . . . . paragraphs" to determine how employees would "reasonably review the language."). See generally *Lutheran Heritage*, supra, 343 NLRB at 646 (stating that the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.").

[17] *Southern Maryland Hospital Center*, 293 NLRB 1209, 1222 (1989), enfd. 916 F.2d 932 (4th Cir. 1990).

[18] *Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011).

[19] *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005).

[20] *Lytton Rancheria*, supra at 1351–1352.

[21] *First Transit, Inc.*, 360 NLRB 619, 630 (2014).

[22] *Valley Health*, supra, slip op. at 2. Significantly, even in finding specific rules to be unlawfully overbroad, the Board took care to explain, "[t]hat a particular rule threatens to have a chilling effect does not mean, however, that an employer may not address the subject matter of the rule and protect his legitimate business interests. Where the Board finds a rule unlawfully overbroad, the employer is free to adopt a more narrowly tailored rule that does not infringe on Section 7 rights." *William Beaumont Hospital*, 363 NLRB No. 162 (2016), slip op. at 4 (2016).

did *not* violate Section 8(a)(1) when they were narrowly tailored to address specific and legitimate employer interests that were unrelated to restricting Section 7 activity. As the Board explained, when it found that a rule was not overbroad, it was "typically because the rule is tailored such that the employer's legitimate business interest in maintaining the rule will be sufficiently apparent to a reasonable employee."[23] Accordingly, the Board found that employers could lawfully maintain rules that sought specifically to prevent disparagement focused on moral character[24] or "harmful gossip,"[25] or that entailed insubordination[26] or abuse or harassment of coworkers,[27] or any unprotected conduct,[28] so long as those rules were not so broad in prohibiting disparaging statements that employees would reasonably construe the prohibition to include Section 7 activity.

II.

The Board in *Boeing*, of course, abandoned this framework based largely on the false premise that the *Lutheran Heritage* approach "entail[ed] a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions."[29] As explained (and demonstrated in my *Boeing* dissent), however, the Board had consistently upheld rules that were narrowly tailored to reflect legitimate employer interests. Nonetheless, the *Boeing* Board introduced a new approach, one that I characterized then as a "jurisprudential jumble of factors, considerations, categories, and interpretive principles."[30]

To begin, the Board stated that:

> when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.[31]

Next, the Board indicated that "*the Board* will conduct this evaluation, consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees, which is consistent with Section 8(a)(1)."[32] Finally, the Board "delineate[d] three categories of employment policies, rules and handbook provisions": Category 1 rules, which are always lawful, either because (a) the Board decides that they cannot be interpreted to restrict protected activity, or (b) the Board determines that the employer's interest in promulgating such rules will always outweigh the potential impact on workers' rights; Category 2 rules, which "warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justification"; and Category 3 rules, which are always unlawful to maintain.[33] In so doing, the Board insisted that the "above three categories will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself."[34] But for the reasons explained below, it is now manifestly clear that those categories have become the test. The Board's new approach is simply to label a rule (using labels created by the majority itself, such as "civility rules"), and then put each type of rule into the appropriate box, insulating all future rules with the same label from further scrutiny, regardless of their exact language or context.

III.

The mechanical nature of the Board's decision-making under *Boeing* is certainly reflected in cases presenting non-disparagement rules. In *Motor City Pawn Brokers Inc.*, supra, the Board applied the *Boeing* framework for the first time to an employer non-disparagement rule. The rule there prohibited employees from communicating to any customer or third party

> any disparaging claim, remark, allegation, statement, opinion, comment, innuendo or information of any kind or nature whatsoever, the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing in the community of Customers, Employer and/or Related Entities, and their customers, members, managers, officers, owners, employees, independent contractors, agents,

[23] *William Beaumont Hospital*, supra, slip op. at 4.

[24] Id., slip op. at 2 fn. 7.

[25] *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 861–862 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015).

[26] *Lytton Rancheria*, supra at 1352.

[27] *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

[28] See *Copper River of Boiling Springs*, LLC, 360 NLRB 459, 459 fn. 3 (2014) (upholding rule prohibiting "insubordination to a manager or lack of respect and cooperation with fellow employees or guests," including "displaying a negative attitude that is disruptive to other staff or has a negative impact on guests.").

[29] *Boeing*, 365 NLRB No. 154, slip op. at 2.

[30] Id., slip op. at 37 (Member McFerran, dissenting).

[31] Id., slip op. at 3. The Board later explained that "the General Counsel has the initial burden to prove that a facially neutral rule would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights." *LA Specialty*, supra, slip op. at 2.

[32] *Boeing*, supra, slip op. at 3.

[33] Id., slip op. at 3–4.

[34] Id., slip op. at 4.

> attorneys, or representatives, regardless of whether any such communication is or may be true or founded in facts.[35]

The rule also prohibited employees from attempting to "negative [sic] influence or otherwise discourage or dissuade any Customer or other party from maintaining its relationship with Employer."[36] The judge correctly found that the employer's rule violated Section 8(a)(1).

But the Board reversed, invoking *NLRB v. Electrical Workers Local 1229 (Jefferson Standard),*[37] where the Supreme Court upheld the discharge of employees who had publicly attacked the quality of their employer's product and its business practices—but *without* relating their criticisms to a labor dispute. That conduct was not protected by the Act, the Court explained, because Congress did not intend to "weaken the underlying contractual bonds and loyalties of employer and employee."[38] The *Motor City* Board asserted that "[s]uch fundamental bonds and loyalties integral to the employment relationship underscored by the Court in *Jefferson Standard* cannot be adequately protected if an employer is prohibited from maintaining facially neutral rules against disloyalty and disparagement."[39] It added that an employer

> has a legitimate interest in conveying to employees its expectation that they will perform their jobs in a manner that will do the employer proud, without sabotaging or otherwise impairing its operations. After all, the success—if not the continued existence—of an employer is often dependent on maintaining its reputation with current or prospective customers and preventing the harm to its commercial image from having its products or services publicly disparaged or misrepresented.[40]

Accordingly, the Board overruled all previous decisions—applying the *Lutheran Heritage* "reasonably construe" standard, long after *Jefferson Standard*—where the Board had found that "nondisparagement and disloyalty rules" interfered with the exercise of Section 7 rights.[41] As to the rule at issue, the *Motor City* Board first acknowledged the obvious: that the rule would be reasonably interpreted by employees to prohibit them from exercising their NLRA rights.[42] Even so, the Board placed the rule in *Boeing* Category 1(b) and declared it lawful because "the legitimate justifications for the [employer's] nondisparagement rules are substantial" and "the potential adverse impact on protected rights is outweighed by the justifications associated with the rules."[43] *Why* this was true, the Board did not explain. Notably, the Board acknowledged the respondent had "not asserted any specific justifications for the rules" but that "the legitimate justifications associated with the [r]espondent's nondisparagement rules are self-evident."[44] The Board then categorically declared nondisparagement rules always lawful under *Boeing* moving forward.[45]

IV.

Nominally, today's decision is an application of *Motor City* to the facts of this case. But, for the majority, the key facts of this case—the actual language and context of the challenged rule—do not really matter at all. All that matters is that the challenged rule can be labelled as a nondisparagement rule. The majority's analysis, such as it is, runs like this: (1) In *Motor City*, the Board found that an employer lawfully maintained a non-disparagement provision; (2) Non-disparagement provisions fall into *Boeing* Category 1; (3) All *Boeing* Category 1 rules are lawful; (4) Therefore, the non-disparagement provisions in this case are lawful.

This approach certainly contradicts the promise of the *Boeing* Board that its framework would "ensure a meaningful balancing of employee rights and employer interests."[46] Rather, the purported one-time balancing done in *Motor City*—which gave virtually no weight to employee rights—eliminates the need to engage in any balancing moving forward. Once a challenged rule is labelled as a non-disparagement rule, it is lawful, no matter what the language of the rule actually says or what context it appears in.

Today's decision does not meaningfully address the facts of this case, let alone perform a genuine balancing analysis. Of course, it is all but impossible to gauge the potential chilling effect of the rules on employees without examining the specific language and context of the rules at issue. It should matter that the rules in this case are significantly broader and less specific—and thus even more likely to reasonably chill protected rights—than the rules in *Motor City*. Even the specific justifications presented by the Respondent—which should have the burden to show that its legitimate business interests should prevail over Section 7 rights[47]—are not acknowledged. Indeed, it

[35] 369 NLRB No. 132, slip op. at 3.
[36] Id.
[37] Id., slip op. at 6, quoting 346 U.S. 464 (1953).
[38] 346 U.S. at 472.
[39] 369 NLRB No. 132, slip op. at 6.
[40] Id.
[41] Id.
[42] Id., slip op. at 7.
[43] Id.
[44] Id., slip op. at 7, fn. 16.
[45] Id., slip op. at 7, fn. 17.
[46] 365 NLRB No. 154, slip op. at 5.
[47] See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781–82 (1979); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 498–505 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–04 (1945). See discussion in *LA Specialty*, supra, slip op. at 11 (Member McFerran, dissenting).

is ironic that the Board in *Boeing* criticized the *Lutheran Heritage* test for "improperly limit[ing] the Board's own discretion,"[48] since its application of *Boeing* here appears to abdicate reasoned analysis altogether.

In its place, the majority instead again treats decision making as categorization. In *Boeing*, the Board majority insisted that its three-category classification system was "*not* part of the test itself."[49] But today's decision proves again that the classification *is* the test. As I have explained previously:

> This categorical approach flies in the face of the long-established principle, applied by the Board and by the federal courts, that a rule restricting employees' protected concerted activity must be narrowly tailored to serve an employer's legitimate interests—and not worded more broadly than necessary to do so.[50]

By its own terms, *Boeing* supposedly left open the prospect that some employer rules would "warrant individualized scrutiny."[51] But today's decision is only the latest example of quickly sweeping as many employer rules as possible into the always-lawful category.[52] This not the reasoned decision-making required of administrative agencies or a tenable view of the National Labor Relations Act.

V.

Even assuming that mechanical categorization could somehow be the appropriate way to decide cases like this one, the majority has failed to articulate any rational basis for determining that non-disparagement rules, as a category, should *always* be lawful. Both here and in *Motor City*, the majority appears to rely primarily on the Supreme Court's decision in *Jefferson Standard*, supra. But nothing in that decision—which did not involve employer rules—supports the majority's blanket approval of any rule that might be deemed a non-disparagement rule. There, the Court upheld an employer's discharge of employees for engaging in *actual* disloyal conduct with no protected component: attacking the employer's product without reference to the parties' labor dispute.[53] The Court said nothing about Section 8(a)(1), or the chilling effect that overbroad employer rules have on Section 7 activity.

Indeed, *Jefferson Standard* illustrates why non-disparagement rules must be analyzed individually, not categorically. The Court framed the core question of the case as "whether the discharges are made because of such a separable cause or because of some other concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection which may not be adequate cause for discharge."[54] Thus, the Court made clear that a distinction exists between *unprotected* disparagement (e.g., attacks on the employer's product without reference to a labor dispute), and disparagement integral to Section 7 activity, which is protected.[55] The majority ignores that distinction. In concluding that all non-disparagement rules are lawful, no matter how broad, *Motor City* and today's decision effectively hold that *any* public criticism of an employer can be lawfully prohibited, even if the criticism is inseparable from protected activity. This is certainly not consistent with Board precedent.[56] Employers can now promulgate and maintain rules that would be reasonably read to proscribe exactly the type of core

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[48] 365 NLRB No. 154, slip op. at 2.

[49] Id., slip op. at 4 (emphasis added).

[50] *LA Specialty*, supra, 368 NLRB No. 93, slip op. at 11 (Member McFerran, dissenting).

[51] 365 NLRB No. 154, slip op. at 4.

