Chemtrade West US LLC *and* International Association of Machinists and Aerospace Workers, Local Lodge 1584. Case 32–CA–282594

April 16, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On November 17, 2022, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. In addition, the Charging Party filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,[1] to amend the remedy,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Chemtrade West US LLC, Richmond and Bay Point, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about conduct protected by Section 7 of the Act.

(b) 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) Post at its Richmond and Bay Point, California facilities copies of the attached notice marked "Appendix."[4]

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[1] We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) by questioning employee Rolando Lugo about protected conduct during a deposition related to a federal wage-and-hour lawsuit against the Respondent. Applying the Board's decision in *Guess?, Inc.*, 339 NLRB 432 (2003), we conclude, in agreement with the judge, that the Respondent has not proven that its interest in obtaining the information outweighed Lugo's confidentiality interests under Sec. 7 of the Act. We find it unnecessary to pass on the Respondent's argument that the judge erred in finding that the deposition questions set forth in complaint pars. 6(c)(i)-(ii) were not relevant to the wage-and-hour lawsuit because, even if they were relevant, we agree with the judge that the Respondent has not satisfied the third part of the *Guess?* analysis.

In adopting the judge's conclusion, we do not rely on the judge's citation to *Best Century Buffet, Inc.*, 358 NLRB 143 (2012), a recess-Board decision. See *NLRB v. Noel Canning*, 573 U.S. 513 (2014). Nor do we rely on the judge's citation to *Chinese Daily News*, 353 NLRB 613 (2008), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Lastly, we do not rely on the judge's citation to 107 Fed. Appx. 576 (6th Cir. 2004) as enforcing the Board's decision in *Guess?* because that citation is to an unpublished decision granting the Board's application for summary enforcement in a case unrelated to *Guess?*.

[2] Following the issuance of the judge's decision in this case, the federal wage-and-hour lawsuit was dismissed with prejudice pursuant to the parties' joint stipulation. See Order, *Blake et al v. Chemtrade West US LLC*, No. 4:20-cv-07577-KAW (N.D. Cal. Sept. 7, 2023). As a result, we delete par. 2(a) of the judge's recommended Order. That paragraph's requirement that the Respondent cease and desist from relying upon or using in the wage-and-hour lawsuit the answers it received in response to the unlawful deposition questions is moot in light of the dismissal of the wage-and-hour lawsuit. In addition, in light of the parties' settlement of the litigation, we decline to order the additional remedies recommended by the judge in that paragraph related to the wage-and-hour lawsuit.

The Charging Party requests that the Board grant several extraordinary remedies. We deny this request because the cease-and-desist and notice-posting remedies are sufficient to effectuate the policies of the Act in this matter.

Member Prouty would order that the Board's remedial notice be read aloud and distributed to employees. See *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 9–15 (2022) (Member Prouty, concurring) (urging the Board to adopt a reading of the notice aloud and distribution to employees at a group meeting as a standard remedy for unfair labor practices because "[h]aving the notice to employees read aloud to them in a group meeting, with a copy in hand to follow along if they choose, is a superior means of disseminating and amplifying the Board's message to maximize the extent to which employees hear and comprehend it."). He further finds these remedies particularly appropriate here where the Respondent may have deposed other employees and asked questions similar to those mentioned in complaint pars. 6(c)(iv) through (viii), (xi), and (xii). In Member Prouty's view, notice reading and distribution at the reading would better remedy the Respondent's misconduct than merely posting the notice, especially where employees who were not involved in this proceeding might not know that their rights were violated, and therefore might not be inclined to read a notice posted in a case in which they were not directly involved.

[3] We shall modify the judge's recommended Order to conform to the Board's amended remedy, the Board's standard remedial language, and in accordance with our decisions in *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the Order as modified.

[4] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States

Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps 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 July 16, 2021.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. April 16, 2024

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Lauren McFerran, Chairman

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David M. Prouty, Member

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Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 coercively interrogate employees about conduct protected by Section 7 of the Act.

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

CHEMTRADE WEST US LLC

The Board's decision can be found at www.nlrb.gov/case/32-CA-282594 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.

Angela Hollowell-Fuentes, Esq., for the General Counsel.
Caren P. Sencer, Esq. and *Corey Kniss, Esq. (Weinberg, Roger & Rosenfeld*), for the Charging Party.
Maria Anastas, Esq. (Ogletree, Deakins, Nash, Smoke & Stewart, LLP), and *Mason Miller, Esq. (Chemtrade in-house counsel),* for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried via videoconference on March 22, 2022.[1] International Association of Machinists and Aerospace Workers, Local Lodge 1584 (Union or Charging Party) filed a charge, as captioned above, on September 2, 2021. The General Counsel, through the Regional Director for Region 32 of the National Labor Relations

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."

[1] On March 8, 2022, Administrative Law Judge Gerald M. Etchingham ordered that this trial be conducted by videoconference due to the ongoing Coronavirus Disease 2019 (Covid–19) pandemic.

Board (the Board), issued a complaint and notice of hearing on January 13, 2022. Chemtrade West US LLC (Respondent) filed a timely answer to the complaint.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) when about July 16, 2021, Respondent, by its legal counsel, unlawfully interrogated an employee concerning their union and other protected activity when taking a deposition in connection with an August 17, 2020, wage and hour lawsuit filed by Respondent's employees.

On the entire record,[2] and after considering the briefs filed by the General Counsel and Respondent,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company with offices and places of business in Richmond, California, and Bay Point, California, is engaged in the operation of chemical recycling and manufacturing plants. During the 12-month period ending December 31, 2020, Respondent, purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of California. Accordingly, I find, and Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, I find, and Respondent admits, that the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Wage and Hour Lawsuit

On August 17, 2020, eight of Respondent's current and former employees filed a complaint in the United States District Court for the Northern District of California, Case No. 20-cv-07577-KAW (the lawsuit), alleging Respondent violated the California Labor Code due to noncompliant meal and rest breaks, unpaid minimum wages, unpaid overtime wages, failure to pay all wages due to separation, and deficient wage statements. These employees opted out of an earlier settlement in a similar lawsuit. The Union represents certain employees, including chemical operators, employed by Respondent, and these employees are covered by the parties' collective bargaining agreement (CBA).

