Argos USA LLC d/b/a Argos Ready Mix, LLC *and* Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO. Cases 12–CA–196002 and 12–CA–203177

February 5, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 14, 2019, Administrative Law Judge Kimberly R. Sorg-Graves issued the attached decision, and on May 23, 2019, she issued an errata. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations 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 only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent operates 300 ready-mix concrete facilities and, in 2015, the Union was certified as the exclusive bargaining representative of the truck drivers at its Naples, Florida facility. Since at least 2014, the Respondent has maintained an Electronic Communications Policy and a Cell Phone Policy and has required employees to sign an Employee Confidential Information Agreement ("Confidentiality Agreement").

On March 3, 2017, the Respondent suspended employee Emmanuel Excellent for suspected possession of a cell phone in his concrete truck in violation of the Cell Phone Policy, pending further investigation. The Respondent did not notify the Union of Excellent's suspension until March 8, but it subsequently negotiated with the Union in an attempt to resolve the situation and have Excellent return to work. Ultimately, the parties were not able to come to an agreement and, on April 28, the Respondent discharged Excellent for violating its Cell Phone Policy.

The judge found that the Respondent's maintenance of the policies at issue violated Section 8(a)(1) of the Act because they were overbroad and, as such, interfered with employees' rights under Section 7 of the Act. Then, having found the Cell Phone Policy to be unlawful, the judge found that the Respondent also violated Section 8(a)(1) by suspending and discharging Excellent pursuant to that Policy. Finally, the judge found that the Respondent violated Section 8(a)(5) of the Act by failing to provide notice and an opportunity to bargain to the Union before suspending Excellent.[2]

For the reasons set forth below, we reverse the judge's findings that the Respondent unlawfully maintained the Confidentiality Agreement, Electronic Communications Policy, and Cell Phone Policy. Because the Respondent disciplined Excellent pursuant to a lawful Cell Phone Policy, we also reverse the judge's finding that the Respondent unlawfully suspended and discharged Excellent. Finally, we sever and retain for further consideration the allegation that the Respondent unlawfully failed to provide notice and an opportunity to bargain to the Union prior to suspending Excellent.

II. DISCUSSION

A. Workplace Rules

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board set out a new standard for determining whether a facially neutral work rule, reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.[3] The Board in that decision overruled the "reasonably construe" prong delineated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the standard articulated in *Boeing*,

> 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.

Id., slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between

[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] There is no allegation that the Respondent failed to bargain with the Union over its decision to discharge Excellent.

[3] The outcome of this inquiry should be determined by reference to the perspective of an objectively reasonable employee who is aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the Act. *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (internal quotations omitted).

the Respondent's asserted business justifications for the policy against the extent to which the policy interferes with employee rights under the Act, viewing the rule or policy from the employees' perspective. Id. "As a result of this balancing. . . the Board will delineate three categories" of work rules:

> *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) 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).[4] However, these 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." Id., slip op. at 4 (emphasis in original).

1. Employee confidential information agreement

The Confidentiality Agreement states, in part, that employees "may receive and obtain access to confidential Company information" and that they agree to "not disclose any such confidential information." Confidential information is defined as

> … all private information not generally known in the industry and not readily available, written, or otherwise including, but not limited to, information regarding Argos' customers, customer lists, prospective customers, customers' buying habits, production methods (including designs, formulas, techniques, processes), any non-published prices, discounts, commissions, costs, supplier information, **earnings**, contracts, **employee information**, subcontractors, business plans, marketing and/or supply strategies, training programs, computer software or programs, and other business arrangements … [(Emphasis added.)]

Several paragraphs following the definition paragraph state that employees will (1) assign to the Respondent inventions, processes, discoveries, or improvements developed while working for it; (2) assist the Respondent with the preparation for patent applications any time within two years after termination of employment; and (3) not divulge confidential information from prior employers to the Respondent, including financial information or technical manuals.

Applying *Boeing*, the judge determined that employees would reasonably interpret the Confidentiality Agreement, specifically the requirement to keep confidential "earnings" and "employee information," as potentially interfering with their Section 7 rights. She further found that the Respondent's legitimate justification—keeping its proprietary information confidential—did not outweigh the infringement on employees' Section 7 right to discuss wages or employee contact information and, therefore, that the Confidentiality Agreement was unlawful.

Unlike the judge, we find that an employee would not reasonably interpret the Confidentiality Agreement to potentially interfere with the exercise of Section 7 rights. Read as a whole, and from the perspective of an objectively reasonable employee as defined in *LA Specialty*, the Confidentiality Agreement clearly applies only to the Respondent's proprietary business information. The Confidentiality Agreement explicitly states that employees may not disclose "confidential *Company* information." (Emphasis added.) Further, confidential information is defined in the policy as "information regarding *Argos'*…earnings" and "*Argos'*… employee information." (Emphasis added.) It does 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." Thus, we find that, under the applicable objectively reasonable employee standard, the term "earnings" would be understood as referring to such things as the Respondent's revenue and profits, not employees' wages, and the term "employee information" would be understood as referring to such things as the Respondent's staffing information, not employees' wage or contact information. See *LA Specialty*, supra, slip op. at 4 (finding confidentiality rule lawful and categorized under Category 1(a) because it applied only to the employer's own nonpublic, proprietary records); see also *National Indemnity Company*, 368 NLRB No. 96 (2019) (finding lawful rule requiring employees to keep confidential non-public

[4] In *LA Specialty*, supra, the Board re-designated the subdivisions of *Boeing* Category 1 as (a) and (b).

information that would harm the company or benefit its competitors).