[52] In fact, in the course of about a year, this majority has already designated the following rule categories, among others, as "always lawful": (1) "no-camera rules," *Boeing*, supra, slip op. at 17; (2) "rules requiring employees to abide by basic standards of civility," Id., slip op. at 15; (3) "policies limiting outside business relationships," *Newmark Grubb Knight Frank*, 369 NLRB No. 121, slip op. at 2 (2020); (4) social media policies, Id., slip op. at 3–4, *Shamrock Foods Co.*, 369 NLRB No. 140, slip op. at 2–3 (2020); (5) "property rights" policies, *Newmark Grubb*, supra, slip op. at 3; (6) "confidentiality" rules, *LA Specialty*, supra, slip op. at 3–4; (7) "media contact" rules, Id., slip op. at 4–5, *Motor City*, supra, 369 NLRB No. 132, slip op. at 2; (8) rules prohibiting cell phones in work areas, *Cott Beverages*, *Inc*., 369 NLRB No. 82, slip op. at 2–3 (2020); and (9) "investigative confidentiality rules limited to the duration of open investigations," *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 12 (2019).

[53] 346 U.S. at 476–477.

[54] Id. at 475.

[55] To this end, the Court concluded that "the findings of the Board effectively separate the attack from the labor controversy and treat it solely as one made by the company's technical experts upon the quality of the company's product. As such, it was as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending." Id. at 477.

[56] As the Board explained in *Allied Aviation Service Company of New Jersey, Inc.*:

> *In determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues. There is no question that Respondent here would be sensitive to its employees raising safety matters with its . . . customers. Yet, we have previously held that, 'absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of Respondent to his choice of forum.'*

248 NLRB 229, 231 (1980) (emphasis added), enfd. 636 F.2d 1210 (3rd. Cir. 1980), quoting *Richboro Community Mental Health Council*, 242 NLRB at 1269. See also *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252–1253 (2007) (discussing distinction between disparagement of products and communications related to labor disputes), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009).

"oppositional"[57] activity that the National Labor Relations Act serves to protect.

Apart from distorting *Jefferson Standard*, the majority relies solely on the assertion in *Motor City* that an employer "has a legitimate interest in conveying to employees its expectation that they will perform their jobs in a manner that will do the employer proud, without sabotaging or otherwise impairing its operations."[58] But this asserted premise is based on neither the employer's arguments in that case (there were none made), nor on the Board's own "cumulative experience."[59] And, of course, the broad language of the rules at issue in *Motor City* and in this case go far beyond arguably conveying the message identified by the majority. This case has nothing to do with rules that, by their terms, *actually* require employees to diligently perform their assigned tasks or rules that *actually* prohibit employees from "sabotaging or otherwise impairing [their employer's] operations."

What is missing entirely from the *Motor City* Board's approach is any meaningful recognition of employees' Section 7 rights and how a reasonable employee reading the rule might be chilled in the exercise of those rights. Indeed, reading *Motor City*, one might think that the purpose of the Act is to protect the power of employers to impose handbook rules. Even *Boeing* purported to "focus[ ] on the perspective of employees"[60] but that focus has been entirely lost in its application.

VI.

Moreover, even under *Boeing*, the standard that the majority purports to apply, today's decision reaches the wrong result. Under the first prong of *Boeing*, the broadly-worded and ambiguous non-disparagement rules in this case would have a significant "potential impact on NLRA rights."[61] Read from "the perspective of employees,"[62] as *Boeing* requires, both rules would be reasonably understood to prohibit core Section 7 activity. As the Board explained with regard to a similar rule requiring employees to represent the employee in the community in a positive manner, "[t]his would . . . discourage employees from engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment—activity that may not be 'positive' towards the Respondent but is clearly protected by Section 7."[63]

The Respondent has asserted specifically that the rules were "intended to protect against situations when employees go out into the community and cause damage to the Company's reputation through misrepresentation" and to "govern management-level employees who represent BMW in the community in some official capacity" in order to protect the brand and control the information being shared. But the Respondent's rules are not remotely tailored to protect its "legitimate justifications associated with the rule."[64] Indeed, if the Respondent intended only for the rules to apply to "management-level employees" who "represent BMW . . . in some official capacity," it could easily have made interests clear, instead of adopting a rule that sweeps far beyond its articulated interests.[65] For these reasons, I would find that the significant "invasion of employee rights" here far outweighs the import of the Respondent's "asserted business justifications."[66]

VII.

Under *Boeing*, *Motor City*, and a string of other post-*Boeing* decisions, the majority has categorically blessed employer rules, regardless of their impact on employees' statutory rights. If it were not already clear after *Motor City*, employers now know that they may maintain broad and vague non-disparagement provisions without any fear of condemnation under the Act, even if the effect is to unnecessarily chill the exercise of Section 7 rights by employees. Today's decision is another reminder of the hollowness of the *Boeing* Board's supposed interest in "ensur[ing] a meaningful balancing of employee rights and employer interests."[67] Under the current majority, employer interests regularly trump all when it comes to workplace rules. Because this is not what Congress intended when it passed the National Labor Relations Act, I dissent.

Dated, Washington, D.C. December 10, 2020

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[57] *Lytton Rancheria*, 361 NLRB at 1352.
[58] *Motor City*, supra, slip op. at 6.
[59] *Boeing*, supra, slip op. at 4.
[60] *Boeing*, supra, 365 NLRB No. 154, slip op. at 3.
[61] *Boeing*, supra, slip op. at 14.
[62] Id., slip op. at 3.
[63] *Hills & Dales*, supra at 612.
[64] *Boeing*, supra, slip op. at 14.
[65] See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 4.
[66] *Boeing*, supra, slip op. at 14.
[67] 365 NLRB No. 154, slip op. at 5.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from talking about the Union while allowing other nonwork-related discussions.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT promulgate and maintain an overly broad rule that prohibits you from engaging in solicitation in work areas on nonworking time.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the rule in the Associate Guidebook that prohibits you from engaging in solicitation in work areas on nonworking time.

WE WILL furnish you with an insert for the current Associate Guidebook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute to you a revised Associate Guidebook that (1) does not contain the unlawful provision, or (2) provides a lawfully worded provision.

BMW MANUFACTURING COMPANY

The Board's decision can be found at www.nlrb.gov/case/10-CA-178112 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Kerstin Meyers, Esq., for the General Counsel.
D. Christopher Lauderdale, Esq. and *Emily K. O'Brian, Esq. (Jackson Lewis, P.C.),* for the Respondent.
James D. Fagan, Jr. (Stanford Fagan, LLC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Greenville, South Carolina, on January 9–10, 2017. The Charging Party, International Union, Automobile, Aerospace & Agricultural Implement Workers of America (the Union) filed the initial charge on June 8, 2016, and an amended charge on August 30, 2016.[1] A complaint issued on September 21, 2016, alleging that BMW Manufacturing Co. (Respondent/BMW) violated Section 8(a)(1) of the Act by interrogating employees about their union membership and activities; prohibiting employees from discussing the union while permitting them to discuss other nonwork matters; creating the impression of surveillance of union activities; and maintaining several unlawful rules (standards of conduct, confidentiality of information and solicitation and distribution). Respondent denies any violations of the Act.[2]

On March 22, the General Counsel filed a motion to strike portions of Respondent's post-hearing brief, in that those portions constitute matters or evidence not presented at hearing or part of the record. The portions include hyperlinks contained in Respondent's Brief, footnote 8, to extrinsic evidence in support of Respondent's business justification for maintaining an overbroad confidentiality rule. Respondent responded on March 30, and argued that the hyperlinks to news articles did not constitute new evidence, but rather bolstered its theory and evidence already contained in the record, and acknowledged by the General Counsel. I have reviewed the motion and response, and find that Respondent could have introduced these hyperlinks and related evidence into the record during the trial, but failed to do so. Accordingly, I have granted the General Counsel's motion to strike, and have not considered the portions at issue in making this decision.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

[1] All dates are 2016 unless otherwise indicated.

[2] During the hearing, I denied Respondent's oral motion to amend its Amended Answer to include certain information on its intranet system defining "strictly confidential information" as being part of its confidentiality policy. (Tr. 317–324; R. Exh. 9.) Respondent maintained in its amended answer that the confidentiality policy attached thereto represented the full text of that policy at issue (GC Exhs. 1(j) and 5). Nevertheless, I admitted the exhibit into the record and will give it whatever weight it deserves.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, engages in the manufacture and nonretail sale of luxury automobiles at its facility in Spartanburg, South Carolina. In conducting its operations during the 12-month period ending June 30, 2016, Respondent sold and shipped from its Spartanburg, South Carolina facility goods valued in excess of $50,000 directly to points outside of the State of South Carolina. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This case arises against the backdrop of a union organizing campaign that started at Respondent's facility in 2015, and involves several of Respondent's associates who have been openly and actively supporting the Union.[3] These associates include Johnnie Gill, Ricky Deese, and Jason Evans in the rework department; Dean Lawter in the body shop; and Willie Pearson in the assembly department. There is no dispute that these employees have been openly supporting the union by wearing union paraphernalia (hats and bracelets) in and outside of the plant, discussing the union, passing out literature and soliciting signatures on union petitions at work during nonwork time. They are also members of the volunteer organizing committee (VOC). Therefore, they have made their union support known to coworkers, supervisors, and managers. There is no evidence that Respondent has attempted to discipline or has disciplined any of these employees for their union support, or actions discussed in this decision.

Section leaders and managers involved in this case are Roger Youngblood, section leader in rework; Stacy Wright, night-shift section manager in rework; Christopher Kirby, section manager in assembly, tilt line; Matthew Treadwell, section leader in assembly, tilt line; and Corey Epps, associate relations section manager. The associate relations section at Respondent's facility is commonly referred to by employees as human resources, and will be referred to herein as HR.

The General Counsel alleges that certain of these section managers and leaders (Kirby and Epps) violated the Act by giving certain associates the impression that they had been surveilling their union activities via posts and pictures on their private Facebook page called The Carmill site. The Carmill site is a private, invitation only, page open to associates supporting unionization. This private site permits members to post information about meetings, union articles, and to air grievances about terms and conditions of employment. (Tr. 114–120). The website is managed by member administrators who try to ensure that antiunion individuals, including supervisors and managers, do not gain access to the site. The site administrators investigate, via searching on social media and questioning other members, to restrict membership to union supporters, but believe that some team leaders and managers have slipped through the cracks and gained access the Car Mill site. Associate witnesses admit that there is no sure-proof way to prevent all union naysayers from joining the site through invitation from some members, or by pretending to be union sympathizers.

The General Counsel also alleges that one of the section leaders (Youngblood), unlawfully interrogated employees about their union activities, and prohibited them from discussing union issues while allowing them to discuss nonunion matters. Finally, it is alleged that several of the rules in Respondent's Associate Guidebook are unlawful. Respondent's witnesses, Steve Wilson, media communications specialist, and Scott Medley, department manager for associate relations, international recruitment and succession planning, testified as to why these rules were necessary to sustain and protect the competitiveness, innovation, trade secrets and integrity of Respondent's high end/luxury automotive lines.

B. Interrogation of Employees

1. The April 4, 2016 incident with Gill and Youngblood

Johnny Gill, as a rework section employee, makes final repairs to cars that have already been assembled by the assembly line department. Gill, an open union supporter, routinely carries around union petitions and orally solicits signatures from his coworkers during nonworking time inside the facility, including during breaks and before and after work. More specifically, Gill regularly carries these petitions into the team break area to solicit signatures right before the beginning of the morning team meetings. These morning team meetings start at 6:45 a.m., and mark the beginning of the employees' workday. In other words, although associates are permitted to clock in as early as 6:35 a.m., their paid work time does not begin until 6:45 a.m.

Prior to the 6:45 morning meeting on April 4, Gill entered into the team break area, held up a union petition, and announced that he had petitions available for anyone interested in signing. At least one of his team members, Anthony Lyles (Lyles), took issue with Gill's solicitation, stating that the Union only wanted employees' money. Lyles and Gill went back and forth about the pros and cons of the union for a few minutes, and then Gill walked out of the break room to clock in before the meeting.[4]

Later that morning, Gill drove a car about 100 feet over to a bay in the rework long-term section so that associate Jason Evans, could perform a sunroof change.[5] After Gill explained what the car needed, he and Evans began talking about nonwork matters such as health care and politics. Within minutes, Deese, who worked in the bay next to Evans, joined their conversation. Gill, Evans, and Deese consistently testified that a few minutes later,

[3] Respondent refers to its employees as associates and refers to its supervisors and managers as team leaders and team managers.