On May 11, 2021,[4] Respondent's current and former employees filed a third amended complaint, stating five causes of action, in the lawsuit. The plaintiff-employees, who are chemical operators, included Rolando Lugo (Lugo), David Blake (Blake), Briton Davis (B. Davis), Tashyia Smith (Smith), Kyle Davis (K. Davis), Marco Gutierrez (Gutierrez), Giovanni Lopez (Lopez), and Eric Kinder (Kinder). Specifically pertaining to Lugo, the third amended complaint alleges that Respondent failed to pay Lugo for every hour that he worked and recorded on his timecard, did not provide him timely rest and meal breaks, failed to pay him overtime hours, and other allegations relating to his wages.

On May 27, Respondent filed a partial motion to dismiss two causes of action, alleging that the plaintiff-emloyees' state law claims for failure to pay overtime wages fails as a matter of law and must be dismissed as these are rights arising from the CBA and are preempted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. Sec. 185 (Sec. 301) (Jt. Exh. 7). Respondent also argued that the plaintiff-employees' state law claims for failure to pay overtime wages fails as a matter of law and should be dismissed as they are preempted by Sec. 301 and require an interpretation of the CBA (Jt. Exh. 7). Finally, Respondent argued that the plaintiff-employees' cause of action for violation of the California's Unfair Competition Law, California Business and Professions Code Sec. 17200 et seq. (UCL) fails as a matter of law because the plaintiff-employees failed to allege there is an inadequate remedy at law available for the underlying labor code claims (Jt. Exh. 7).

On July 16, in connection with the third amended complaint, Respondent deposed employee Lugo. During his deposition, Respondent's attorney Thomas McInerney, Esq. (McInerney) asked Lugo a series of questions related to the lawsuit including his discussions with the Union and other chemical operators, who are union members, union stewards, and plaintiff-employees in the lawsuit. Lugo was represented by Corey Kniss, Esq. (Kniss); Kniss also represents the Union. The General Counsel alleges that certain questions by McInerney to Lugo during the deposition violated the Act.[5]

On September 27, United States Magistrate Judge Kandis A. Westmore granted Respondent's motion to dismiss two causes of action—dismissal of the California unpaid overtime and unfair competition law claims (Jt. Exh. 8). Judge Westmore granted the motion on the basis that plaintiff-employees' state law claim fails because it is preempted by the Labor Management Relations Act (LMRA). Judge Westmore also noted that the plaintiff-employees had not alleged that they lack an adequate legal remedy, and thus, dismissed the plaintiffs' UCL claim with leave to amend (Jt. Exh. 8).

Respondent's current and former employees, thereafter, on October 12, filed a fourth amended complaint (Jt. Exh. 3). The plaintiff-employees alleged that they cannot recover damages under the California Labor Code or the Fair Labor Standards Act (FLSA), and thus are seeking damages under the UCL. The plaintiff-employees argue that they were denied benefit contributions to which they were entitled under the CBA, and absent a UCL claim, they lack an adequate legal remedy (Jt. Exh. 3). Plaintiff-employees also argued that the ability to receive wages

[2] Although I have included several citations to the evidentiary record in this decision to highlight exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case. This record contains no credibility disputes to be resolved.

[3] Other abbreviations used in this decision are as follows: "p." for page; "L." for Line; "Q" for question; "A" for answer; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's Brief; and "R. Br." for Respondent's Brief.

[4] All dates hereinafter are 2021 unless otherwise specified.

[5] The specific questions and answers will be included within the legal analysis of this decision.

as remedy for their first six claims will not fully restore them to their rightful position, and that they require equitable restitution to correct the "downstream effects of Defendant's actions." (Jt. Exh. 11). Plaintiff-employees argued that the grievance procedure in the CBA requires all disputes to be raised with their immediate supervisor within 5 working days, and since the grievance procedure can quickly bar their claims, they lack an adequate legal remedy for any disputes not raised during that time. Respondent filed another motion to dismiss one cause of action alleging that the plaintiff-employees' UCL claim is preempted by Sec. 301 of the LMRA (Jt. Exh. 10).

On December 13, Judge Westmore denied Respondent's motion to dismiss (Jt. Exh. 11). In response to Respondent's motion to dismiss, the plaintiff-employees argued that the UCL claim is based on Respondent's failure to follow the California Labor Code. Judge Westmore wrote, "The Court acknowledges that [Respondent] may ultimately prevail on this claim should [the plaintiff-employees] be unable to show that they experienced any other harm for which they lack an adequate legal remedy. Even so, in granting [Respondent's] motion to dismiss the third amended complaint" it is too early in litigation to foreclose the employees' potential to recover under the UCL claim.

Thereafter, Respondent filed its answer on January 3, 2022, alleging, in part, that the employees' claims are barred by the parties' CBA (Jt. Exh. 9).

B. Analysis

Legal Framework

Section 8(a)(1) of the Act, which states that "it shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7," establishes employees' right to keep protected activity confidential from their employers. See *Guess ?, Inc.*, 339 NLRB 432, 434 (2003), enfd. 107 Fed.Appx, 576 (6th Cir. 2004) (citing *National Telephone Directory Corp.*, 319 NLRB 420 (1995) (the Board held that an employer in an unfair labor practice proceeding was not entitled to obtain the names of employees who attended union meetings and signed authorization cards after balancing competing legitimate interests)). Section 7 gives employees the right to keep confidential their union activities. *Guess?*, supra. Furthermore, it is well-settled law that employees are engaged in protected concerted activity when filing a lawsuit against an employer with coworkers and when discussing a collective lawsuit concerning working conditions with coworkers. *Host Int'l, Inc.*, 290 NLRB 442, 443 (1988) (multiple plaintiff lawsuit concerning working conditions was protected concerted activity); see also *Cordua Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 4 (2019) (finding that employee engaged in protected concerted activity "by discussing wage issues with his coworkers and filing a Fair Labor Standards Act collective action alleging minimum wage and overtime violations), enfd. 985 F.3d 415 (5th Cir. 2021); *Healthy Minds, Inc.*, 371 NLRB No. 6 (2021) (employee engaged in protected concerted activity when discussing a potential racial discrimination lawsuit and asking a coworker to make copies of her timesheets and other employees' timesheets regarding the filing of a third-party wage complaint); *Montgomery Ward & Co.*, 156 NLRB 7 (1965) (employee engaged in protected concerted activity by asking coworker to "go [along] with her" in pursuing a claim against the employer for violating the Equal Pay Act, even though solicited employee declined the request and reported the employee to management).