Apart from the express definitional link between Argos' private information and references to "earnings" and "employee information," the overall context in which these terms appear further supports finding that an objectively reasonable employee would understand that the Confidentiality Agreement applies only to the Respondent's proprietary business information and would not interfere with employees' Section 7 rights. The disputed terms "earnings" and "employee information" are included in a list of categories of obviously proprietary information, including non-published prices, costs, supplier information, business plans, contracts, production methods (including designs, formulas, techniques, processes), and other business-related documents. These categories of information confirm that the policy only applies to the Respondent's confidential information, and implicitly omit from coverage employees' wages, contact information, or other terms and conditions of employment. Additionally, the three paragraphs following the definition paragraph contain information about inventions, business improvements, patents, and third-party confidential information. These paragraphs reinforce the fact that the policy is concerned with the Respondent's proprietary business information that it may lawfully keep confidential. See *Macy's, Inc.*, 365 NLRB No. 116, slip op. at 4 (2017) (employees have no right to information "improperly obtained from their employer's private or confidential records").

Accordingly, we reverse the judge and dismiss the allegation of a Section 8(a)(1) violation because the General Counsel has failed to show that an objectively reasonable employee would interpret the Confidentiality Agreement, when read as a whole, to potentially interfere with Section 7 rights. As stated in *LA Specialty*, "it is the General Counsel's initial burden in all cases to prove that a facially neutral rule *would* in context be interpreted by a reasonable employee, as defined above, to potentially interfere with the exercise of Section 7 rights. If that burden is not met, then there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule. The rule is lawful and fits within *Boeing* Category 1(a). There will be no need for further case-by-case litigation of the legality of a rule so classified." 368 NLRB No. 93, slip op. at 2. We therefore find that the Confidentiality Agreement here is a lawful Category 1(a) rule, requiring no need to address the legitimate interests justifying it.

2. Electronic communications policy

The Electronic Communications Policy states, in part, that employees understand that the Respondent's email system "is to be used for business purposes and not for personal purposes."

Applying *Purple Communications, Inc.*, 361 NLRB 1050 (2014), the judge found the Electronic Communications Policy an unlawful ban on employee use of the Respondent's email system for personal use during non-work time. Subsequent to the judge's decision in this case, the Board issued its decision in *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019), in which it overruled *Purple Communications*. In doing so, the Board reinstated the principle that employees have no statutory right to use employer email systems for Section 7 purposes in a typical workplace and applied this principle retroactively to all pending cases. *Caesars Entertainment* also recognized that, under Supreme Court precedent, employees must have "'*adequate* avenues of communication'" in order to meaningfully exercise their Section 7 rights and that employer property rights must yield to employees' Section 7 rights when necessary to avoid creating an "'*unreasonable* impediment to the exercise of the right to self-organization.'" Id., slip op. at 7 (quoting *Republic Aviation*, 324 U.S. 793, 802 fn. 8 (1945) (emphasis added), and *Le Tourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944) (emphasis added)). Thus, an employer does not violate Section 8(a)(1) by restricting employees' use of its email system for Section 7 communications absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other or proof of discrimination. Id.

The Board also held in *Caesars Entertainment* that it would be appropriate to apply the standard announced there retroactively to "all pending cases that similarly involve allegations that an employer unlawfully maintained rules restricting the use of the employer's IT resources for nonwork purposes." Id., slip op. at 9. Accordingly, we apply that standard in this case and find that the Respondent's Electronic Communications Policy, a facially neutral restriction on employees' personal use of its email system, is lawful. First, the record demonstrates that the Respondent's facility is a "typical workplace" where employees are able to exercise traditional methods of Section 7 communications, including oral solicitation and face-to-face literature distribution in their breakroom during non-work time. In addition, there is no indication that the employees do not have access to more modern forms of communication, such as use of personal email and social media, that do not require using the Respondent's email system. Lastly, there is no allegation by the General Counsel that the Electronic Communications Policy was discriminatorily applied. As a result, we find the Respondent's Electronic Communications Policy to be a permissible

restriction on employees' use of the Respondent's email system for nonwork purposes, and we dismiss the allegation.[5]

3. Cell phone policy

In recognition of "the danger associated with using cell phones while driving," the Respondent's Cell Phone Policy places certain restrictions on employees' ability to use cell phones while working. The Policy states, in part, as follows:

> Road safety must be a priority. Cell phone use must never distract a driver's attention from safely operating a vehicle. Employees are expected to direct all necessary attention towards the safe operation of vehicles driven by them, to ensure their own safety as well as the safety of others around them, including pedestrians and passengers in vehicles nearby.
>
> …
>
> **It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle;** (i.e., "commercial vehicles" are defined as having a gross vehicle weight of 10,000 lbs. or more including any heavy equipment used on the plant yard. ([Emphasis in original.)]