[4] Deese, one of Gill's rework teammates, remembered seeing Gill clock in prior to soliciting signatures on union papers (petitions and/or authorization cards) in the team break area. Gill recalled that he clocked in afterwards at about 6:44 a.m. Nevertheless, there is no dispute that Gill is permitted to solicit during the period prior to the 6:45 a.m. morning meetings whether or not he clocks in beforehand.

[5] Associates in the rework long-term section performed work that literally took longer or made repairs that Gill, who worked in the shorter-term rework section, could not make.

their section leader, Roger Youngblood, approached them, with night-shift team manager, Stacy Wright standing about a car length or so behind him. Gill, Evans, and Deese all testified that Youngblood appeared to be angry, and said in a loud voice, to give him the "papers." Deese asked him what he was talking about, and Youngblood repeated "[g]ive me the papers" two more times. Then, Youngblood instructed Gill to go with him to HR. (Tr.62–67.) During this exchange, Wright never said a word, but he testified that he followed Youngblood and Gill to the HR office.

Deese described Youngblood's demeanor as "[u]pset, red faced," with a "pretty stern" tone. Evans said that Youngblood did not holler, but yelled "pretty loud." (Tr. 70–71, 96–97.) They both described in detail how Youngblood's loud, angry demeanor was not normal for Youngblood, who was usually a pretty "laid back" supervisor.

Gill testified that at some point during the exchange, Youngblood told him that he was "sick" of him talking about the Union on the floor, that three people had accused him (Gill) of doing so and that he (Youngblood) was "sick and tired of this." Gill said that he responded, "[t]hat's a lie," and Youngblood told him that they were going to go to HR. Gill's version of this incident was mostly supported by the testimony of Deese and Evans, and to some extent by that of Wright. However, Deese and Evans did not recall hearing Youngblood tell Gill that three people had accused Gill of handing out papers on the floor. (Tr. 33–24, 84.) Rather, Deese testified that about 30–40 minutes after Gill left with Youngblood and Wright, this incident, he and Evans confronted Youngblood on the work floor. He demanded an apology for how Youngblood had approached them and told him that he did not appreciate him "raising his voice and accusing [them]" of something they knew nothing about. Deese insisted that Youngblood explained that "[he] was upset," and apologized. According to Deese, during this second conversation, Youngblood explained that someone had reported that Gill had been giving out union papers on company time. Deese told him that Gill had not solicited signatures nor discussed the union with anyone during work time or on the work floor.[6] (Tr. 72–78.)

According to Gill, Youngblood escorted him into one of the HR conference rooms while Wright stayed outside trying to call one of the human resource associates.[7] He testified that Youngblood repeatedly told him that, "I'm sick and tired of this. I keep getting phone calls." Youngblood then left him in the conference room for a few minutes before returning to tell him that, "[w]ell, I didn't see you passing out anything on the floor. All I'm going to ask you is to do it on nonworking time." Gill told Youngblood that he was aware of his rights and returned to work. (Tr. 26–32.) Wright confirmed that he called Corey Epps, the associate relations manager, from outside the HR offices. He explained to Epps that a couple of associates had complained about Gill doing union work after his shift started. He said that Epps told him that Gill "[could] do it as long as its nonworking time." Wright confirmed that he related Epps' message to Youngblood, and that Youngblood informed Gill that he could perform union activities, but not on working time. (Tr. 429.)

Regarding the initial discussion in the bay, Wright testified that he went with Youngblood to approach Gill in order to provide support, but stopped and waited at least 8–10 feet or a car length behind. He claimed not to have heard any of what was said by Youngblood or Gill. He also did not recall that Deese and Evans were present during this encounter, but could not testify with certainty that they were not. Despite testifying that he was too far away to hear any of what was said, Wright insisted that he could hear that, "[t]here was no yelling. . . it was a calm transition on Roger's [Youngblood's] side," such that Youngblood calmly asked Gill to go with him to HR. (Tr. 426–428.) After further questioning, Wright acknowledged that Youngblood might have demanded "papers" since he did not hear the conversation. (Tr. 433.)

Of all witnesses, Youngblood's testimony was most conflicting, confusing, and generally implausible. First, he described two separate conversations involving Gill, and insisted that the first, which occurred sometime in the Spring of 2016, was the only encounter with all three on the work floor. He testified that he saw Gill showing Deese and Evans something on his cell phone, assumed that it was not work related and verbally admonished them to get back to work.[8] (Tr. 442–445.) I discredit this account of an earlier meeting with Gill, Deese and Evans, as it was contradicted by Deese, Gill, and Evans, who consistently and convincingly testified that they were all present during the confrontation on April 4. Further, Wright could not unequivocally say that Deese and Evans were not present on April 4.

Youngblood next described his version of the April 4 incident. He did not attend the morning shift meeting on April 4, but testified that, afterwards, Lyles complained to him about Gill interfering with his right not to be confronted with union talk and solicitation during his break time before the morning pre-shift meetings. Youngblood agreed to talk to someone in HR, despite initially telling Lyles that HR had previously confirmed Gill's right to solicit in the team break area prior to pre-shift meetings. He testified that after talking to Lyles, he went directly to HR and talked to HR associate, Darryl Hall. He did not seek out Gill until after Hall asked him to do so. Initially, Youngblood testified that he proceeded to the floor to get Gill, but decided to ask Wright, who was in the area, to accompany him. He explained that supervisors usually liked to have a witness under those circumstances. He believed that at some point, Wright might have called Epps, but stated that they were "kind of on different pages." He testified that when they returned to the HR office with Gill, they (Youngblood and Wright) said nothing at all, but instead listened to Hall tell Gill that he had the right to solicit during nonworking time, but to "please respect the others as

[6] Evans corroborated Deese's testimony about the second encounter with Youngblood on April 4. Youngblood was not questioned about it.

[7] Initially, Wright did not recall that Youngblood went into the conference room with Gill, but later admitted that Youngblood might have done so. (Tr. 429–430.)

[8] Youngblood testified that company policy precluded associates from having personal cell phones on the plant floor, but that they were permitted to have and use them if there was a family emergency. (Tr. 442–445.)

well."[9] He claimed that it was a "general, nice conversation," in that Gill was "very nice about it," asked several questions and returned to work. (Tr. 446–449, 451.) Next, Youngblood testified that on his way back to his bay, Gill turned, walked back towards him and asked, "[w]hat's this all about?" Youngblood claimed that he told Gill he would not discuss it, but they could return to HR. He said that Gill responded, "[n]o, that's ok." (Tr. 446–447.) Youngblood also testified that when Gill started walking back towards him, he asked Wright to stay with him "in case something was said."

Then, Youngblood contradicted his testimony, stating that when he went to get Gill to go to HR, no one was with him, not even Wright.[10] He also denied telling Gill, at any time, that he was sick and tired of his union activities or receiving complaints about them.[11] In fact, he testified that he never mentioned to Gill the reasons why he was taking him to the human resources office. (Tr. 452–454.) However, in his affidavit testimony, he stated that he asked Gill for the facts related to Lyle's complaint. When shown his affidavit testimony, he still insisted that he never discussed the matter with Gill; he only asked him to accompany him to HR. He also claimed not to know what he meant in his sworn affidavit statement. (Tr. 461–466; GC Exh. 7, p. 2.) He did admit that when he approached Gill to take him to HR, he already knew that Gill was permitted to solicit during nonworking time.

In contrast to Youngblood, I find that Deese, Evans, and Gill, presented more straight forward, consistent testimony. In addition, I find it unbelievable that Deese and Evans (and Gill) fabricated their presence when Youngblood took Gill to HR. Further, Youngblood never rebutted Deese's and Evans' testimony that Deese questioned him later in the day about his earlier conduct. Therefore, I credit the testimony of Gill, Deese and Evans that Youngblood approached them on April 4, and demanded that they give him the "papers." I discredit Youngblood's testimony that he never told Gill the reason why he wanted him to go to HR since it was inconsistent with his affidavit testimony. Additionally, Youngblood's testimony that Hall met with him, Wright, and Gill to explain Gill's solicitation rights is totally unsupported by Wright and Gill, who testified that no one from HR physically met with them or talked to Gill.

Further, I find that Wright's testimony is not credible where it differs from that of Deese and Evans. It is unbelievable that he accompanied Youngblood to provide support and protection, and to witness what occurred, but stood behind such that he could not hear a word spoken. It is more likely, and I find, that Wright did not want to contradict his manager's version of what was said to Gill, Deese and Evans.

Also of note, Youngblood testified that "it's like I said, about 3 that were in my area out of 60 guys that I know of . . . 3 gentlemen . . . of that I was told that were union activity folks . . . Johnny Gill, Deese, and Evans." (Tr. 459.)[12] This statement supports a finding that he targeted and interrogated Gill and his coworkers because of Gill's union sympathies. It is evident that Youngblood was frustrated with repeated complaints about Gill soliciting during morning break time and did not tell the truth about why he took Gill to HR and Hall asking him to do so. He admitted that he took Gill to HR despite being told that Gill was permitted to do what Lyles had complained of him doing. There was no evidence that Gill had been soliciting or making prounion comments during the morning meeting or while working on the plant floor. Nor was there evidence to support that Youngblood believed that he had been doing so.

2. Analysis—Respondent unlawfully interrogated employees

The General Counsel alleges that on April 4, Youngblood interrogated employee Gill and two of his coworkers in the rework department, Deese and Evans, about union activities.

Under Board law, not all interrogations are automatically considered to be coercive. *Rossmore House*, 269 NLRB 1176 (1984). See also *Bourne v. NLRB*, 332 F.2d 47 (2nd Cir. 1964). In the Board's view, interrogation of employees will violate the Act if, considering the totality of the circumstances, it is deemed coercive. *Rossmore House Hotel,* 269 NLRB 1176 (1984), affd. sub nom, *Hotel & Restaurant Employees Local 11, v. NLRB*, 760 F2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985); *Raytheon Co*., 279 NLRB 245 (1986).

In determining whether an interrogation violates Section 8(a)(1) of the Act, the Board weighs five factors: (1) the truthfulness of the replies from the employee being questioned; (2) the nature of the information sought; (3) the identity and rank of the questioner; (4) the place and method of the interrogation; and (5) the background between the employer and union, i.e., whether a history of employer hostility and discrimination exists. *Metro-West Ambulance Services, Inc.*, 360 NLRB 1029, 1091 (2014); *Bourne v. NLRB*, 332 F.2d 25 47, 48 (2d Cir. 1964). Whether an interrogation is courteous rather than rude or profane is not dispositive. *Woodcrest Health Care Center*, 360 NLRB 415, 421 (2014).

I have found that Youngblood demanded papers from Gill and his coworkers. I find that he believed them to be union petitions or authorization cards that Gill had passed out and/or on which he collected signatures earlier on the morning of April 4. Soliciting signatures included Gill telling Lyles and others during the break/pre-shift meeting time that he had union papers if they

[9] On direct examination, he testified that Hall told Gill not to "harass" other associates, but I discount any such meeting with Hall. (Tr. 446–447.)

[10] On cross-examination by the Union, Youngblood vacillated on this point. For example, he testified that Wright "didn't accompany [him]," but then stated that "[he] and Mr. Wright did not speak to Johnnie. So it wasn't our place. All it was was [sic] to bring Johnnie back to HR to allow Darryll to speak to him." Next, when asked whether Wright followed him to get Gill or not, he said that "[h]e followed me up half way, yes sir, just to make sure that, you know, that nothing was funny or anything like that . . . [f]rom the HR office to Johnnie's bay where he was at." He testified that he took Wright because "[n]ormally we'd like to have two members of management, you know, just to make sure that in case anything is said, we can, you know, make sure that we're not—to protect the associate, protect ourselves, I guess." (Tr. 467–468.)

[11] However, his demeanor and tone of voice while testifying reflected that the complaints about Gill had obviously frustrated him.

[12] The process support production associates, also known as team leaders, told him about who in his section were union supporters. However, he claimed that they were not "tattling," but just told him in "casual conversation." (Tr. 459.)

were interested. Gill had also engaged in a pro versus antiunion discussion initiated by Lyles. Further, I credited Gill's testimony that at some point between the work floor and the HR conference room, Youngblood told him about how coworkers had accused him of discussing or conducting union business on the plant floor. This was the case even though he knew that the complaint about Gill related to his permitted solicitation and discussions during the break time before the morning meeting. I find that Youngblood seized this opportunity to unlawfully target, interrogate and harass Gill (and his coworkers) about his union activities because he had become frustrated with the complaints from associates who were not union supporters. Thus, this is not a case such that Youngblood was investigating a legitimate complaint about Gill, but rather, as noted, the opposite. Youngblood admitted that he already knew and advised Lyles that Gill had the right to solicit signatures and discuss the Union during the morning pre-shift meetings. Youngblood also knew that Lyles believed that he should be free from solicitation during his breaktime.