An employer's questioning on protected activity is not *per se* unlawful in the context of discovery for a civil proceeding, as employers also have rights implicated in this situation, including their First Amendment right to access the courts and civil procedure rules entitling them to discover relevant evidence. See e.g., *Maritz Communications Co.*, 274 NLRB 200 (1985) (pretrial questioning of employee about union activity not unfair labor practice where relevant to civil suit alleging age discrimination); *Wright Electric, Inc.*, 327 NLRB No. 196 (1999), enfd. 203 F.3d 1162 (8th Cir. 2000) (discovery request seeking the identities of employees who signed collective bargaining authorizations unlawful).

However, there are instances where an employer's questioning in a civil proceeding may violate the Act. In *Guess?* the Board set forth a three-part test for determining whether an employer's deposition questions in a separate proceeding violate the Act. First, the questions must be relevant. Relevance is determined by the law of the forum in which the civil suit is pending. See *Maritz*, supra. Second, if the questioning is relevant, it must not have an illegal objective. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 738 fn. 5 (1983) (the Board may enjoin lawsuits that have an objective that is illegal under federal law). Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' confidentiality interests under Section 7 of the Act.

Specifically, in *Guess?* the employer violated Section 8(a)(1) by asking an employee during a deposition in a workers' compensation case to reveal the identities of other employees who attended union meetings. The Board reasoned that even assuming the employer's questioning during a deposition was relevant and lacked an illegal objective, the questions to the employee about who attended union meetings would infringe on the employees' Section 7 right to keep confidential their union activity. Id. at 434. The employees had a substantial interest in keeping their attendance at union meetings private, as employees' willingness to partake in such activity could be "severely compromised" if employers' could easily obtain that information. *Guess?*, supra at 434 (citing *National Telephone Directory Corp.* ("The confidentiality interests of employees have long been an overriding concern for the Board.")). The Board concluded that these confidentiality rights could not be outweighed by the employer's interests because such interests were marginal, as the queries were broad and not targeted toward information likely to be relevant or helpful. Id. at 435. Furthermore, the Board found that the employer's contention that the questioning was relevant to determine witnesses to support its defense was not supported as the questions were broad, and not limited to a particular period relevant to the external litigation. Id. at 434–435.

The Board's recent decision in *Pain Relief Centers, P.A.*, 371 NLRB No. 143, slip op. at 2 (2022), is illustrative of when a violation using the test set forth in *Guess?* will be found. In *Pain Relief Centers*, the Board held that the employer violated the Act when requesting in a state court proceeding documents the

discriminatees submitted to the General Counsel in a prior unfair labor practice complaint or planned to introduce into evidence, the identity of all persons with whom the discriminatee discussed the NLRB case, all the facts alleged to support a violation of the Act, and all persons whom the discriminatee contacted about serving as a witness in their NLRB case. The Board held that assuming the discovery requests were relevant, the requests had an unlawful objective as the timing of the requests were within one month of the issuance of the complaint in the unfair labor practice charge. Moreover, even if the requests had a lawful objective, the Board agreed with the administrative law judge that the scope of the requests were broad and not connected with the state court proceedings. For instance, the employer sought information the discriminatees provided to the General Counsel for the unfair labor practice complaint which could not support a defamation claim. The employer also sought information that could be used in future unfair labor practice charges, and the requested information focused primarily on the discriminatees' protected activity of participating in Board proceedings. In contrast to the employer's "weak" interest in obtaining the information, the discriminatees' right to keep confidential their Section 7 activity of participating in a Board proceeding is "very strong." Id. at 13.

Other examples of impermissible questioning evaluated under the *Guess?* test can be found in *Chinese Daily News*, 353 NLRB 613, 614 (2008) (finding deposition questions probing an employee's vote in a union election were unlawful); *Tower Industries*, 349 NLRB 1077, 1083 (2007) (deposition questions about discussions at union meetings and employees' conversations about wage complaints were unlawful);[6] and *Best Century Buffet, Inc.,* 358 NLRB 143, 157 (2012) (employer violated the Act during deposition by posing broad questions about employees' union membership and activities).

Legal Analysis

As the General Counsel has alleged various portions of the deposition as unlawful, it will be easiest to analyze the lawfulness of these questions by grouping them as the General Counsel and Respondent have done in their post-hearing briefs. Again, the applicable test, applying *Guess?* is: (1) are the questions relevant; (2) if relevant, do the questions have an illegal objective; and (3) if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining the information must outweigh the employees' confidentiality interests under Section 7 of the Act.

In the end, this inquiry is fact specific, and should not be extrapolated to create or infer blanket privileges which are not recognized by the Federal courts. A careful review of the evidence and circumstances in this case drives whether ultimately Respondent's need for the information in litigation outweighs the employees' confidentiality interests under the Act. From the outset, the General Counsel does not contend nor is there any evidence of illegal objective by Respondent in posing any of these questions to Lugo. Thus, the questions of relevance, and if relevant, Respondent's interest in the information outweighing the employee's confidentiality interest must be analyzed.