Employees are also required to sign a "Cellular Telephone Acknowledgement" form, which states that the Respondent has "zero tolerance" for the use of a cell phone in commercial vehicles because the "safety of Argos, USA employees and others is very important" and that it believes "employees will be safer drivers when they are not distracted by dialing, answering, talking, or texting on their cellular telephone while driving a commercial motor vehicle."[6]

Applying *Boeing*, the judge determined that employees would reasonably interpret the Cell Phone Policy and Acknowledgment as potentially interfering with their Section 7 rights. She further found that the Respondent's legitimate justification—ensuring cell phones were not used while driving commercial vehicles—did not outweigh the infringement on employees' right to communicate with each other while away from the facility and, therefore, that the Cell Phone Policy and Acknowledgement were unlawful.

Unlike the judge, we find that employees would not reasonably interpret the Cell Phone Policy and Acknowledgment to potentially interfere with the exercise of their Section 7 rights. Read as a whole, and from the perspective of an objectively reasonable employee, the Policy and Acknowledgment prohibit the possession and use of cell phones in the Respondent's commercial vehicles, including concrete trucks, but they do not restrict employees' right to communicate with each other during nonwork time. The purpose of the Policy and Acknowledgment is repeated over and over again—to ensure the safety of drivers and the general public. Concrete truck drivers, interpreting the Cell Phone Policy and Acknowledgement as they apply to the "everydayness of [their] job," would reasonably understand the danger associated with talking or texting while driving a 70,000-pound concrete truck. Even non-commercial drivers can recognize that a prohibition on possessing a cell phone in a vehicle most effectively prevents a driver from getting distracted by a cell phone while driving. Further, nothing in the Cell Phone Policy and Acknowledgement would indicate to an employee that they are prohibited from discussing, taking photos, or recording their terms and conditions of employment while away from the facility. As a result of the limited scope of these restrictions, and recognizing that employees are not guaranteed the right to use every method of communication available to them to discuss their terms and conditions of employment, we find that the Policy and Acknowledgement do not interfere with the exercise of their rights under the Act. See *Register Guard*, 351 NLRB 1110, 1115 (2007) ("'Section 7 of the Act protects organizational rights…rather than particular means by which employees may seek to communicate.'" (quoting *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995)), enfd. in relevant part and remanded sub nom. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

Accordingly, we reverse the judge and dismiss the allegation because a reasonable employee would not interpret the Cell Phone Policy and Acknowledgment, when read as a whole, to potentially interfere with his or her rights under the Act. Further, we designate rules that prohibit the use or possession of cell phones in commercial vehicles as lawful Category 1(a) rules because the General Counsel has failed to meet the burden of showing that these rules

[5] Although *Purple Communications* no longer applies, we find the result should have been the same under that case as well. The General Counsel presented no evidence that *statutory* employees have access to the Respondent's email system for work purposes. Proof of access for work purposes by statutory employees, as opposed to supervisors and others not covered by the Act, was required in order for those employees to be afforded the Sec. 7 right to use email for protected activities. 361 NLRB at 1063–1064. In this respect, we disagree with the judge that the General Counsel could have met the initial burden of proving that some statutory employees had access to the Respondent's email system based merely on an inference drawn from the size of the Respondent's operations. Therefore, the Respondent's Electronic Communications Policy would have been lawful under *Purple Communications* as well.

[6] A concrete truck is considered a commercial vehicle because it weighs between 29,000 pounds unloaded and 70,000 pounds loaded.

would reasonably be understood as interfering with employees' Section 7 right to communicate with each other during nonwork time.

B. Suspension and Discharge of Emmanuel Excellent

There is no dispute that the Respondent discharged Emmanuel Excellent pursuant to its Cell Phone Policy because it suspected he possessed a cell phone in the cab of his concrete truck. Based on her finding that the Cell Phone Policy was an unlawful workplace rule, the judge then applied *Continental Group, Inc.*, 357 NLRB 409 (2011), to find Excellent's suspension and discharge pursuant to that Policy unlawful. However, because we find the Respondent's Cell Phone Policy a lawful workplace rule, we reverse the judge and dismiss this allegation.[7]

C. Failure to Provide Notice and Opportunity to Bargain

Applying *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and an opportunity to bargain before suspending Excellent. Subsequent to the judge's decision, the General Counsel joined the Respondent in requesting that the Board reconsider *Total Security Management* and dismiss the allegation. Moreover, in another case pending before us, *800 River Road Operating Company, LLC d/b/a CareOne at New Milford*, 22–CA–204545, the parties and an amicus curiae filed comprehensive briefs regarding the question of whether *Total Security Management* was correctly decided. Therefore, we deem it appropriate to sever and retain for further consideration the allegation that the Respondent unlawfully failed to bargain with the Union before suspending Excellent.