I have considered all of the factors mentioned above. Gill was truthful when questioned about union papers and accused of soliciting on duty; the interrogator was his supervisor who disingenuously interrogated and harassed him; and there was evidence of Youngblood showing disdain for and frustration with Gill and other union supporters.

I have also considered Respondent's arguments regarding this allegation and reject them. In particular, I find that Respondent is mistaken in its assertion that there can be no violation since there was no evidence that the union papers, if requested, contained any names or other information identifying union supporters. I find such specific evidence unnecessary in determining whether or not Youngblood interrogated Gill. Therefore, considering the totality of the circumstances, I find that Respondent, through Youngblood, unlawfully interrogated Gill and his coworkers about union activity in violation of Section 8(a)(1) of the Act.

C. Alleged Prohibition Against Talking About the Union, but not Other Nonwork Subjects During Working Time

1. Facts

There is no dispute that associates on the plant floor were allowed to talk about nonwork subjects during downtime (while waiting for work or a part) or while working near each other. In fact, their section leaders and managers knew that they did so, and even joined these conversations at times.[13] On direct examination, Youngblood disagreed with Gill's testimony that associates spent about 20 percent of their workday talking about nonwork related topics. However, he admitted that associates engaged in such discussions while they waited for work or parts. (Tr. 454.) In addition, other witnesses confirmed that associates in rework spent a good deal of down time while waiting for work and/or parts, and that management permitted them to talk about all varieties of nonwork topics. There is also no dispute, as described above, that Gill was told not to conduct union business, including oral solicitation of union participation during worktime.

2. Analysis—Respondent violated the Act with discriminatory restriction on Union—related speech

It is well established that a respondent's cautionary directive to employees to "cease Union-related discussions only" constitutes an 8(a)(1) violation. *ITT Industries, Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. 2001). In addition, while it is permissible for a company to promulgate and maintain nonsolicitation rules in order to advance legitimate business interests related to employee discipline and productivity, an employer violates the Act when it precludes employees from talking about unionization, but allows them to discuss other nonwork related subjects. *Oberthur*, 362 NLRB 1820, 1820 fn. 4 (2015); *Jensen Enterprises, Inc.*, 399 NLRB 877, 878 (2003). There would not be a violation for example, if an employer forbid solicitation or discussion of any kind during working time, or if the employer barred talk about sports or other nonwork-related topics unless done before or after work or during lunch or other breaktimes. See *Our Way, Inc.*, 268 NLRB 394, 394 (1993); *F.P. Adams Co., Inc.*, 166 NLRB 967, 967 (1967).

The General Counsel alleges that Respondent, through Youngblood, restricted Gill and other associates from talking about the Union during working time, while concededly permitting them to discuss nonunion matters. The undisputed facts reveal that Youngblood reminded Gill that Respondent did not permit him to ask coworkers to sign union petitions or discuss the benefits of the Union during work time. As stated above, Youngblood did so even though associates, including those in the rework area, were often permitted to discuss other or nonunion matters during worktime. Accordingly, I find that Respondent unlawfully discriminated against Gill while permitting associates to discuss nonunion subjects while working, in violation of Section 8(a)(1) of the Act.

D. Impression of Surveillance

1. Telephone conversation between Lawter and Epps on or after May 6

Epps and Lawter had worked together in the past and had remained good friends who often talked about various matters, including work issues. Lawter has also been a member of the VOC since mid-2015, an open union supporter and a Car Mill site administrator. (Tr. 114–123.)

On May 4, Lawter, an associate in the body shop, arranged a meeting with Epps to discuss work issues. They emailed back and forth and ended up having a telephone conversation later in the week. There is no dispute that during this conversation, Lawter expressed his concerns about being ineligible for jobs outside of his department and the existing low morale among associates. They both agree that Epps explained that in his new associate relations management role, he would be in a better position to try to help associates in the plant address these types of issues.

However, according to Lawter, Epps also said that he knew

[13] In fact, Lawter testified that his section leaders in the body shop permitted them to talk about sports, religion, and politics during working time. (Tr. 133–134).

why morale was low and asked if he (Lawter) was aware that managers had been on the Car Mill site. Lawter testified that he told Epps that he knew that managers had been on the site, and that if employees discovered that they had been, they would "kick them out because it's a secret group and not open to the public." Lawter stated that Epps replied that associates were going about "it the wrong way." Lawter believed that despite the best efforts of administrators to monitor the secret site, managers may have still accessed it. (Tr. 138–139, 148–149.)

On the other hand, Epps denied that he and Lawter discussed the Car Mill site during their conversation, and that he had accessed the site. (Tr. 475–481.) He admitted, however, that several of the HR associates who work for him had shown him copies "of something that was seen or said" on the Car Mill site that an associate on the floor had given them. He testified that, "a lot of times when the associates come up, they want clarity from our side, is this true or something like that. I have seen those types of things." Yet, he claimed to have no knowledge of these associates or other managers directly accessing or visiting the site. (Tr. 489–490, 504–505.) Although these HR associates worked under Epps, they were HR representative and not similarly situated to Lawter and other associates working on the floor. Epps also acknowledged that he and Lawter might have talked about low morale among associates. Given that Epps and Lawter were good friends, and talked to each other often, I find it believable that Epps, who conceded that he had seen Car Mill site posts, would have felt comfortable discussing the site and what others had seen on it with Lawter. Further, Epps initially testified that he "[did not] remember discussing The Car Mill" with Lawter. He also testified that he spoke to more than 10 associates each week and met with even more face to face to discuss their various issues. So, it is questionable that he would later testify that he did not mention the Car Mill site to Lawter. Finally, I find that Lawter was more confident in his testimony and memory about what was said during the conversation with Epps. Therefore, I credit his testimony over that of Epps', and conclude that Epps cautioned him that managers had been on or seen information posted on the Car Mill page.

2. Pearson and Kirby incidents

a. Morning team meeting

On about May 5, during a morning team meeting in the tilt break area,[14] a construction crew working outside the meeting room ran a saw through one of the walls into the room. Associate Willie Pearson noticed the saw as it came through the wall, within inches of the table where he and other coworkers were sitting in the back of the room and warned his coworkers. They abruptly moved their chairs out of the way. Several of them voiced their reactions out loud. Upon hearing the commotion in the back of the room, Section Manager Chris Kirby (Kirby), looked towards Pearson's table and yelled to "show a little respect."[15]

Pearson left the meeting feeling that Kirby had disrespected him in front of his coworkers because of his response to the saw incident, but mostly due to what he believed to be Kirby's anti-union talk or comments during the same morning meeting. He was also upset because he believed that Kirby had disrespected another prounion associate in the morning meeting. The other associate, Mark (last name unknown), had asked about bonuses, and Pearson did not believe that Kirby told Mark the truth about not knowing if, when or how much they would receive. (Tr. 159, 385–386, 414–415.) After the meeting, Pearson asked his section leader, Matthew Treadwell, to set up a meeting with Kirby. Shortly thereafter, Pearson met with Kirby and Treadwell in an upstairs management conference room.

b. Pearson's meeting with Kirby and Treadwell

Pearson's version

In the meeting with Kirby and Treadwell, Pearson told Kirby that he had disrespected him in front of his peers. Kirby told Pearson that he did not need to raise his voice, and Pearson responded that it was "the same way you talked to me down there in the general meeting." However, Pearson testified that his tone was only "a little louder than a normal conversation, but not screaming or hollering."[16] They all sat down across from each other, with Treadwell at the head of the table. (Tr. 158–159.)

Pearson testified that when he asked Kirby why he had given the antiunion speech, Kirby responded that Pearson did not know his "position." (Tr. 163–164.) Pearson testified that this is when Kirby began to bombard him with antiunion comments such as, "if we ever hoped to get the union in we better hurry up and get out numbers and vote before election time that the new labor relations board that will be put into office will be favoring the company," and that "UAW teaches nothing but to tell lies . . .[l]ike the Facebook page that you guys got. The Car Mill . . . . Y'all spread lies. You and the rest of them are administrators on that Car Mill don't do nothing but spread lies." When Pearson asked him what he was talking about, Kirby said, "[l]ike the thing about Rich Morris . . . [you] tell lies, and I saw what y'all, you and your administrators, put on there, put on The Car Mill about Rich Morris." Kirby also told him that Morris' wife and kids saw the rumors on The Car Mill site and called Morris to ask why he was terminated. That resulted in Morris calling him. When Pearson asked him why he, and Morris' wife and children, were looking at their secret Facebook page, Kirby replied that he had not been on the site, but that, "[p]eople tell me. Just like you standing out in front of the plant with a bull horn with your union sign." (Tr. 165–167, 172.)[17] Pearson insisted that Kirby initially said that

[14] The tilt section team mostly works on the under bodies of cars such as gas tanks, brake lines, and air shocks. (Tr. 151–152.)

[15] According to Pearson, he told Kirby that there was a safety issue with a saw blade coming through the wall, but Kirby responded that he did not care, and to get up and move. (Tr. 160–163.) Kirby admitted that he told Pearson to "show some respect" after seeing him jump up and hearing him say "what the hell is going on?" However, Kirby testified that no one, including Pearson, told him there was a safety issue or a saw cutting through the wall. (Tr. 383–384, 401.) Regarding the nature of the incident, and the undisputed reactions of the employees, I credit testimony that Pearson told Kirby about the saw right after Kirby admonished him to show respect.

[16] In his Board affidavit, Pearson stated that both he and Kirby "got loud and we were arguing." (Tr. 197, 200; R. Exh. 1.)

[17] Pearson testified that Kirby was referencing a photograph of him (Pearson) on the Car Mill site posing in front of one of the plant building turnstiles holding a bull horn and a "Union Yes" sign. The photograph was posted on the Car Mill site on April 2. (Tr. 168–169.)

he "saw" what was on the Car Mill site. Pearson further testified that Kirby said that "[i]f [he] was Rich Morris, [he] would sue each and every one of "the administrators on there. . ." because had slandered Morris' name. Kirby then said, "I take that back. If he tried to sue you, he probably wouldn't get nothing because all of you are worthless. Every one of you are worthless," and only tell lies. (Tr. 168–170.)[18] Pearson testified that Kirby questioned why they had a site administrator who never came to work. Pearson testified that all of Kirby's comments led him to believe that he had seen their Car Mill Facebook page.

At this point, Pearson told Kirby that he needed to talk to HR. However, he testified that Kirby "kind of got like he was mad, but then he wanted to, I guess, show me what he was going to do when he came up there because he started saying, '[t]he way you came in here trying to intimidate me, how violent your body language was, the way you came in here with your loud voice towering over me, I was afraid for my life. Yeah, let's go to HR. Let's do it.'" Pearson described Kirby as "holding up his hand and shivering." Pearson believed that Kirby was "intimidating him," and did not know whether Kirby "was going to say some slurs or what." On the other hand, he believed that Kirby was only pretending to be intimidated by him (Pearson). He characterized Treadwell's demeanor as just "standing there like he saw a ghost; he wasn't telling him to chill out or anything." (Tr. 170–171.)

On cross-examination, Pearson acknowledged that the rumor about Morris being fired for misappropriating funds was discussed "a lot" by "a lot" of people in the plant because Morris had been a manger in assembly. He also admitted that it was "possible" that another associate took a screen shot of the Car Mill posts and showed them to Kirby. (Tr. 191–192.) He maintained, however, that Kirby initially told him that he had seen the rumors on the Car Mill page. (Tr. 193–194.) He also testified that Kirby never told him which associates had talked about the Morris rumors, or that associates had shown him screen shots or information copied from the Car Mill site. (Tr. 210–211.)