Overall, the General Counsel alleges that Respondent, through its counsel, asked multiple questions which violated the employees' right to keep confidential their union activity thereby violating Section 8(a)(1) of the Act. Respondent argues, in its November 1 in-house counsel's position statement, that the questions presented to Lugo were relevant to the lawsuit as the questions related to its defense; Respondent argued that California state law does not apply to an employee covered by a valid CBA and that the California state law claims are dependent on the parties' CBA and are thus preempted (Jt. Exh. 7). Moreover, Respondent argues that there is no evidence of illegal objective when asking these questions as there is no evidence of hostility towards the Union. Respondent argues that the questions were not directed towards discovering Lugo's "union activities," and even if these questions were related to "union activity," Respondent's need for the information outweighed Lugo's Section 7 rights. Respondent argues that it needed to know Lugo's motivation for bringing the lawsuit ("relevant to how the case is presented to a jury in that Mr. Lugo was, in fact, provided breaks, but is simply motivated by ego and/or seeking to get more money than what his co-workers obtained in a class action"), information about potential witnesses, why Lugo did not complain or grieve any alleged failure to be provided breaks and be paid overtime wages, and knowledge of the grievance process to prepare any motions to dismiss and how to present the case before a jury (Jt. Exh. 2).[7]

Complaint paragraphs 6(c)(i) through (iii)

The General Counsel alleges that the following questions violate the Act. For clarity, I have included lines before and after the alleged interrogation in certain instances, and I have italicized the questions and answers that are alleged violations of the Act.

> (1) Q: So we started on this by my asking you how you got introduced to your lawyers in this case. How did you get introduced to them?
> A: I called my union.
> *Q: Who did you call at your union?*
> *A: My representative, Brian. I forgot the gentleman's last name. First name was Brian.*
> *Q: Do you know what Brian's position is?*
> *A: He represents us as our union – our union representative. I don't really know his full title.*
> *Q: All right. So you –when did you call him, do you know?*

[6] The parties disagree on the extent of the Board's ruling regarding motive for filing lawsuits in *Tower Industries* (GC Br. at 26; R. Br at 13). While the Board decided to affirm the administrative law judge's rulings, findings, and conclusions in light of the exceptions, which are not described, the Board did not specifically discuss motivation when specifying what the administrative law judge found and with what the Board agreed. Id. at 1077 fn. 1. Thus, I am reluctant to agree with the General Counsel's interpretation regarding motive arising from the Board's decision in *Tower Industries*.

[7] Admissions of an attorney in the management litigation are admissible against the client. *Steve Aloi Ford, Inc.*, 179 NLRB 229 fn. 2 (1969).

A: Shortly after I made the decision to opt out.[8]

(Jt. Exh. 4, p. 26, L. 13-25 and p. 27, L. 1.)[9]

(2) Q: Okay. And what did—you said you called Brian at the union. And just to be clear, which union is that? Is that the Machinists Local 1584?
A: Yes
Q: Okay. You called—I take it you called Brian, right?
A: Yes, I did.
Q: And what was said in this phone call?
A; I just explained to him the situation at hand, and I told him I felt I didn't agree, and he connected me with Caren.
Q: What did he say when you said you disagreed with the amount you were being offered?
A: We would look into it, as we are now.
Q: Did he introduce you—did he give you Caren—is that Caren Sencer?
A: Yes.

(Jt. Exh. 4, p. 27, L. 9–25.)[10]

(3) Q: Did he give you her name and contact information in that first phone call?
A: Yes, he did.
Q: Did he encourage you to call her?
A: No, he didn't. He was giving me an option.
Q: Did he tell you who she was or anything about her?
A: Yes
Q: What did he say?
A: That she's a lawyer of labor law, and he gave me the option, and her phone number, to call. So I took it upon myself to—to give her a call.
Q: Okay. Had you talked to—by the time you called Brian at your union local, had you discussed your concerns about the settlement with any of your coworkers?
I'm sorry. Did you answer or were you thinking?
A: Sorry, I said no.
Q: Okay. Sorry. I didn't hear you.
And since you spoke to Caren, have you discussed—and I'm not asking for any communications that may have taken place with your attorney present.

(Jt. Exh. 4; p. 28, L. 1-25.)[11]

The General Counsel alleges that Respondent's questions to Lugo regarding who he called at the Union, the details of Lugo's conversation with union representative "Brian," and discussions with his coworkers about the settlement were not relevant to the lawsuit (GC Br. at 7–8, 31–32). Meanwhile, Respondent argues that the questions related to Lugo's conversations with a Union representative are relevant as they have a right to discover potential witnesses. Respondent states that Lugo's reasons for opting out of a settlement are relevant to the merits of his lawsuit against Respondent (R. Br. at 12–14).

The Federal Rules of Civil Procedure (Fed. R. Civ. P.) permit broad questioning in relevant areas. "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1).

Although Fed. R. Civ. P. 26(b)(1) has a broad scope, I do not find that these questions, at complaint paragraph 6(c)(i) through (ii), are relevant. Respondent's defenses in the litigation of this lawsuit concern whether the plaintiff-employees' complaint should be dismissed due to the UCL as well as the CBA. How Lugo obtained his counsel and what the Union said to him about his decision to opt out of the settlement has no bearing on Respondent's defense or litigation strategy. Thus, I do not find any relevance to these questions. At the deposition, Lugo admitted to opting out of the settlement (which Respondent knew) and obtaining his own attorney (which Respondent also knew). It is unclear how these responses could lead Respondent to know Lugo's potential witnesses or why he opted out of the settlement. Thus, I do not find that the questions as described at complaint paragraph 6(c)(i) and (ii) are relevant.

However, I do find that the question, at complaint paragraph 6(c)(iii), regarding whether Lugo spoke about his concerns with the settlement with his coworkers to be relevant. Such a question arguably goes to Lugo's reasons for rejecting the settlement as well as his coworkers' reasons. Having found that this question is relevant, I must decide whether Respondent's need for the information outweighs the employees' confidentiality interest as described by Section 7. Furthermore, for the sake of argument, assuming the questions, at complaint paragraphs 6(c)(i) through (ii), posed were marginally relevant, I will proceed with the third step as described in *Guess?*

I find that Respondent has not proven that its interest in the information outweighs Lugo's confidentiality interest under Section 7. McInerney asked a series of questions probing how Lugo obtained his attorney in the lawsuit as well as whether he discussed his settlement with his coworkers. Those questions implicate Lugo's Section 7 rights to maintain confidentiality of his discussion with the Union on any legal referral as well as his right to speak freely with his coworkers about the settlement of the prior lawsuit. Even if the questions are relevant under Fed. R. Civ. P. 26(b), the relevance is specious or marginal. After Lugo responded that he was introduced to his lawyers in the lawsuit from the Union, McInerney continued to intrusively probe into this conversation with Brian from the Union. McInerney asked further questions about whether Lugo was encouraged to

[8] Lugo along with the other plaintiff-employees in the lawsuit chose to opt out of a settlement reached on similar issues in a class action brought previously (Jt. Exh. 4, p. 19, L. 25, p. 20, L. 1-25, and p. 21, L. 1–15).