ORDER

The complaint allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union notice and an opportunity to bargain before suspending Emanuel Excellent is severed from this case and retained for further consideration.

IT IS FURTHER ORDERED that the remaining complaint allegations are dismissed.

Dated, Washington, D.C. February 5, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

The Board's decision can be found at www.nlrb.gov/case/12-CA-196002 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.

Cristina Ortega and *John F. King, Esqs.,* for the General Counsel.

Douglas R. Sullengerger and *Michael S. Bohling, Esqs. (Fisher & Phillips LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. On March 31, 2017, Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO, (Union or Charging Party) filed Case 12–CA–196002 with Region 12 of the National Labor Relations Board (Board), and amended the case on July 26, 2017. The Union also filed Case 12–CA–203177 with Region 12 on July 26, 2017. The cases allege that Argos USA LLC d/b/a Argos Ready Mix, LLC (Respondent) maintained unlawful overly broad rules concerning employee use of cell phones, confidential information, and work email systems and that Respondent unlawfully suspended employee Emmanuel Excellent and subsequently discharged him pursuant to the overly broad cell phone policy in violation of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). On January 31, 2018, the Region issued the consolidated complaint in this matter. (GC Exh. 1(a)-(n).)[1] I heard this matter

[7] There is neither an allegation that the Respondent disparately enforced the Cell Phone Policy and Acknowledgement nor any record evidence that Excellent was engaged in protected concerted activity at the time of his suspension.

[1] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." and GC "Br." for the General Counsel's exhibits and posthearing brief, "R. Exh." and "R. Br." for Respondent's exhibits and posthearing brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review and are not

on June 13–15, 2018, in Miami, Florida, and this matter was continued to July 6, 2018. On July 5, 2018, by agreement of the parties, the continuance of the hearing was cancelled. On July 6, 2018, I issued an order granting the parties' joint stipulation regarding the receipt of exhibits into the record and joint motion to set briefing schedule and to close the record. I afforded all parties a full opportunity to appear, introduce evidence examine and cross-examine witnesses, and argue orally on the record. On September 4, 2018, General Counsel and Respondent filed posttrial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witnesses, and the parties' briefs[2] I find that

FINDINGS OF FACT

JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, Argos USA LLC d/b/a Argos Ready Mix, LLC, is a limited liability company with an office and a place of business in Naples, Florida, where it engages in the manufacturing and delivery of ready-mix concrete. In conducting its operations during the calendar year prior to the issuance of the consolidated complaint, Respondent purchased and received goods valued in excess of $50,000 directly from points outside the State of Florida. I find, that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(j) and (l).)

UNFAIR LABOR PRACTICES

1. Background

In about 2011, Respondent purchased the Naples, Florida ready-mix batch plant[3] facility (Naples facility) from Vulcan Enterprises which had purchased it from Florida Rock in about 2007. (Tr. 54, 57, 174, 2007.) Many of Respondent's employees and management officials worked for one or both of these predecessors or for other companies that Respondent has purchased in the process of expanding its business into several southern states. (Tr. 55–56, 156, 242, 334.) Respondent owns about 300 ready-mix concrete batch plant facilities. Because ready-mix concrete maintains the correct slump[4] for a limited period of time, the delivery distance from a batch plant is correspondingly limited. For example, Respondent's south Florida geographical region, in which the Naples facility is located, is comprised of 23 batch plant facilities employing 220 individuals of whom about 150 are ready-mix truckdrivers. (Tr. 244.)

To cover this number of facilities over a large geographical area, Respondent has an extensive managerial hierarchy. Michael Beer (Beer) is the director of human resources for ready-mix operations in the United States. (Tr. 55.) Beer oversees human resource managers who cover various geographical regions. Monique Wallace is the human resource manager for the Florida geographical area. Robert Marion (Marion) is the division manager for the south Florida geographical area, which spans from Tampa to Miami, including the Naples facility. (Tr. 60, 353.) Chad Kennedy (Kennedy) is the district manager for the 15 facilities between Port Charlotte and Naples employing about 40 drivers. He visits the Naples facility at least once per week. (Tr. 333, 335–336.) Spencer Johnson (Johnson) is the plant supervisor at the Naples facility. (Tr. 60.)[5]

The approximately 11 ready-mix truck-drivers at Respondent's Naples, Florida facility are Respondent's only ready-mix drivers represented by a union.[6] The Union was certified as their bargaining representative in July of 2015. At the time of the hearing, Respondent and the Union had not yet negotiated their first contract, and therefore, no grievance arbitration procedure was in place. (Tr. 190–192.)

2. Naples facility

The Naples facility is a large rectangular lot. For the most part, raw materials are stored at the rear of the lot and structures are located around the perimeter or down the middle of the lot allowing room for the trucks and equipment to maneuver. The batch plant sits in the center of the lot. The two-story office building containing a second-floor batch plant control center and office and a first-floor driver breakroom sits in line with the batch plant but closer to the front of the lot. (Tr. 105–106; GC Exh. 7.) Mixer trucks not in use are typically parked along the front perimeter or in a parking area towards one side of the office building.