In an email to Union Organizer Brad Bingham, dated May 8, Pearson described what had occurred on May 5. (GC Exh. 2.) He stated that when he informed Kirby that there was a safety hazard with "an 8-inch blade coming through the wall," Kirby responded that he (Pearson) knew they were doing construction, and "to just move." He explained that he later told Kirby that he would be filing a charge with the NLRB, presumably for the anti-union speech which he believed Kirby gave to "upstage [him]" and his "pro union efforts" in front of his peers. Next, he stated that Kirby had accused the Union of teaching lies, and asked:

> [W]hy did we the administrators on the Facebook page The Car Mill put a lie out on our formerly demoted VP Rich Morris that HE saw what we put on there about him and that Morris wife was upset about it when She saw it she called Rich upset. . . . Kirby also said Morris has kids who saw . . . my question to him was why are all you guys in management on our pro union page. . . . he said he heard . . . just like me standing in front of the plant with a bull horn and a UAW YES sign... he was trying to intimidate me by letting me know he knows all of our pro union moves . . . . I told him it was our fed right he said he didn't care and if he was Morris he would [sue] all the admins of the car mill . . . but WE'RE ALL WORTHLESS I then told him I also noticed he was being condescending to another pro uaw guy with a uaw hat on he said. . . . YOU DAMN RIGHT I HAD AN ATTITUDE WITH HIM THE GUY HAD ON A UAW HAT ASKING ME ABOUT A COMPANY BOUNUS AND WHEN WE WAS GOING TO GIVE IT. . . . Kirby said this to me as well as my meeting that I asked for with hr and him...Kirby also told me in our meeting before hr that if we had any hope of getting uaw in we had better hurry and vote before the NLRB changed due to voting and new laws. Kirby also told me that if we wanted the union in we'd better pic new spokesman because one of the one we had was riding the system and that that's what uaw was consistent with helping workers to get paid to doing nothing.

(Id.)

In his Board affidavit dated August 10, Pearson stated that Kirby asked if the Union did not tell lies, then why did they put lies about Morris on the Car Mill Facebook page. Pearson further stated that when he told Kirby that he should not be on their private site, Kirby responded that, "he was in management and hadn't been on Facebook, but people told him about it." He said that Kirby also said that other managers had also "heard" from employees. He explained that the site was private, by invitation only, but "anyone that asks we let in and the plant is too big to monitor whether people are really employees, so there are probably managers there." He and other members suspected that "a manager started the rumor about Morris to make the Union look bad." (R. Exh. 1.)

Management's version (Kirby and Treadwell)

Kirby testified that when he met with Pearson, he could tell that he was "agitated" and "aggravated," but that he was not loud or screaming. Both he and Treadwell agreed that after Pearson explained the saw incident, he accused him (Kirby) of being "anti-union," disrespecting him with his speech during the morning meeting and disrespecting the other pro-union associate, Mark. Treadwell added that Pearson also said that Kirby had disrespected Mark because he had his UAW hat on the table. (Tr. 384–386, 414, 419.)

In contrast to Pearson, Kirby and Treadwell denied that Kirby brought up the Car Mill site or told Pearson that he and other managers had seen or accessed the site or been told by others what was posted on it. Instead, they testified that Pearson first mentioned the Car Mill site after Kirby told him that it was disrespectful to spread rumors about Morris. Kirby testified that Pearson accused him of "being on The Car Mill site," and that he told him that he "had never been on The Car Mill site and . . . didn't know what The Car Mill site was." (Tr. 387–388, 415–

[18] He said that after the Morris story broke about him being fired for stealing bonus money, members spent an entire week commenting about it on the Car Mill site. This led the site administrators to become even more vigilant about what was put on the site, and who accessed it. Before April 2, "things didn't need to be approved by administrators as they do now. If you were on there, you could just put whatever it is that you wanted on The Car Mill." He also explained that they try harder to research to make sure managers or associate relations associates do not access the site. He testified that a site member could easily access the administrator names. (Tr. 174–177.)

417.) Kirby stated that he heard the Morris rumors "on the floor," and that "[i]t was pretty general on the floor. I heard quite a few people talking about it. Some people had asked me questions direct because I had worked for [Morris] for 20 years." He claimed that he "had heard associates making comments that Rich's children had heard [in school] that their father had been fired while he was in Germany, and it had upset them." (Tr. 387–389, 416.) He said that the rumor "was all over the plant." He also denied telling Pearson that Morris' wife and children had been on or seen the rumor on the Car Mill site. However, Pearson continued to insist that he had been on the site because "that's the only place that I would know that was going on," and told him that he (Pearson) "was aware of management people putting—posting on The Car Mill site to make the union look bad with false statements and all." (Tr. 389.) Kirby testified that he was not aware that anyone in management had posted information on the site.[19]

Treadwell also corroborated most of Kirby's testimony regarding Pearson's accusation that Kirby must have been on the Car Mill site, and Kirby's insistence that he had only heard rumors on the plant floor. Both Treadwell and Kirby testified that this meeting with Pearson was the first time they had heard about the Car Mill site. (Tr. 415–416.)

c. HR office meeting

Pearson, Kirby, and Treadwell met with associate relations manager, Corey Epps, and associate relations team leader, Latonya Atkins. In this meeting, neither Pearson nor Treadwell mentioned their discussions about the Morris rumors, the Car Mill site, or accusations about the union spreading lies. According to Pearson, Kirby told Epps and Atkins that he and Pearson, who was a "[p]retty good guy," had frequent "man-to-man talks," but that he (Kirby) had said more than he should have during this talk.[20] (Tr. 179.) Pearson testified that this prompted him to believe that Kirby was "pulling back like I don't really want to talk about everything we talk about up here, as long as I wouldn't do it, oh, he wouldn't." (Tr. 208.) Instead, Pearson talked about how Kirby had disrespected him in the morning meeting. Kirby responded that would have apologized had he known about the saw, and then he and Treadwell left the meeting. Pearson explained that when he was alone with Epps and Atkins, he told them that he "got tired of management playing the black card against [him], big black guy going crazy," and using his size against him. He also spoke about being disrespected because of his union sympathies. (Tr. 207.)

Epps testified that after Pearson explained the saw incident, and how Kirby called him out in front of his coworkers, Kirby explained that had he known about the saw, he would not have done so. Epps further testified that he asked Pearson if all was okay, and that he said, "yes that he just wanted to be respected." (Tr. 484–488.) Epps explained that after Kirby and Treadwell left the meeting, Pearson said that he's pro and "you're anti and Kirby is anti-union," and that he wanted to be treated fairly. Pearson also said that he thought that Kirby had violated his rights by talking to him in front of his team members and by making an antiunion speech. Epps confirmed that the Car Mill never came up during the HR meeting. (Id.)

d. Other testimony regarding the Car Mill site

Steve Wilson, Respondent's media communications specialist, testified that on April 30, his department received a media inquiry from WEPS television to one of Wilson's coworkers in the communications department about the Morris rumor. The sender stated that they had received the information detailing his alleged termination for improper use of bonuses. (Tr. 268–269; R. Exh. 7.)

Medley testified that associates had come to him and reported what they had seen about the union on social media sites, but could not recall names of any of the associates. He admitted that most of the associates who had shared such information with him were supervisors and managers or associate relations associates (not hourly employees). He recalled one incident involving a Barney video on You Tube and another regarding the Car Mill site. He explained that associate relations associates, Brenda or Donell (last names unknown) had told him that there was union information "out there on The Car Mill site . . . ," and that he has "only seen maybe a hard copy of something that was out there, a comment, something from social media, but nobody has come up and shown me a smart device." (Tr. 363–367.)

e. Additional credibility findings[21]

There is no dispute that Kirby accused Pearson, other prounion associates and the Union of spreading rumors and lies about Morris being terminated for misappropriating company funds. There is also agreement that at some point during Pearson's meeting with Kirby and Treadwell, Kirby told Pearson that he had not seen the rumors on the Car Mill site, but had heard about them from others. The question is whether or not Kirby also told or otherwise indicated to Pearson that he and others had seen the Morris scuttlebutt on the Car Mill page.

First, I discredit testimony by Kirby and Treadwell that they first learned about the Car Mill site when Pearson accused Kirby and other managers of accessing the site. Treadwell's testimony that he had not heard about the Morris rumors at all before the meeting with Pearson and Kirby is equally doubtful. It is

[19] Kirby and Treadwell denied that Kirby said he had seen a picture of Pearson with the bull horn in front of the plant. Kirby also disagreed that he told Pearson that a new administration and new rules at the NLRB would favor companies, since he had no idea at the time who would win the national election. (Tr. 391, 393, 418.)

[20] On cross-examination, Treadwell did not recall hearing Pearson mention "man-to-man talks," but Kirby did not testify as to whether or not he made the comment. (Tr. 421.)

[21] The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

undisputed that the Morris rumors were posted on the Car Mill site. Further, Epps and Medley testified that associates and managers had shown them copies of various Car Mill posts. Additionally, Kirby testified that he heard about the Morris rumors from others in the plant and accused Pearson and the union supporters of spreading them. Even Pearson admitted that associates on the plant floor talked about the Morris situation. It is unbelievable that Kirby and Treadwell had no knowledge of the Car Mill site before that time, or that the Morris rumors had been posted on it.

I also discredit testimony by Kirby and Treadwell that Pearson brought up the Car Mill page, and that Kirby never mentioned or indicated that he had seen the Morris gossip posted there. In his statement to Union Representative Bingham on May 8, Pearson related how Kirby had asked him "why did we the administrators on the Facebook page The Car Mill put a lie out on our formerly demoted VP Rich Morris that HE saw what we put on there about him and that Morris wife was upset about it when She saw it . . . Kirby also said Morris has kids who saw this . . ." In his Board affidavit, dated June 13, Pearson stated that Kirby asked why the union put lies on the Car Mill Facebook page about Morris. (GC Exh. 2; R. Exh. 1.) These accounts, given shortly after the incident, were essentially consistent with Pearson's testimony that Kirby initially told him that he had seen the Morris rumors posted on the Car Mill page. They were also consistent with Pearson's testimony that when he asked Kirby why he, as a manager, was on the private page, Kirby then responded that he had not been on it, but that others had told him about it. (Id.) In contrast, Kirby, who admittedly accused Pearson and others of spreading lies around the plant about Morris and told Pearson that he and Morris' family heard about the rumors, failed to mention this or any other version of the discussion in his Board affidavit. (GC Exh. 6.) Further, Kirby's testimony that he heard that Morris' children learned about the gossip in school simply does not ring true.[22] Consequently, where their testimonies conflict, I credit Pearson's testimony over the contrived and self-serving testimony of Kirby and Treadwell. Therefore, I find that Kirby questioned and accused Pearson and other union supporters of broadcasting the Morris tale on the Car Mill site, and that Kirby initially told or indicated to Pearson that he and Morris' family had seen the Car Mill posts regarding Morris.

Given these findings, and Pearson's more detailed and consistent testimony, I also find that Kirby told him that he had seen photographs of Pearson with the bullhorn at the plant entrance and indicated that he knew who some of the Car Mill site administrators were.

3. Analysis—Respondent violated the Act by creating the impression of surveillance

The General Counsel alleges Respondent's managers, Kirby and Epps, created the impression of surveillance by telling employees Pearson and Lawter that they and/or other managers and supervisors had seen or accessed the employees' private, restricted access, prounion Facebook page, the Car Mill.

In determining whether a statement constitutes creating the impression of surveillance, the Board asks whether or not employees could reasonably assume from the employer's statements or conduct that their activities had been placed under surveillance. See, e.g., *Greater Omaha Packing Co.*, 360 NLRB 493, 495 (2014); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 963 (2004); *Flexsteel Industries*, 311 NLRB 257 (1993).

a. Respondent, through Epps, created an impression of surveillance and violated the Act.

Regarding Lawter and Epps, I conclude, based on my factual findings, that Epps warned Lawter that managers knew about their Car Mill site, and that the associates were going about dealing with their issues the wrong way. I find that in this context, employees would reasonably assume from Epps' statements, that their conduct or activities on the private Car Mill site had been placed under surveillance. Therefore, I find that Respondent in this instance violated Section 8(a)(1) of the Act.

b. Respondent, through Kirby, created an impression of surveillance and violated the Act

I have credited Pearson's testimony over that of Kirby and Treadwell, and found that during their meeting, Kirby criticized Pearson and other administrators for putting "lies" about Morris on the Car Mill site, and gave the impression that he had seen posts on the site. Kirby also told him that Morris' wife and children had seen what was posted. Therefore, I find that employees would reasonably find Kirby's accusations to create the impression of surveillance of the private website by Kirby and other managers. There is no doubt that Pearson was an open union supporter and did not hide his union sympathies from Respondent's managers. However, the private website maintained by employees who were union supporters was not a public Facebook page open to all, but rather was limited to those who were invited to join by webpage members, and then approved by the Car Mill site administrators. Admittedly, the administrators were not able to ensure that all invitees were union supporters, but it is undisputed that the page was considered private by members and administrators.