[9] Complaint par. 6(c)(i).
[10] Complaint par. 6(c)(ii).
[11] Complaint par. 6(c)(iii).

call the lawyers. McInerney then asked questions probing into Lugo's communications with his coworkers about the prior settlement. Such questions do not have any bearing on Respondent's litigation. Instead, these questions are designed to chill employees' conversations with the Union and coworkers. Employees' willingness to discuss working conditions would be undermined if Respondent could obtain the information easily. If Respondent is seeking to learn Lugo's reasons for opting out of the settlement, Lugo answered those questions earlier in the deposition (Jt. Exh. 4 at 10–22, 34). Lugo explained several times that when he reviewed his wage and hour documentation, he believed he would be underpaid by accepting the settlement and thus chose to opt out. Respondent's desire to search for a nefarious reason by Lugo to pursue the lawsuit would not come from any answers to these questions as Respondent claims. In addition. Lugo's responses do not have any bearing on Respondent's defense that the plaintiff-employees' lawsuit should be dismissed because the parties have a CBA which covers these disputes.

Furthermore, Respondent failed to present any argument as to why their need for this information outweighs Lugo's confidentiality rights under Section 7, and instead focused on a "new" privilege that Respondent believed the Union and the General Counsel were trying to claim. Respondent argues that the Union seeks to have the General Counsel impose a coworker-employee and union representative-employee privilege in any litigation involving employees (R Br. at 2, 14, 18–19). The Union did not file a post-hearing brief nor was this argument advanced by the General Counsel. Respondent also argues that Lugo may not shield himself from discovery simply because he spoke to a Union representative. Finally, Respondent claims that the General Counsel is seeking a labor relations privilege (R. Br. at 14–16). However, the General Counsel has not argued as such in the post-hearing brief. Rather the General Counsel only argues that Respondent violated Section 8(a)(1) of the Act when applying Board precedent in *Guess?* to the facts of this matter. This matter only concerns whether certain questions, in a fact-specific query, violate the Act. Moreover, I am bound by Board precedent and follow the test set forth in *Guess?* See *Western Cab Co.*, 365 NLRB No. 78, slip op. at fn. 4 (2017), citing *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

Lugo's right to speak confidentially to the Union about his desire to opt out of the wage and hour settlement, any referrals for attorneys, and speaking with his coworkers about settlement concerns outweighs any need set forth by Respondent for the information. Respondent's arguments are specious and do not support the balance of rights tipping in their favor. Thus, Respondent has not proven that its need for the information outweighed the employees' confidentiality interests under Section 7 thereby violating Section 8(a)(1) as described in complaint paragraphs 6(c)(i) through (iii).

Complaint paragraph 6(c)(iv) through (viii)

The General Counsel alleges that the following questions violate the Act:

(1) Q: But putting that aside, have you talked about this lawsuit that you're in now with any other Chemtrade employees?
A: I don't understand the question.
Q: Have you spoken about this lawsuit with any Chemtrade employees?
A: I mean, I've discussed a few matters.
Q: Okay. What have you discussed and with whom?
A: I feel like that's kind of personal. I don't want to answer that.
Q: Yeah, you unfortunately need to.

Mr. Kniss: You can answer that question, Rolando. Just don't give any information about conversations that you've had in the presence of me or Caren.

The witness: I mean, I've spoken with my fellow operators who have opted out just to, you know, figure out dates and how their cases are going, but I don't really get in detail with their business.

By Mr. McInerney: So you've spoken to the different operators who've opted out. So tell me which ones.
Have you spoken to David Blake about the allegations in this complaint?

(Jt. Exh. 4, p. 29, L. 1-25 and p. 30, L. 1.)[12]

(2) Q: What have you discussed with Mr. Blake?
A: Just matters about the case, how he feels about it. That would be about all.
Q: What do you mean? Like, what did he feel about the case?

Mr. Kniss: Objection. Calls for hearsay.
You can answer, Rolando.
Mr. McInerney: Hearsay is not really an objection for a deposition.

Q: But please answer.
A: I mean, I don't understand what – I don't want to speak about what another person is saying that's not here right now.
Q: What has Mr. Blake said about this lawsuit to you?
A: That he doesn't feel that his hours are adding up, same as mine.
Q: Okay. Have you spoken to Briton Davis about this lawsuit?
A: Maybe once or twice.
Q: What has been said in those communications or conversations?

(Jt. Exh. 4, p. 30, L. 3–24.)[13]

(3) Q: Okay. Have you spoken to Tashyia Smith?
A: Not so much. He just asked me about certain things that are coming up about certain dates applying to the case.
Q: What dates, like, have been discussed? What do you mean when you say certain dates you've discussed?
A: You know, when we have Zoom meetings, if I receive certain e-mails pertaining to the case. Sort of things of that nature.

[12] Complaint par. 6(c)(iv).

[13] Complaint par. 6(c)(v).

Q: Okay. Have you spoken to Kyle Davis about this case?
A: The same as the others.
Q: What about Marco Gutierrez?
A: About the same as the others.
Q: Have you spoken to Giovanni Lopez about this case?
A: Not really. Gio is not an employee with us no more.
Q: So you've never spoken to Mr. Lopez about this case?

(Jt. Exh. 4, p. 31, L. 4–24.)[14]

(4) Q: Okay. Have you—other than the Chemtrade employees who are opted out, as you said, and are plaintiffs in this case, have you spoken about this lawsuit or the allegations in it with any other Chemtrade employees, either current or former?
A: No.
Q: Have you asked anyone if they would be a witness for you in this case?

(Jt. Exh. 4, p. 33, L. 18–25.)[15]

(5) A: Not at the present time.
Q: In discussing this—well, do you anticipate asking anyone to be a witness for you in this case?
A: I'm not sure yet.
Q: Okay. Now, in your discussions with the other plaintiffs in this case, what is your understanding of what their specific issues were or are that they're claiming or they believed about this lawsuit?
A: I really can't answer for the next person how they feel. I just know how I was introduced to this situation, and the way I feel is that I was underpaid.