---

necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on the highlighted evidence but upon my review and consideration of the entire record. My findings of fact encompass the credible testimony, evidence presented, and logical inferences from the evidence. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

[3] A batch plant consists of: large storage containers of concrete components such as cement, gravel, sand, and other additives; a water supply; conveyor systems to refill the storage containers; and conveyor systems that deliver the components to the shoot. The concrete mixer truck is maneuvered under the batch plant so that the shoot can deliver the materials into the rear opening of its drum.

[4] Slump is the industry's term for the correct consistency of concrete mixture to meet a customer's order, including the correct amount of moisture. (Tr. 94.)

[5] Respondent refers extensively to Argos-Florida in its brief as if it is a separate entity, but it is simply a geographical region established by Respondent's supervisory structure. Respondent provided no evidence that it maintained specific written policies for its Florida geographical region. As discussed more thoroughly below, the policies at issue applied to all of Respondent's employees regardless of which geographical area in which they work.

[6] The Union represents: all full-time and regular part-time ready-mix drivers employed by the Respondent at its Naples, Florida facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act (unit).

Customer orders are taken by a centralized customer service and dispatch office in Sarasota, Florida, and a computerized system sets the schedule for deliveries for the next day. (Tr. 247.) The drivers call dispatch after 6 p.m. to receive their report time for the next morning. (Tr. 92.) Because the delivery time is based upon customer needs, the drivers' start and end time can vary significantly from day to day. On a typical day, the drivers report at staggered times for their first load of the day between about 5 and 6 a.m.[7] End times also vary, but drivers usually complete their last loads and clean their vehicles by 5 p.m. (Tr. 341.) Upon arrival, they clock in in the breakroom and then perform the precheck inspection on their work truck. They take the inspection form to plant supervisor Johnson for him to sign. The driver then puts fuel in the truck, if needed, and then parks near the breakroom. The driver waits in the breakroom for a ticket of laden.

The computerized dispatch system prints a ticket with all the delivery information and the ready-mix truckdriver's name. Johnson clips the ticket to a string and lowers it through a hole in the office floor to the breakroom. Once a driver receives a ticket, the driver positions the ready-mix truck under the batch plant shoot and notifies Johnson that the truck is ready to be loaded. Johnson activates the computerized system and the batch plant loads the truck drum with the materials to fill the customer's concrete specifications. Once loaded the driver drives to the slump rack. The slump rack consists of stairway up to an elevated platform. On each side of the platform is an extension platform or catwalk that is raised to a vertical position when not in use and lowered to a horizontal position when being used by drivers to inspect the concrete in the truck drum. Two drivers can inspect their loads at the same time, one on each side of the slump rack. The drivers must exit their trucks, climb the slump rack, visually inspect the slump of the concrete, and add water or other additives if necessary to ensure the proper slump and concrete specifications. (Tr. 159–160, 247–249.)

The driver commutes to the customer's jobsite and assesses the jobsite for safety concerns. After all concerns are addressed and the customer is ready to receive the concrete, the driver dispenses the concrete as requested by the customer. A driver may be detained at a jobsite for various reasons including unsafe conditions, rain, an inspection has not been completed, and improper grade of the area on which the concrete will be dispensed. (Tr. 161–162, 164.) Pouring concrete on certain types of construction, such as curbs and pools, requires periodic breaks in the pouring while the concrete workers finish the concrete. These various delays can last mere minutes to 90 minutes or more. (Tr. 163.) While waiting the truck can be parked but must remain operating with the drum rotating to maintain the concrete. Depending on weather conditions and the amount of wait time, the driver may need to climb up the truck to inspect the slump and add water if needed one or more times before dispensing or continuing to dispense the concrete. (Tr. 165–166.) Once the drum is empty or the customer has received all the material needed, the driver must wash out the drum before driving back to the facility. (Tr. 161.)

Upon returning to the facility, the driver waits in the breakroom to receive another ticket. Subsequent loads are assigned on a first in/first out basis dependent upon the order in which drivers return to the facility after their first loads. (Tr. 257–258.) Frequently more than one driver will be waiting for initial or subsequent tickets at the same time. On average drivers haul between three and five loads per day. Respondent's employees refer to the time it takes to be loaded, deliver the load, and return to the facility, as turnaround time or roundtrip time. Based upon Respondent's records, the average round trip time is about 2 hours. (Tr. 159, 259, 295, 374; R. Exh. 10, at pp. 1b–26b under RTT column.) Time at the jobsite usually ranges between 20 and 80 minutes. (Tr. 161.)

A ready-mix truck weighs as much as 29,000 pounds unloaded and 70,000 pounds loaded. (Tr. 74, 264.) Respondent's data on roundtrip times shows that Excellent's average roundtrip time of 2.08 hours was consistent with the average round trip time of approximately 2.0 for all the drivers at the facility. Also, the data shows that Excellent occasionally had roundtrip times between 3 and 4 hours and only a few times in a year did his roundtrip time exceed 4 hours. (Tr. 259, 295, 374; R. Exh. 10, at pp. 1b–26b under RTT column.) This is consistent with employee Perez' testimony that he rarely has occasions where this roundtrip time exceeds 4 hours. (Tr. 161–162.)