Unlike the manager in *Cf. United Charter Service*, 306 NLRB 150, 161 (1992), Kirby provided Pearson with detailed knowledge of the employees' union activities on the private Car Mill site, including alleged lies or rumors about Morris being terminated, photographs of Pearson and information about site administrators. In *Cf. United Charter Service*, above, the Board found that even had the employees' union meeting been "common knowledge," the manager created an impression of surveillance when he "went into detail about the extent of the [meeting] and the specific topics [that employees] discussed." While random or isolated viewing of a union gathering by an employer agent is not prohibited surveillance, *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987), an employer unlawfully creates the impression of surveillance by statements or other conduct which, under all relevant circumstances, would lead reasonable employees to assume that their union activities have been placed under surveillance. *Durham School Services*, 361 NLRB 407, 407 (2014).

Respondent relies *on Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1275–1276 (2005), in which the Board

[22] His testimony in this regard was hesitant and indecisive.

concluded, contrary to the judge, that a supervisor's comment to an employee that he was aware of a message on the Yahoo! Web page posted by another employee would not have reasonably caused employees to believe that they were under surveillance. In *Frontier Telephone*, technicians, as a part of their union organizing campaign, utilized a Yahoo! Web page "for the purpose of facilitating discussion among the techs on the various union employment issues that concerned them." (Id.) One of the techs actually invited a supervisor, who was mentioned in the email, to his desk to view the posted email, and sent a copy of it to the supervisor's computer. Subsequently, another tech asked the supervisor what he thought about the union, to which the supervisor replied that he knew about the Yahoo! Web page group and what another tech had posted there. This tech testified that he had "assumed" that the website was a private, invitation only site "dedicated solely for the benefit of the techs who wished to discuss CWA representational issues, and that access to the website by management personnel was not possible." (Id.) The judge found that to techs who had subscribed to the site and believed it to be secure, the supervisor's statement sent a "clear message" that the employer knew about the website, it's purpose and its contents regarding employees' concerns. In reversing the judge, the Board considered it significant that the tech to whom the supervisor made the statement admitted that he did not know the identities of all of the website subscribers; that there was nothing on the site's homepage indicating that it was restricted only to the techs; and that there was no evidence that subscribers were told to "maintain the secrecy of the website's existence." (Id.) The Board also focused on the tech's acknowledgement that any subscriber could show posted messages to anyone else, including supervisors. Therefore, the Board concluded it "unreasonable for [the tech] to have assumed from [the supervisor's] remark that [he] learned, by means of unlawful surveillance, the message that [another tech] had posted on the Website." It found that "[t]o the contrary. . . a reasonable employee would assume that [the supervisor] lawfully learned of [the message] exactly the way [the supervisor] did—through public dissemination by another website subscriber." (Id.)

While on its face, *Frontier Telephone* is similar to this case, I find that it is distinguishable for several reasons. Like the webpage in *Frontier Telephone*, the Car Mill site is utilized by Respondent's associates to share information about the Union and Union meeting announcements, and to discuss and air grievances about the terms and conditions of their employment. However, unlike *Frontier Telephone*, there is no evidence here to contradict that the Car Mill site is a private webpage understood by members to be private and privileged to Respondent's associates who support the union. Additionally, the Car Mill site administrators must approve each individual's invitation to membership. Lawter and Pearson acknowledged that due to the size of the plant, the site had become difficult to monitor. However, they testified that administrators had vamped up their vetting process in order to maintain the secrecy of the website and confidentiality of its terms. Therefore, unlike the Yahoo page in *Frontier Telephone*, the associates supporting the Union clearly had an expectation of privacy, and also incorporated a process to maintain the Car Mill site's privacy.

I understand that the Board also considered the fact that a subscriber to the Yahoo site could and did show the email post to the supervisor. The associates in this case also acknowledged that it is possible for an associate Car Mill page member to show the site or copies of posts on the site to non-members, including managers and team members. However, that was only one factor in determining the expectation of privacy in *Frontier Telephone*, and I have not credited Kirby's testimony that he heard about the rumor on the floor and never mentioned the Car Mill site to Pearson, and that he had not even heard of the site before his meeting with Pearson. Additionally, there is no evidence that Kirby told Pearson who told him about the Morris rumor, and unlike the employee subscriber in *Frontier Telephone*, there is no evidence that Pearson or another Car Mill member showed Kirby posts from the site.

It is impossible to ignore the social media forum as a modern-day alternative to a union meeting, or medium for employees to privately share union and employment related information. Employees' expectation of privacy in connection with their webpage should not be automatically extinguished just because they do not know all of the subscribers, or when someone infiltrates the site. This would not be the case with real life private union organizing meetings. Here, Kirby's statements not only involved the Morris rumor, but also other details about what was posted on the site, including identities of site administrators and the lies he believed they told and pictures posted on the site. See *Cf. United Charter Service*, above at 151. Nevertheless, it matters not that the rumors had also been discussed by associates on the plant floor when Kirby's detailed comments clearly created an impression that he had been watching what was posted on the Car Mill site.[23]

Moreover, this was not the only situation in which I find that Respondent had created the impression of surveillance of the Car Mill site.[24]

In *Flexsteel Industries*, 311 NLRB 257, 258 (1993), a supervisor communicated his knowledge about rumors about an employee's union activity to that employee. The supervisor informed that he not only knew of his union support, but also that he was aware the employee may have initiated the union campaign and passed out authorization cards. In other words, he implied that he knew details of the employee's activity. The Board found that it never required "evidence that management actually saw or knew of an employee's union activity for a fact, nor do we require evidence that the employee intended his involvement to be covert or that management is actively engaged in spying or

[23] This is not a case where management officials observed public union support activities, but a case where they did "something out of the ordinary," and focused its efforts on protected conduct by union activists on their private web page. See *Purple Communications*, 361 NLRB 1124, 1138 (2014), citing *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991).

[24] In fact, as mentioned earlier, Medley, one of Respondent's managers, testified that supervisors and managers had come to him and reported what they had seen about the union on social media sites as well as on the private Car Mill page.

surveillance. Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement," citing *Emerson Electric Co.*, 287 NLRB 1065 (1988).

Therefore, I find that Respondent violated the Act when Kirby created the impression that the associates' prounion private Car Mill Facebook page had been placed under surveillance.

E. Challenged Associate Guidebook Rules

Respondent has promulgated and maintained an Associate Guidebook of rules for its employees, revised and effective January 1, 2016. (GC Exh. 5.) At issue here are the "Standards of Conduct," "Confidentiality of Information," and "Solicitation and Distribution" policies. The General Counsel alleges that Respondent has unlawfully maintained these rules since about January 8, 2016.

Steve Wilson, Respondent's media communications specialist, described in detail Respondent's process of getting new vehicles through the stages of design, manufacturing, and testing, and how the process can take several years to reach the "start of communications," or date when a new car design is released to the public. Wilson explained that it is necessary for Respondent to maintain complete confidentiality throughout this process in order to protect its brand and over one-billion-dollar investment in new car development. He pointed out how "Forbes.com" had ranked BMW number 14 on its list of the world's most valuable automobile brands, valued at over 28 billion. (R. Exh. 6.) Wilson testified that Respondent specializes in manufacturing luxury cars in a highly competitive automotive industry, and has become an innovator in that industry necessitating tight control over its trade secrets and proprietary information.[25] He further explained how Respondent goes to great lengths to protect is new designs prior to public release, such as completely camouflaging or wrapping the exterior and interior of its new models when they are being tested and transported to different locations.[26] He cited the high degree of interest that the media and others have in BMW's new designs, and the market for "spy" photographs of various technical design concepts. He also gave examples of how rogue photographers have attempted to photograph new models from public property across from the plant.

The evidence shows that these new cars are typically cloaked with psychedelic patterned coverings wrap externally and covers internally. However, the evidence shows that while wrapped they are publicly displayed and tested on public roads. In addition, despite the camouflage, the media and trade publications are still able to detect some of the new body design features, as they are not clothed in tents but rather a stick-on film type of material. Nevertheless, Wilson testified that Respondent's associates would violate the company's no photography policies if they took a picture of a camouflaged car parked on a public street away from the plant. (Tr. 273.) New cars are not under camouflage until they are completely built. (Tr. 229–236; R. Exhs. 2–3.)

Common Legal Standards

The Board has long recognized the right of employees to communicate in the workplace, which includes the right to discuss with each other hours, wages, and other terms and conditions of employment. *Parexel Int'l., LLC*, 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996).

In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004). If it does not, a violation is established by showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to protected activity; and/or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 647. In addition, maintenance of the rule may be deemed unlawful even absent any evidence of enforcement. *Lafayette Park Hotel*, above at 825. The Board has explained that where an employer does not intend for a rule to extend to or prohibit protected activity, the employer's lawful intent must be "clearly communicated to the employees." Id. at 828. Further, it is well settled that "any ambiguity in a rule must be construed against the Respondent as the promulgator of the rule." Id., citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

Background and analysis of Respondent's rules

1. Standards of conduct

In order to maintain a safe, efficient organization and to promote a spirit of teamwork, certain basic rules of conduct must be followed. These are general standards for behavior and are not all-inclusive. Associates of BMW MC are expected to know, understand, and follow these standards. Any conduct which disrupts safety or normal business activities may result in corrective action up to and including termination of employment.
(GC Exh. 5, p. 4–5.) The bulleted examples set forth in the complaint are:[27]

- Demonstrated respect for the Company.
- Not engage in behavior that reflects negatively on the Company.
- Not use threatening or offensive language.
- Not use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval.

[25] He gave an example of how BMW was the first to invent the BMW iDrive system which is now commonly utilized by many of its competitors. He explained that that premature release of this system would have greatly diminished the value of its investment. (Tr. 228.)

[26] Wilson acknowledged that in the auto industry, it is common for car manufacturers to camouflage new vehicles until public release. (Tr. 274.)

[27] Although not necessarily clear in the complaint, the General Counsel set forth at trial and in its brief the specific bulleted examples of standard of conduct alleged to violate the Act. (GC Br. at 2.) Therefore, it is not necessary to include the other examples contained in Respondent's standards of conduct policy at GC Exh. 5, pp. 4–5.

a. Prohibitions on disrespecting and engaging in behavior that negatively reflects the company

Scott Medley, Respondent's department manager for associate relations, provided testimony in support of the company's contested guidebook policies. He testified that he knew of only one time that this policy was enforced, and that it was never enforced against an hourly employee. He essentially explained how associates had freely and frequently complained about work and other conditions to managers, openly engaged in union activities, including passing out flyers in team areas and other areas of the plant and wearing various union paraphernalia in the plant, without discipline or fear of discipline. (Tr. 288–303.) Regarding the rule restricting employees from engaging in behavior that negatively reflects the company, Medley testified that, it is "really applied for those people that are going out into the community and representing BMW in an official capacity . . . so that there's some regulation about how they're to conduct themselves and what information they should be sharing." He said that like the last, this policy had never been enforced against an hourly associate, or in connection with any associate complaining about his work conditions. (Tr. 303–304.)

Analysis

I find that these prohibitions are overly broad such that they would be understood by employees to restrict Section 7 activity and violate the Act. The Board has repeatedly found that similar rules requiring that employees demonstrate respect for the company and not engage in behavior that negatively reflects or is "detrimental to the company's image or reputation" are so broad in scope that they infringe on employees' Section 7 rights. See *Hills & Dales General Hospital*, 360 NLRB 611, 611 (2014); *First Transit, Inc.*, 360 NLRB 619 fn. 5 (2014) (finding unlawful a disloyalty rule prohibiting employees from participating in outside activities or conducting themselves during nonworking hours "in such a manner would be detrimental to the interest or reputation of the Company.") Indeed, Respondent's justification that this rule is "really applied for those people that are going out into the community and representing BMW in an official capacity…," is not contained in the rule. Therefore, the policy insufficiently informs employees that the rule excludes protected activity. (Tr. 303–304.)