(Jt. Exh. 4, p. 34, L. 1–14.)[16]

The General Counsel alleges that Respondent's questions to Lugo about his conversations with his coworkers regarding concerns with a settlement, the lawsuit, those who have opted out of the class action, and specific conversations he had with coworkers are not relevant to the lawsuit. Even if the questions about his conversations with coworkers concerning the lawsuit are relevant, the General Counsel argues that Lugo's Section 7 right to confidentially discuss protected concerted activity of the wage and hour claims outweighs Respondent's interest in obtaining the information (GC Br. at 8–12). The General Counsel further argues that Respondent's questions to Lugo regarding whether coworkers will be witnesses on his behalf are not relevant, and even if relevant, do not outweigh Lugo's Section 7 right to keep his discussions regarding the lawsuit confidential (GC Br. at 13–14).[17]

Respondent argues that the questions to Lugo did not seek information related to union activity and were limited to questions relevant to the litigation. Respondent also argues that the questions are not "undiscoverable" or privileged because the questions relate to Lugo's conversation with his coworkers (R. Br. at 17–18). Respondent further argues that the questions asked of Lugo during the deposition were narrowly tailored to Lugo's litigation and claims against Respondent (R. Br. at 11, 17). Respondent continues that the complaint allegations should be dismissed because federal courts would not enforce the order (R. Br. at 18–19). Respondent did not present any argument as to why its need for the information outweighs Lugo's Section 7 rights as set forth in *Guess?*, and instead focuses on federal court decisions (R. Br. 18-19).

Considering the scope of these questions, I find that McInerny's questions to Lugo were relevant as Fed. R. Civ. P. 26(b)(1) provides a broad scope. McInerny sought to learn why the other employees opted out of the class action settlement as well as who Lugo's witnesses would be. Such questions are arguably relevant for Respondent's litigation strategy.

However, when examining the deposition questions at step 3 of *Guess?*, on balance, the employer's interest in obtaining the information does not outweigh Lugo's confidentiality interest under Section 7. These questions by McInerney were designed to elicit information regarding the plaintiff-employee's litigation strategy and sought to learn the employee's motivation for opting out of the settlement. Respondent, in its position statement, offers that it sought to discover the reasons why the plaintiffs opted out of the settlement and who Lugo plans to call as witnesses. While it is certainly reasonable for Respondent to seek out such information, *how* Respondent seeks this information violates Lugo's Section 7 rights to maintain confidentiality of the conversations about protected concerted activity. Asking Lugo what the other plaintiff-employees told him about opting out of the lawsuit or any such discussion can certainly inhibit employees' right under Section 7 and has the effect of chilling discussions amongst employees about their working conditions. Employees' interest in maintaining their confidentiality is strong, and if employees were not assured confidentiality in their communications with their coworkers, they would be unlikely to share their information or participate in litigation in support of coworkers.

Respondent has not shown that its need for the information outweighs Lugo's strong confidentiality interest. Respondent can obtain this information in other ways which would not infringe Lugo's confidentiality interest such as asking the named plaintiff-employees these questions directly and asking for a witness list at an appropriate stage of discovery. Any potential witnesses may also be cross-examined which could also be used to support Respondent's defense. Furthermore, as the General Counsel correctly points out, at the beginning of the deposition, Lugo admitted his reasons for opting out of the settlement and joining the other plaintiff-employees in the lawsuit (GC Br. at

[14] Complaint par. 6(c)(vi).
[15] Complaint par. 6(c)(vii).
[16] Complaint par. 6(c)(viii).
[17] The General Counsel argues that motivation is not relevant if that is Respondent's aim (GC Br. at 26–27). Respondent, in the posthearing brief, did not raise Lugo's motivation as a basis for its need for the information. But Respondent mentioned such basis in the November 1 position statement. However, Respondent has presented no justification to this line of questioning to establish why its need to know whether Lugo's "ego" or desire obtain more money outweighs Lugo's right to maintain confidentiality in his conversations with coworkers about the settlement and lawsuit.

27; see Jt. Exh. 4 at 20–21). In fact, McInerney asked many questions of Lugo about his knowledge of break laws in California as he has worked for several companies prior to working for Respondent (Jt. Exh. 4 at 48–49). Such testimony surely can be used to support Respondent's litigation strategy. In fact, such questioning appears highly relevant based on Respondent's arguments in the lawsuit pleadings that the CBA provides adequate relief. Thus, Respondent has not proven that its need for the information, as described in complaint paragraphs 6(c)(iv) through (viii), outweighed the employees' confidentiality under Section 7 thereby violating Section 8(a)(1).

Complaint paragraphs 6(c)(ix) through (xvi)

The General Counsel alleges that the following questions violate the Act:

(1) Q: Okay. Have you been—do you remember any other specific disciplines?
A: I believe I had a situation a few years prior from that. I mixed a tank on accident.
Q: Okay. And what was the outcome of that discipline?
A: I received a—I forgot. I don't remember if it was one or two days relief of pay—relief of duty.
Q: Okay. And were you—did you file a grievance over that discipline?
A: No, I didn't.

(Jt. Exh. 4, p. 84, L. 7–18.)[18]

(2) Q: Do you know who your current shop steward is?
A: Briton Davis
Q: And is there just one shop steward?
Mr. Kniss: Objection. Irrelevant.
You can answer, Rolando.

[…]

Q: Do you know of any other–anyone else who served as shop steward?
A: David Blake.
Q: Okay. Anyone else?
A: Eric Kinder, I believe.
Q: Anyone else?
A: Jeff Armstrong.

[…]

Q: And you're not aware of any other—the names of any other shop stewards at any other point while you worked for Chemtrade, are you?
A: No, I'm not. No, I do not.
Q: How would you described your relationship with Eric Kinder?
Mr. Kniss: Objection. Irrelevant.
Go ahead and answer, Rolando.
Mr. McInerney: Counsel, as I think you probably know, relevance isn't a proper deposition exhibit [sic]. Are you going to continue to object on relevance grounds?
Mr. Kniss: If we take things that are far outside the scope of anything at issue in this case, I will.
Mr. McInerney: Okay. All right. Well, let's see. I'd caution you against doing that objection. It's not a proper deposition objection.
Q: Eric Kinder is a plaintiff in this case. Can you describe your relationship with Mr. Kinder?