The breakroom contains a refrigerator, coffee maker, microwave, tables and chairs, and a restroom. Drivers are allowed to take at least short breaks between loads even if their next ticket is available. Pursuant to Respondent's policies, drivers may use their personal cell phones in the breakroom, on the facility property, or in their personal vehicles and can store them in their vehicles, the breakroom or the office area. One driver estimated that he was at the facility between 15 and 20 percent of his work week. (Tr. 160.) The driver did not specify how much of this time was performing necessary work duties such as the beginning of the shift pretrip truck inspection and cleaning his truck at the end of the shift, and how much of that time is spent as break time between loads. (Tr. 130.) While their work assignments are staggered often two or more employees are engaged in these at the facility duties or taking a break between loads at the same time. (Tr. 130, 143, 151–152.)

Each ready mix-truck is equipped with a two-way radio, often referred to as a CB radio. The drivers communicate with dispatch, each other, and management via the radios. (Tr. 261.) The radios are used to communicate work progress, jobsite safety issues, truck maintenance issues, accidents, delays in work, etc. Communications on the radio are broadcasted to all company radios that are turned on, tuned to the right frequency, and within range of where they typically deliver. To broadcast a message via the radios, you pick up and key[8] the mike with one hand, bring the mike to your mouth, and speak. (Tr. 99, 167–168, 261.) Drivers frequently engage in short nonwork related chatter over these radios without repercussion. (Tr. 239, 292, 313.) Periodically management reminds employees that the radios are for business purposes only and has specifically reminded employees of this policy, when employees have failed to be brief

[7] For the monthly safety meetings, all the employees report at the same time and attend the same meeting. (Tr. 261.)

[8] Witnesses used the term "key the mike" to mean depressing the talk button on the mike. (Tr. 261, 292, 313.)

in their nonwork related use of the radio frequency. (Tr. 292; GC Exh. 14.)

Drivers use what is referred to as "10-codes" to communicate their progress in performing deliveries via the two-way radios.[9] For example, drivers use the code 10-2 to communicate that they are leaving the facility to make a delivery. The dispatcher enters into the computer the departure time for that delivery. Through this system and with the use of GPS tracking devices on some trucks, Respondent keeps a computerized "utilization report" that shows when each truck leaves the facility, arrives at the jobsite, starts and finishes pouring the concrete, leaves the jobsite, and returns to the facility. (Tr. 168, 367, 378.) If employees want to stop for a short break while they are returning to the facility, they communicate the code 10-7 to dispatch**.** Such breaks are regularly allowed. (Tr. 102–104, 139–140, 171.)

Until the end of 2017, the Naples facility also delivered cement blocks to customers. (Tr. 84.) The blocks were delivered on a shortened semi-tractor and flatbed trailer or on a straight truck with a flatbed. (Tr. 85, 174). The trailers were equipped with a truck mounted forklift attached to the back which is used to unload the block. The exact weight of these trucks is not in the record, but they are commercial trucks estimated to weigh more than 10,000 pounds. (Tr. 85–86, 237.) The flatbed truckdrivers used Nextel flip phones to communicate. A Nextel phone can be used like a cell phone, and it can have preprogrammed contacts. Once the preprogrammed contact is selected, the phone functions much like a walkie-talkie in that you push a button to talk and release it to receive communications. (Tr. 175–176, 237.) Nextel phones only broadcast to the selected contact.

Maintenance employees drive Ford 350 or 450 pickup trucks with side utility boxes and in some cases a welder. Maintenance employees use these trucks to carry tools and equipment to repair vehicles away from the facility. Maintenance employees may possess cell phones in these trucks to communicate, provided that rules for hands-free operation are followed. (Tr. 81–82; GC Exh. 5.)

3. Respondent's work rules and policies

The General Counsel contends that the following exerts of Respondent's work rules and policies and employee acknowledgement forms separately or in combination violates Section 8(a)(1) of the Act.

a. Employee confidential information agreement

Since at least June 11, 2014, Respondent has required that all employees abide by an "Employee Confidential Information Agreement" stating that employees may have access to "confidential Company information," and that they:

> understand and agree that [they] may only use such confidential information for purposes of carrying out Argos' business, and [they] may not make use of or disclose any such confidential information during or after termination of [their] employment with Argos without the express written consent of the General Counsel of Argos.

The document defines "confidential information" to include:

> all private information not generally known in the industry and not readily available, written or otherwise including, but not limited to, information regarding Argos' customers, customer lists, prospective customers, customers' buying habits, production methods (including designs, formulas, techniques, processes), any non-published prices, discounts, commissions, costs, supplier information, earnings, contracts, employee information, subcontractors, business plans, marketing and/or supply strategies, training programs, computer software or programs, and other business arrangements. [GC Exh. 3.]