In *University Medical Center,* 335 NLRB 1318, 1321 (2001), the alleged unlawful rule prohibited "insubordination . . . or other disrespectful conduct towards service integrators and coordinators and other individuals." The Board found that this rule violated the Act as employees would reasonably believe that their protected rights were prohibited by this rule. In its finding, the Board found the term "disrespectful" to be problematic. The Board stated that "[d]efining due respect, in the context of union activity, seems inherently subjective." Id. In other words, employees would reasonably believe that a rule restricting disrespectful demonstrations and behavior reflecting negatively against the company precludes any written or oral expression of disagreement, concern or discontentment about company practices deemed to be discriminatory or unfair labor practices. This might include discussing these types of issues with coworkers, the Union, or others. "Where reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity. Employees, who are dependent on the employer for their livelihood, would reasonably take a cautious approach and refrain from engaging in Section 7 activity for fear of running afoul of a rule whose coverage is unclear." *Whole Foods Market,* 363 NLRB No. 87, slip op. at 4 fn. 11 (2015). Additionally, the Board has found that rules prohibiting conduct that has the "potential to have a negative effect on the Company" and instructing employees not to refer to the employer in any internet posting that "would negatively impact the Company's reputation or brand" violate the Act. See *Boch Imports, Inc.,* 362 NLRB 706, 706, 715–716 (2015), enfd. 826 F.3d 558 (1st Cir. 2016).

This case is similar. The employees here would reasonably construe the rules as preventing discussions with fellow employees, or others, regarding their working conditions. Accordingly, this rule prohibits employees' Section 7 activity in violation of Section 8(a)(1) of the Act.

b. Prohibition against using threatening or offensive language

Medley testified that the main purpose of this threatening language policy is to preclude workplace violence, in that it intends to prevent threats against others and name calling (such as "idiot") from escalating into a serious conflict between or among associates. He claimed this rule had never been applied to limit union or protected activity. (Tr. 305–306.)

Analysis

I agree that a ban on "threatening" language alone might be lawful, but find that the part of the rule prohibiting "offensive" language taints the entire rule. Respondent relies on the Board's approval of the District of Columbia Circuit Court's finding in *Adtranz ABB Daimler-Benz Transp., N.A. Inc. v. NLRB,* 253 F.3d 19, 26–28 (D.C. Cir. 2001), denying enf. in pert. part to *Adtranz ABB Daimler-Benz Transp. N.A., Inc.*, 331 NLRB 291 (2000), that an employer's rule banning "abusive or threatening language" was lawful. In *Lutheran Heritage Village-Livonia*, above at 647–648 the Board agreed with the Circuit Court in *Adtranz* "because [the rule] was clearly intended to maintain order and avoid liability for workplace harassment and could not reasonably be read to prohibit activity protected by Section 7." Similarly, in *Lutheran Heritage Village-Livonia*, the Board upheld the judge's finding that the employer's rules prohibiting "'abusive and profane language,' 'harassment,' and 'verbal, mental and physical abuse'" were lawful since their intent was "to maintain order in the employer's workplace" and not to "explicitly or implicitly prohibit Section 7 activity." Id. The majority agreed, that "a rule can be unlawful if employees would reasonably read it to prohibit Section 7 activity," and declined to determine what rules in a future case would be unlawful. However, this case is dissimilar, and the Board's approval of the Circuit Court's finding in *Adtranz* does not extend to it. The instant case does not involve a rule prohibiting abusive or profane language, or racial, sexual, or other harassing words. Nor does it list types of language that sufficiently informs employees that the rule intends to prevent workplace violence. Instead, the rule in this case broadly and ambiguously bans not only "threatening" language, but also "offensive" language, without specifying examples of such speech.

Therefore, I find that this section of Respondent's standards of conduct policy also violates Section 8(a)(1) of the Act.

c. Prohibition against use of personal recording devices within Respondent's facilities and use of business recording devices within Respondent's facilities without prior authorization

Medley corroborated Wilson's testimony that this policy protects the company's brand and confidential and proprietary information, including new design technology, trade secrets and new car models, etc. from being recorded, photographed, or publicly disseminated. Indeed, Respondent's witnesses explained that Respondent forbids both personal audio recording devices and photography. Medley reiterated that if production associates have safety concerns or other issues they want photographed, they should first notify a supervisor. If the supervisor is not available, or the associates have additional issues, they can go to the area's process support associate. He emphasized that process support associates, if authorized to receive a photo pass, can use a smart device or camera in the area, to take pictures in the plant. (Tr. 306–310, 312.)

Analysis

In recent decisions, the Board has found that employer rules broadly prohibiting employees from recording and photographing in the workplace would reasonably be understood to limit Section 7 activity in violation of the Act. See *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3–5 (2016), citing *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1693–1694 (2015), and *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015). In *T-Mobile*, the respondent's rule restricted employees from using cameras and audio and recording devices in the workplace without certain management authorization. The Board in *T-Mobile* overruled the judge's finding and determined that the respondent's rules were not justified by its "general interest in maintaining employee privacy, protecting confidential information, and promoting open communications." *T-Mobile*, above, slip op. at 5. The Board in *Rio All-Suites Hotel & Casino*, above, cited examples of types of protected conduct potentially affected by such a rule, such as employees recording and documenting employees picketing, unsafe work equipment or conditions, discussions about terms and conditions of employment, and discriminatory application of employer rules. The Board determined such documentation might also be necessary to preserve evidence for later use in an administrative or judicial employment-related proceeding. Id. In its finding, the Board also relied on *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798–799 (2009) (finding photography to be part of the "*res gestae* of employee's protected concerted activity in documenting inconsistent enforcement of employer dress code"), reaffirmed and incorporated by reference at 355 NLRB 1294 (2010), enfd. 452 Fed.Appx. 374 (4th Cir. 2011); and *Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991) (finding tape recording in the workplace to support federal investigation protected), enfd. mem. 976 F.2d 743 (11th Cir. 1992). Id. In *Whole Foods Market*, above, slip op. at 3, the Board reversed the judge's decision that since the rule had not been promulgated in response to union activity or applied to restrict the exercise of Section 7 rights, it could not have reasonably been read to encompass Section 7 activity. The Board found the employer's rule prohibiting all recording of conversations, calls, images or company meetings with a camera or other recording device without prior management approval violated the Act.

In this case, the rules do not indicate, explicitly or implicitly, that they are designed to only protect the privacy of new car model designs, innovative technology, trader secrets, and other such confidential and proprietary information. Rather, they unqualifiedly prohibit all unauthorized workplace recording, whether audio or recording images on film. I find unpersuasive Respondent's argument that their luxury automobile business and place as a top innovative leader in the industry with billions of dollars of investments at risk justifies maintenance of this policy. The rule here, like those in *T-Mobile, Whole Foods Market,* and *Rio All-Suites Hotel*, above, fail to differentiate between Section 7 protected recordings and photographing and those that are not protected. Further, Respondent's rules fail to qualify whether or not employees would be permitted to use their cameras or recording equipment to capture unfair labor practices in break or other nonworking areas or during nonworking, break, or meal times. Nor does the rule allow for any exclusions of this rule when there are not new models in development stages. To the contrary, this rule far exceeds protecting Respondent's proprietary information as it prohibits employees from using recording devices or cameras anywhere in the facility, and not just in production or work areas where such information is located.

Thus, I have considered and reject Respondent's argument that its substantial interest in protecting its brand and confidential and proprietary information justifies its rule and outweighs its employees' Section 7 rights. In order for an employer's business interests to outweigh employees' Section 7 rights, the rule must be "narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition." See *T-Mobile*, above, slip op. at 4. Similar claims that overly broad bans on recording are necessary to maintain confidentiality and protect proprietary information have been rejected by the Board. See *T-Mobile*, where the Board stated, "[t]hat the Respondent's proffered intent is not aimed at restricting Section 7 activity does not cure the rule's overbreadth, as neither the rule nor the proffered justifications are narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition." Id.

Next, Respondent's assertion that this rule, and all of the other challenged rules, are lawful because they have never been enforced, or that employees have never been disciplined for violating them, is without merit. The applicable standard set forth to evaluate these rules is not based on subjective interpretations or evidence of enforcement or discipline. As stated, maintenance of the rules may be deemed unlawful even absent any such evidence of enforcement. *Lafayette Park Hotel*, 326 NLRB at 825.

I have considered all of Respondent's evidence and arguments in support of its special circumstances and justification for its rules, but find they are insufficient to justify the overly broad recording rules in this case. Accordingly, these rules would reasonably be construed to interfere with and chill employees in the exercise of their Section 7 rights such that they violate Section 8(a)(1) of the Act.

2. Confidentiality of information

Because of the highly competitive nature of the automotive industry, the protection of confidential business information and trade secrets is vital to the interests and success of BMW MC. Such information includes but is not limited to personal and financial information, customer lists, production processes and product research and development.

> ALL BMW MC Associates, suppliers, contractors and third-party vendors must:
>
> - Respect the nature of privileged or confidential information.
> - Not use confidential information for personal gain.
> - Not share such information with persons internal or external to BMW.
>
> Any information that BMW MC has not released to the general public must be treated as confidential. If an Associate has a question about whether certain information should remain confidential, he/she should discuss it with his/her supervisor or a manager.
>
> Violation of these guidelines may result in corrective action up to and including termination of employment.

Respondent admitted in its amended answer that this rule represented the "full text" of its confidentiality of information policy. (GC Exh. 1(j).) Medley explained that this policy included any kind of confidential information necessary to protect the company's new model information, trade secrets and new technology. He defined "financial" information as pertaining to the funding for its competitive projects, and not to restricting employees from discussing with each other their wage rates or other terms and conditions of employment. Wilson, on the other hand, believed that "personal" and "financial" information referred to "something like social security numbers, home addresses, phone numbers, your salary, if you're talking about financial information, those kinds of things." (Tr. 277–278.)

At trial, Respondent introduced a different form of this confidential policy, which included at the end of the next to the last paragraph, "[i]f additional information is needed the entire policy can be viewed on the BMW intranet." (R. Exh. 10.) This sentence was added to the policy effective on January 1, 2016, but Respondent failed to include it in its amended answer. (GC Exh., p. 3 and p. 11 of 80.) Although I denied Respondent's on the record motion to amend the answer to include this part of the policy, I admitted it into the record to consider in context with the above policy. Respondent's intranet confidentiality policy is titled "What is strictly confidential information and data?" It defines the misuse of "strictly confidential" information as that which "can lead to significant damage (at least one million euros)," and includes several topic areas such as corporate management and strategic planning, products and technologies, legal matters, sales data and figures and finance and purchasing data. Within each category, Respondent lists "[c]oncrete" examples of each. (R. Exh. 9.) Finally, this intranet policy informs that such strictly confidential information "can only be accessed by using your user ID and password." (Tr. 351; R. Exh. 9.)

Medley testified that Respondent has computer terminals throughout the facility available to associates to access and gain additional information about Respondent's policies. They may do so during breaks, or if working, they may ask a process supporter to fill in for them while they used the computers to access information. (Tr. 347–348.) When asked what the difference is between "confidential information" and "strictly confidential information," he said that "it's all considered confidential information." He ultimately admitted that he did not "know why 'Strictly' is there." (Tr. 368.) Regarding the prohibition against disclosing information not released to the general public, Medley admitted that Respondent did not release associates' names to the general public. He believed "personal information" to be "something more health related. Financial information would be something that's relevant to BMW." He did not consider associates' addresses to be "personal information," however, since they can be accessed on the internet. He did acknowledge that this information relates to workers. (Tr. 370–372.)