(Jt. Exh. 4, p. 110, L. 11–16, p. 111, L. 9–15 and p. 112, L. 2–22.)[19]

(3) Q: I'm sorry.
A: We were just colleagues.
Q: We can't hear you.
A: We were just colleagues.
Q: Okay. Do you have a—would you say, a friendly relationship with Mr. Kinder?
A: Yes.
Q: Is there any reason you couldn't raise any concerns with Mr. Kinder of any kind?
A: Yes.
Q: Why?
A: I believe he had poor judgment.
Q: Okay. What poor judgment did he exhibit to you?
A: Work ethic.
Q: "Work ethic," you're saying?
A: Yes.
Q: In what way?
A: I just—I think I just expressed that. His work ethic.
Q: Yeah, what does that—I don't know what is meant by "work ethic." I have an idea, but I don't know if it's consistent with yours.

(Jt. Exh. 4, p. 113, L. 2–24.)[20]

(4) Q: All right. And you mentioned David Blake. Can you describe your relationship with David Blake?
A: We have a good relationship.
Q: Is there any reason you weren't able to raise any concerns you had with David Blake?
A: I never had a reason to raise a concern.
Q: Okay. Briton Davis, how would you describe your relationship with Briton Davis?
A: Briton Davis, we had a great relationship.
Q: And at any point, did you ever have any issue or problem raising any concerns that you might have with Mr. Davis?
A: No problems or concerns.
Q: And Jeff Armstrong, how would you describe your relationship with him?
A: We have a really good relationship.
Q: And I take it then you never had any issue or problem raising

[18] Complaint par. 6(c)(ix).
[19] Complaint par. 6(c)(x).
[20] Complaint par. 6(c)(xi).

any concerns with Mr. Armstrong.
A: No.
Q: Is it your understanding that if you had a complaint or grievance regarding the terms and conditions of your employment, you were able to file a grievance under the union agreement and seek relief?
Mr. Kniss: Objection. Vague and ambiguous as to "terms and conditions."

(Jt. Exh. 4, p. 114, L. 3–25 and p. 115, L. 1–3.)[21]

(5) Q: You said, "Yes, I have." So you have filed grievances, right?
A: Yes, I have.
Q: Okay. Have you felt that your shop stewards have generally been responsive to any concerns and complaints that you may have had at Chemtrade?
A: Yes and no.
Q: What do you mean by "yes and no"?

(Jt. Exh. 4, p. 115, L. 17–25.)[22]

(6) Q: What are you referring to? What wasn't properly explained to you until Briton Davis became a shop steward?
A: Well, I had situations in the past that I wasn't too knowledgeable about, you know, being in a union for the first time. And, you know, certain things were expressed to me that I didn't understand until Briton Davis became a union steward in which he helped me understand my rights.
Q: Are you referring to anything—I'm sorry. Continue.
A: I'm just referring to what my rights are, basically.
Q: Are you referring to anything specifically, any specific issue or rights that you felt were not protected until Briton Davis became a shop steward?

(Jt. Exh. 1, p. 116, L. 5–21.)[23]

(7) Q: You said there were certain concerns, or your rights you weren't aware of, words to that effect, until Briton Davis became the shop steward. I was just trying to understand where there was anything specific you're referring to.
A: Oh. Basically primarily first mishaps of a disciplinary action that were taken up on me, I could have fought them in different way, and I didn't. I kind of just laid down and accepted what was going on to avoid any further conflict with the company.
Q: Okay. And Mr. Davis kind of counseled you or coached you that there are ways you could fight better or protect your rights better?
A: Just protect my rights.
Q: Okay. Do you feel the shop stewards—that last question was directed more at you.
But is it your impression that the shop stewards at Chemtrade that you've dealt with have generally been responsive to concerns and complaints of other workers at Chemtrade?
A: Primarily for right now, yes. But before, no.
Q: Yeah. When you say "before," what do you mean?

(Jt. Exh. 4, p. 117, L. 1–25.)[24]

(8) A: Other shop stewards.
Q: Who didn't—who didn't you think was responsive—of the shop stewards you listed, which was everybody you remembered was a shop steward, which of those do you think was not generally responsive to concerns and complaints of workers – of union workers at Chemtrade?
A: Eric Kinder.
Q: Eric Kinder? Anyone else?
A: I mean, I haven't gotten—I haven't had too many situations where I've had to obtain the help of a shop steward besides the few situations I was in.

(Jt. Exh. 4, p. 118, L. 1–13.)[25]

The General Counsel argues that Respondent's question to Lugo about whether he filed a grievance concerning disciplinary actions in the past bear no relevance to the lawsuit (GC Br. at 14). The General Counsel argues that Respondent's questions to Lugo about his communications with the shop stewards are also not relevant as the questions have "no bearing on the merits or defenses" raised in the lawsuit (GC Br. at 15–18). Moreover, the General Counsel argues that questions to Lugo about his experience with the grievance process under the CBA and relationship with shop stewards has no relevance to the lawsuit (GC Br. at 18–21).

Respondent argues that these questions are directly relevant to the lawsuit where Lugo and the other plaintiff-employees allege that they should be able to obtain a remedy under the UCL as they have no adequate remedy under the CBA. Respondent explains that it narrowly tailored its questions to Lugo as his "understanding and use of the grievance process, and his assessment of his union stewards' abilities to represent him in that process are directly relevant" to Respondent's defense (R. Br. at 21 (emphasis in original)). Most importantly, Respondent argues the following: "Given the relevant legal standard for a UCL claim, Mr. Lugo's understanding and use of the grievance process, and his assessment of his union stewards' abilities to represent him in that process, are directly relevant to Respondent's ability to defend itself by showing that Mr. Lugo had an adequate remedy at law for his claims. In connection with its defense, Respondent also has a right to seek any evidence relating to a potential claim by Mr. Lugo that he was unable to seek a remedy under the grievance procedure—for example, because he lacked confidence in the process itself" (R. Br. at 21).