General Counsel, in brief, contends that the inclusion of the terms "earnings" and "employee information" in this list constitutes a violation of the Act.

b. Electronic communications policy

All of Respondent's employees are required to sign its "Electronic Communications Policy Acknowledgment Form" which states, in pertinent part, that the employee understands that Respondent's email system "is to be used for business purposes and not for personal purposes." (Tr. 69; GC Exh. 4.) The record contains little evidence of employee use of the email system. The only individuals who have email access at the batch plant facilities are the plant supervisors. Employees who periodically fill in for the plant supervisors use the supervisors' email accounts to send and receive information about the batch work they perform. General Counsel failed to solicit evidence about whether other statutory employees such as employees who work in centralized dispatch or clerical employees, as excluded from the unit description, have access to Respondent's email system via individualized email accounts. I note that Respondent provided information concerning only the batch plant employees' lack of access to Respondent's email system and specifically avoided the issue as to whether the rule applied to other statutory employees. (Tr. 381, 397.)

c. Cell phone rules and policies

The following portions of Respondent's work rules and policies regarding cell phone use have been in effect since at least June 1, 2014, at all of its facilities:

> *Commercial Vehicles and Heavy Equipment:*
>
> It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle; (i.e. "commercial vehicles" are defined as having a gross vehicle weight of 10,000lbs. or more including any heavy equipment used on the plant yard). This prohibition also extends to the use of any accompanying equipment (e.g. earpieces or hands-free devices) and applies regardless of where the commercial vehicle is being operated. Employees are encouraged to leave their cell phones in personal vehicles at all times. If a driver in a commercial vehicle is involved in an accident, the company reserves the right to look at the driver's cell phone call history (including their personal cellphone), to determine if the driver

[9] Respondent uses the following 10-codes:
10-2 is leaving the plant to go to the jobsite; 10-3 is at the jobsite; 10-4 is a universal code to acknowledge something; 10-5 is starting to pour the concrete; 10-6 finished the pour; 10-7 to stop for a short break, especially when taking a break away from the facility; 10-8 on the road; 10-9 coming back to the plant; and 10-10 at the plant. (Tr. 168.)

was using his/her phone at or around the time of the accident.

Medium Duty Trucks, Small Trucks, and Light duty Passenger Vehicles

Cellphone use is not permitted in a light duty (passenger) vehicle that is in motion, at any time, unless the employee is using a completely hands-free device. When using a hands-free device the driver must be able to operate, place and receive calls from the phone without distraction. The driver must not attempt to make notes or write while driving. If the driver finds it necessary to do so, they may have to pull the vehicle over and park in a safe manner and place before continuing the call.

Disciplinary Action

Failure to follow any aspect of the cell phone policy will result in a minimum of a three (3) day suspension and final written warning for the first offense and could result in termination depending on other disciplinary write-ups in the employee's file under the progressive discipline guidelines. [GC Exh. 5.]

In addition to these portions of Respondent's work rules and policies addressing cell phone use, employees working in approximately 110 facilities in Respondent's South Central Region, including Texas, Arkansas, and Florida have also signed "Cellular Telephone Acknowledgement" forms. The acknowledgement form that Excellent signed on June 11, 2014, states, in relevant parts:

—that "possession of any cell phone while driving and/or on any job site…can lead to immediate termination;"

—that Respondent has "a zero tolerance for the use of cellular telephones while operating an Argos, USA commercial motor vehicle;" and

—that "use or possession of cellular telephones are (sic) prohibited while operating any Argos, USA commercial motor vehicles." (GC Exh. 4.)

In November of 2016, at least the employees in the South Central Region, including Excellent, were again required to sign a "Cellular Telephone Acknowledgement" form which states, in relevant part:

The use or possession of cellular telephones is prohibited while operating any Argos, USA commercial motor vehicles. [GC Exh. 2.]

In about 2015, Beer distributed to all of Respondent's human resource officers, managers, and supervisors a "Progressive Discipline Table—A Guideline," which states that "[u]sing radios, tape recorders, cameras, cell phones, or other appliances and electronic devices, except as authorized by the Company" is listed under "Step 2: Written Warning—Document to file." (Tr. 229; GC Exh. 10.) The discipline table was meant to be used as a guideline for managers and supervisors in assigning discipline. (Tr. 229.)

Respondent's prohibition on the possession of cell phones in its heavy commercial trucks is more restrictive than the Federal Motor Carrier Safety Administration (FMCSA) regulations, which allows the use of cell phones while driving such vehicles as long as certain standards for hands-free operations are met. (Tr. 243–244; GC Exh. 11.) See also, 49 CFR § 392.80–392.82; 76 Fed. Reg. 75470, 75481 (Dec. 2, 2011).

Beer testified about two ready-mix truck accidents that resulted in the death of the drivers and how such incidents contributed to Respondent's initiation and/or maintenance of the cell phone policies. (Tr. 432–439.) As General Counsel notes in his posthearing brief, Respondent presented no documentary evidence to support Beer's assertion that cell phone usage played a role in these accidents or any other accident caused by Respondent's drivers. While I have no doubt that two drivers were killed in accidents while performing work and these incidents were traumatic for Respondent's personnel, I find that Beer did not adequately explain through his testimony or documentary evidence the basis for his assertion that cell phone use contributed to the cause of these accidents. For example, Beer testified that one driver lost control of the ready-mix truck he was driving because he "reached for his cell phone," but there was no explanation as to how Beer had such knowledge. (Tr. 432.) Even if Beer's testimony is accurate, I note that these employees were using or attempting to use cell phones while driving. There is no evidence of record that the mere possession of a cell phone in a ready-mix truck caused any accident. Furthermore, the devastating accidents to which Beer testified occurred well after the cell phone policy was instituted and could not have been the impetus for enacting it.