Analysis

I find this confidentiality policy, even when read in context with the additional information and examples on Respondent's intranet, is overly broad in scope in that it prohibits employees from disclosing "[a]ny information that BMW MC has not released to the general public." The Board found similar prohibitions unlawful in that, "[w]ithout more, this sweeping provision "clearly implicates terms and conditions of employment that the Board has found to be protected by Section 7." *Caesars Entertainment*, 362 NLRB 1690, 1691, 1692(2015), citing *Flamingo Hilton-Laughlin*, 330 NLRB 287, 291–292 (1999). In *Caesars Entertainment*, the company's confidentiality rule also banned employees "from disclosing to anyone outside the Company, indirectly or directly, any information about the Company which has not been shared by the Company with the general public," unless authorized by the company or the law. Id. The Board held that in so prohibiting employees from disclosing information not shared by the company with the general public, the policy was "extraordinarily broad in scope." The rule set forth examples of information encompassed therein including, but not limited to, company financial data; development, marketing and business plans and strategies; organizational charts; salary structures; policy and procedure manuals; research and analysis; and customer or supplier lists. The rule also provided that employees should consult the property or corporate law departments whenever they had a question about what information was confidential. Id.

The rule set forth in the employee guidebook here states that such confidential information includes, but is not limited to, personal and financial information, without qualification. Therefore, I find that employees would reasonably understand restrictions on disclosing personal and financial information, in the context of any confidential information that Respondent has not released to the general public, to interfere with their Section 7 rights. Like the rule in *Caesars Entertainment*, personal and financial information, without more, would reasonably be construed to encompass and prohibit employees from sharing with each other or the Union personal information such as names, addresses, telephone numbers, or information related to wages. Such ambiguity in a rule must be construed against the promulgator. See *Rio All-Suites Hotel and Casino*, above; *Lafayette*

Park Hotel, above at 825.

Respondent argues that when this policy is read in context with its intranet "strictly confidential" policy, it clearly would not be interpreted to chill employees in the exercise of their Section 7 activity. I reject this argument. A reading of the intranet policy does not easily add clarity to or qualify the confidentiality rule at issue here. Rather, it appears to focus more, if not separately, on corporate confidentiality while the rule here includes unqualified personal and financial information. It is quite telling that Medley defined "financial" information as pertaining to the funding for its competitive projects, while Wilson believed that "personal" and "financial" information referred to "something like social security numbers, home addresses, phone numbers, your salary…those kinds of things." Additionally, as stated, Medley thought that "strictly confidential" and "confidential" meant the same thing, but did not know why Respondent used both terms separately. As such, I find that employees would reasonably understand this rule to interfere with and chill them in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

3. Solicitation and distribution

BMW MC prohibits the solicitation, distribution and posting of materials on or at Company premises by any Associate or non-Associate, except as may be permitted by this policy. Associates may not solicit other Associates to join or contribute to any fund, organization, cause, activity, or sale during work time and/or in work areas. Work time is that time when Associates are expected to be working and does not include rest, meal, or other authorized breaks. Associates may not distribute literature, including circulars or any other materials, during work time and in any work areas. The posting of materials is only permitted with joint approval by the departments of Associate Relations and Corporate Communications. BMW MC permits appeals for United Way. Human Resources must approve any exceptions to this policy. Solicitation or the distribution of literature or any circulars or material by non-Associates on BMW-MC premises is prohibited.

Medley testified that employees, such as Pearson, have access to and have used Respondent's associate service center's electronic system to seek clarification on when and where he is allowed to engage in union solicitation. Respondent responded (to Pearson) that associates may not solicit during work time and/or in work areas. Work time does not include "rest, meal, or other authorized breaks." Examples of nonwork areas include the K-Platz; "areas where associates are permitted to eat meals;" and team areas ("a mixed use area (both working area and non-working area) as long as no associate is on work time)." (Tr. 326, 330; R. Exh. 11.)

Analysis

This rule broadly restricts associates from soliciting for any reason, including for joining or contributing to any fund, organization, cause, etc. during work time or in work areas. The evidence has established that associates at Respondent's facilities are permitted to discuss and share information about a variety of nonwork-related topics during work time on the plant floor. In fact, the policy itself allows solicitation and appeals for United Way, but not for union related activity. On the other hand, Pearson was told not to have such discussions or solicit on behalf of the Union during work time or on the work floor. Additionally, Lawter's section leaders told him that it was fine for employees to talk about topics such as sports or politics during working time. As such, an employee could reasonably construe this rule to preclude him or her from merely asking a fellow associate to attend a meeting about wages, hours or other terms and conditions of employment, or attend a union meeting scheduled to take place after work. While an employer may ban solicitation in work areas during actual work time, an employer may not extend the ban to work areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011); *Our Way*, 268 NLRB 394, 394–395 (1983).

As stated above, while it is permissible for a company to promulgate and maintain non-solicitation rules in order to advance legitimate business interests related to employee discipline and productivity, an employer violates the Act when it precludes employees from talking about unionization, but allows them to discuss other nonwork related subjects. *Oberthur*, 362 NLRB 1820, 1820 fn. 4 (2015); *Jensen Enterprises, Inc.*, 399 NLRB 877, 878 (2003). Furthermore, the rule may be well intentioned, as Respondent argues, and may never have been enforced, but it clearly forbids solicitation without the qualifications provided in the response to Pearson about when and where employees are permitted to solicit. In fact, Pearson was interrogated and warned against soliciting on work time even when his supervisor knew that he had only been doing so during nonworking time and in a break area or mixed area during break time. Moreover, Respondent did not disseminate these qualifications to all employees, or include them in the confidentiality policy. I find no legitimate business reason for not doing so and maintaining the rule as it reads. Therefore, I find this solicitation and distribution policy would reasonably be construed by employees to prohibit their Section 7 activities, and as such, it violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. 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. By interrogating employees about their union support or activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. By discriminatorily prohibiting employees from talking about the Union, but not other nonwork related subjects during work time, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

5. By creating an impression of surveillance of union activities, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

6. By maintaining overbroad Associate Guidebook standards of conduct rules requiring employees to demonstrate respect and not engage in behavior that negatively reflects the company; prohibiting the use of offensive language; and prohibiting employees from using personal recording devices within company facilities or business recording devices without prior management approval, Respondent has engaged in unfair labor practices in

violation of Section 8(a)(1) of the Act.

7. By maintaining overbroad Associate Guidebook confidentiality of information rules prohibiting employees from sharing personal and financial information with persons internal or external to BMW, including that which BMW MC has not released to the general public, or using any such confidential information for personal gain, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

8. By maintaining an overbroad Associate Guidebook solicitation and distribution policy that prohibits the solicitation and distribution and posting of materials by associates during work time and/or in work areas in Respondent's facilities, and permits such activity by an outside organization, Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent, BMW Manufacturing Co., has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent has violated Section 8(a)(1) of the Act by interrogating employees about their union support or activities; discriminatorily prohibiting employees from talking about the Union, but not other nonwork related subjects during work time; and creating an impression of surveillance of union activities, it shall refrain from doing so.

Having found that Respondent has violated Section 8(a)(1) of the Act by maintaining unlawful Associate Guidebook rules, it shall rescind or revise the overbroad guidebook rules that have been found unlawful. It may comply by furnishing all current employees with an insert for its current guidebook that (1) advises that the unlawful rules have been rescinded, or (2) provides lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees in its facilities nationwide revised guidebooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded rules. See *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in rel. part 475 F.3d 369 (D.C. Cir. 2007).

Respondent shall distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

The General Counsel has requested in the complaint that a meeting or meetings be scheduled to ensure the widest possible attendance, that Respondent's representative read the notice to the employees on work time in the presence of a Board agent. Alternatively, the General Counsel has requested that Respondent promptly have a Board agent read the notice to employees during worktime in the presence of Respondent's supervisors and agents identified in paragraphs 5 and 6 of the complaint. The Board has required that notices be read aloud by high-ranking officials or a Board agent when numerous serious unfair labor practices have been committed by high-ranking management officials. *Allied Medical Transport, Inc*., supra. at 6 fn. 9 (2014). When unfair labor practices are severe and widespread, having the notice read aloud to employees allows them to "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), affd. 400 F.3d 920, 929–930 (D.C. Cir. 2005); see also *Homer D. Bronson Co*., 349 NLRB 512, 515 (2007). I find the General Counsel has not provided evidence or otherwise established that these types of remedies are required in this case to enable employees to exercise their Section 7 rights free from coercion.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, BMW Manufacturing Co., Spartanburg, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Discriminatorily prohibiting employees from talking about the union, but not other nonwork subjects during working time.

(c) Creating an impression of surveillance of union activities

(d) Maintaining overly broad Associate Guidebook standards of conduct rules requiring that employees demonstrate respect for and not engage in behavior that reflects negatively on Respondent, prohibiting the use of offensive language; and prohibiting employees from using personal recording devices within company facilities or business recording devices without prior management approval.

(e) Maintaining overly broad Associate Guidebook confidentiality of information rules prohibiting employees from sharing personal and financial information with persons internal or external to BMW, including that which BMW MC has not released to the general public, or using any such confidential information for personal gain.

(f) Maintaining an overly broad solicitation and distribution policy that prohibits the solicitation and distribution and posting of materials by associates during work time and/or in work areas in BMW MC facilities, and permits such activity by an outside organization.

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

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

(a) Rescind or modify the overbroad language in the Associate Guidebook standards of conduct policy to the extent that it requires employees to demonstrate respect and not engage in behavior that reflects negatively on the Company, prohibits the use of offensive language and prohibits use of personal recording devices within BMW MC facilities and not use business recording

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

devices within BMW MC facilities without prior management approval.

(b) Rescind or modify the overbroad language in the Associate Guidebook confidentiality of information policy to the extent that it prohibits employees from sharing personal and financial information with persons internal or external to BMW, including that which BMW MC has not released to the general public, or using any such confidential information for personal gain.

(c) Rescind or modify the overbroad language in the Associate Guidebook solicitation and distribution policy to the extent that it prohibits employees soliciting and distributing and posting materials during work time and/or in work areas in BMW MC facilities, and permits such activity by an outside organization.

(d) Furnish all current employees with inserts for the Associate Guidebook that (i) advise that the unlawful rules have been rescinded, or (ii) provide the lawfully worded language on adhesive backing that will cover or correct the unlawful rules; or publish and distribute to all current employees a revised Associate Guidebook that (i) does not include the unlawful rules, or (ii) provides the language of lawful provisions.

(e) Within 14 days after service by the Region, post at its Spartanburg, South Carolina facilities copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 10, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an 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 January 1, 2016.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 1, 2017.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate you about your union support or activities.

WE WILL NOT discriminatorily prohibit you from talking about the union, but not other nonwork subjects during working time.

WE WILL NOT create an impression of surveillance of your union activities.

WE WILL NOT maintain overly broad Associate Guidebook standards of conduct rules requiring that employees demonstrate respect for and not engage in behavior that reflects negatively on Respondent; prohibiting the use of offensive language; and prohibiting the use personal recording devices within Respondent's facilities and not use business recording devices within BMW MC facilities without prior management approval.

WE WILL NOT maintain overly broad confidentiality of information rules to the extent that they prohibit employees from sharing personal and financial information with persons internal or external to BMW, including that which BMW MC has not released to the general public, or using any such confidential information for personal gain.

WE WILL NOT maintain an overly broad solicitation and distribution policy to the extent that it prohibits employees soliciting and distributing and posting materials during worktime and/or in work areas, and permits such activity by an outside organization.

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

WE WILL Rescind or modify the language in the Standards of Conduct policy to the extent that it requires employees to demonstrate respect and not engage in behavior that reflects negatively on the Company, and to not use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval.

WE WILL rescind or modify the language in the Confidentiality of Information policy to the extent that it prohibits employees from disclosing and treating as confidential information including, but not limited to, personal and financial information that BMW MC has not released to the general public.

WE WILL rescind or modify the language in the Solicitation and Distribution policy to the extent that it prohibits employees from soliciting and distributing and posting materials during work time and/or in work areas in our facilities, and permits such

[29] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

activity by an outside organization.

WE WILL advise you in writing that we have made the above revisions or modifications, and that the unlawful rules will no longer be enforced.

WE WILL furnish you with inserts for the Associate Guidebook that (i) advise that the unlawful rules have been rescinded, or (ii) provide the language of lawful rules on adhesive backing that will cover or correct the unlawful rules; or WE WILL publish and distribute a revised Associate Guidebook that (i) does not include the unlawful rules, or (ii) provides the language of lawful provisions.

BMW MANUFACTURING CO.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-178112 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.