Putting aside the fact that many of Respondent's arguments here arise from its motion to dismiss plaintiff-employees' October 12 fourth amended complaint, which occurred after the July 16 deposition, I find that McInerny's questions to Lugo were relevant as Fed. R. Civ. P. 26(b)(1) provides a broad scope. In

[21] Complaint par. 6(c)(xii).
[22] Complaint par. 6(c)(xiii).
[23] Complaint par. 6(c)(xiv).
[24] Complaint par. 6(c)(xv).
[25] Complaint par. 6(c)(xvi).

addition, Respondent's defense to the lawsuit is that the CBA is the appropriate venue for this wage and hour claim and provides an adequate remedy. Thus, McInerny sought to learn Lugo's relationship with his stewards as well as their knowledge, and his knowledge of the grievance process. Such questions are relevant for Respondent's litigation strategy.

However, when balancing whether Respondent's need for the information outweighs the employees' Section 7 right to speak confidentially, the balance tips in favor of Lugo. Asking Lugo questions about his experience with the grievance process directly unveils Lugo's prior confidential communications with the Union about matters not related this lawsuit. Moreover, Lugo's subjective impressions of the shop stewards has no relevance for Respondent's defense. Such questioning, if permitted, certainly would chill employees' desires to speak with their shop stewards and be reluctant to bring such a lawsuit for fear of disclosing their impressions of their coworker-shop stewards in a public forum.

Respondent's need for this information has not been proven. Respondent did not sustain its burden. Respondent made assertions in its posthearing brief about the "relevant standard for a UCL claim," but Respondent provided no legal basis or citations for such claims or even explained what is the standard and what must be proven. Rather, Respondent makes these arguments and expects that their interests automatically outweigh Lugo's Section 7 rights. Even a close reading of the pleadings in the lawsuit do not reveal why any of these questions are remotely relevant to Respondent's defense. Respondent did not explain how the answers to these questions would support their claim that plaintiff-employees have an adequate remedy under the CBA. In the alternative, Respondent clearly may obtain information on whether Lugo has filed grievances previously such to support its argument that Lugo is familiar with the grievance process. Respondent seeks to discredit Lugo by arguing that Lugo never complained to his shop stewards or filed a grievance when claiming he never received an uninterrupted meal break (see Jt. Exh. 4 at 132–134). Thus, Respondent argues, Lugo's actions are inconsistent (R. Br. at 21). Again, however, these specific questions would unlikely yield responses specifically targeted to the information Respondent seeks. Respondent has also failed to present any argument about why its defense would be undermined if it does not learn whether Lugo "lacked confidence" in the grievance process (R. Br. at 21). Furthermore, these questions about his knowledge of the grievance process as well as his subjective impressions of the shop stewards and whether they knew how to administer the CBA are also overbroad and not specifically tailored to the questions to support Respondent's defense. Thus, I find that Respondent has failed to prove that its need for the information outweighed the rights of Lugo and thereby violated Section 8(a)(1) as described in complaint paragraphs 6(c)(ix) through (xvi).

CONCLUSIONS OF LAW

1. Respondent, Chemtrade West US LLC has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, International Association of Machinist and Aerospace Workers Local Lodge 1584 has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act by questioning employees about conversations with the union representatives and coworkers about the merits of a lawsuit or reasons for non-participation in a lawsuit concerning working conditions, and about the employee's evaluation of union representatives and discussions with union representatives concerning a lawsuit or concerning the terms and conditions of employment.

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

REMEDY

Having found that Respondent 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.

As requested by the General Counsel, I order Respondent to cease and desist from relying upon or using the answers it received in response to deposition questions, identified in complaint paragraph 6(c), in Case No. 20-cv-07577-KAW, U.S. District Court Northern District of California (GC Br. at 33). Moreover, Respondent shall move to strike these deposition questions and answers in the above federal case and delete and destroy all copies, including those in position of its agents, of these questions and answers in physical and electronic form. Specifically, the deposition questions and answers to be stricken and not relied upon are at complaint paragraph 6(c). Thereafter, Respondent shall file an affidavit with the Regional Director indicating as such.

I will order that the employer post a notice at the facility in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. at 13.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

Respondent, Chemtrade West US LLC, Richmond and Bay Point, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Questioning employees about conversations with the union representatives and coworkers about the merits of a lawsuit or reasons for non-participation in a lawsuit concerning working conditions, and about the employee's evaluation of union representatives and discussions with union representatives concerning a lawsuit or concerning the terms and conditions of employment.

[26] 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.

(b) 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) Within 14 days of the Board's order, Respondent shall cease and desist from relying upon or using the answers it received in response to deposition questions, identified in complaint paragraph 6(c), in Case No. 20-cv-07577-KAW, U.S. District Court Northern District of California. Respondent shall move to strike these deposition questions and answers, described in complaint paragraph 6(c), in the above federal case and delete and destroy all copies, including those in position of its agents, of these questions and answers in physical and electronic form. Thereafter, Respondent shall file an affidavit with the Regional Director indicating as such.

(b) Within 14 days after service by the Region, post at its facility in Richmond and Bay Point, California, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, 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 July 1, 2021.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 17, 2022

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 question employees about conversations with the union representatives and coworkers about the merits of a lawsuit or reasons for nonparticipation in a lawsuit concerning working conditions, and about the employee's evaluation of union representatives and discussions with union representatives concerning a lawsuit or concerning the terms and conditions of employment.

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, within 14 days from the date of the Board's Order, cease and desist from relying upon or using the answers it received in response to deposition questions, identified in complaint paragraph 6(c), in Case No. 20-cv-07577-KAW, U.S. District Court Northern District of California. WE WILL move to strike these deposition questions and answers, described in complaint paragraph 6(c), in the above federal case and delete and destroy all copies, including those in position of its agents, of these questions and answers in physical and electronic form. Thereafter, WE WILL file an affidavit with the Regional Director indicating as such.

CHEMTRADE WEST US LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/32-CA-282594 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.

[27] If the facility 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 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 Respondent customarily communicates with its employees by electronic means. *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68, slip op. 4 (2020).

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."