4. Excellent's suspension

Excellent testified that he arrived at work on March 3, 2017, at about 7:00 a.m. and parked in his usual spot close to the dumpsters. (Tr. 104; GC Exh. 7, marked as "B" on the photo.) After getting out of his car he walked past the slump rack and went to the drivers' breakroom. (Tr. 104; GC Exh. 7, marked as C and A on the photo.) Excellent claims that while waiting for his first load ticket in the breakroom, he noticed that his cell phone was missing and started to search for it in the breakroom and by asking other drivers about it. Before locating his cell phone, he received a ticket and left to deliver the load. (Tr. 108.) Upon returning from the delivery, he again attempted to locate his cell phone and asked plant manager Johnson about it. Johnson responded that Keith Chadwick, a ready-mix truckdriver and backup plant operator for Johnson, had found it near the slump rack and gave it to Johnson. (Tr. 109.) Excellent testified that Johnson told him it was okay to have his cell phone at the facility and that he was not going to tell Marion about it because Marion might consider the location where it was found suspicious. (Tr. 110.) Excellent returned to the breakroom to wait for his next ticket. (Tr. 112.)

I give little credit to Excellent's version of events on March 3 because it is inconsistent with the record as a whole. In general, Excellent had a tendency to exaggerate details of his work such as the frequency of being assigned deliveries with turnaround times of more than 4 hours, when company records and the testimony of another driver do not support such claims. (Tr. 94, 95, 132; R. Exh. 10.) The tone of Excellent's voice evidenced animosity that likely influenced his perception or accurate recollection of the events. Other portions of his testimony were simply inaccurate. For example, Excellent stated that he had misplaced his cell phone while waiting for his first load of the day and approached Johnson about his missing cell phone after making that

first delivery. Company records show that Excellent was issued his first ticket at 6:17 a.m. and that he returned to the plant at 8:07 a.m. He was issued a second ticket at 8:26 a.m. and returned to the plant at 10:04 a.m. (R. Exh. 10, at 26a and b.) Then he was not assigned another load.

I find other portions of Excellent's testimony implausible considering all the circumstances. For example, Excellent stated that he regularly stored his cell phone in his personal vehicle while making deliveries. If that is what occurred on March 3, one would think he would remember returning to his vehicle during the 19 minutes between trips to retrieve his phone and immediately thereafter being unable to locate it. No witnesses corroborated Excellent's testimony that he asked them if they had seen his cell phone before leaving to deliver his second load. Additionally, Excellent's claim that Johnson told him he was not going to tell Marion where the phone was found is also implausible. I can think of no reason that would have caused Johnson to mentioned Marion only to lie to Excellent about what he would tell Marion. I also note Excellent's lack of testimony expressing his conviction that the only way his cell phone could have possibly ended up by the slump rack was that he dropped it on his way from his car to the breakroom. While he would have crossed over the driveway that passes by the slump rack on his way to the breakroom his proximity to the slump rack when doing so is not established in the record and could have varied significantly based upon where he entered the breakroom. Finally, Excellent admitted that he sometimes kept his cell phone with him and, as discussed more below, refused to provide Respondent with his cell phone records to prove he had not made calls from his cell phone while away from the facility.[10] (Tr. 115, 153, 285.) Thus, considering the entire record, I do not find Excellent's testimony reliable when it is rebutted by other testimony or documentation.

Accordingly, I credit the testimony of Marion and Kennedy as to their interactions with Excellent after they arrived at the facility in response to learning that Chadwick had pulled up to the slump rack right behind Excellent and found his phone within 10 feet from where Chadwick exited his vehicle to use the slump rack. (Tr. 270–271.) Their testimony is consistent with each other's testimony and company records, and nothing in their demeanors gave me reason to discredit their testimonies as to their interactions with Excellent.

After speaking with Johnson, Excellent waited in the driver's breakroom. Marion and Kennedy arrived and spoke with Johnson and Chadwick about the situation. Although Marion was familiar with the area around the slump rack and understood Chadwick's description, Marion had Chadwick show him where he found the cell phone.

Excellent was asked to participate in a meeting with Marion, Kennedy, and Johnson in the office. Another driver attended the meeting as a witness, but the union was not informed of the meeting. Marion explained to Excellent that because his phone was found close to the slump rack they were going to investigate. Marion asked Excellent if he had taken his cell phone in his truck cab, and Excellent denied that he had. (Tr. 271.) Excellent claimed that he always carried his cell phone in his pocket while he was at the facility and that he had no idea how it ended up by the slump rack. Marion informed Excellent that he was suspended, pending an investigation. Excellent washed out his truck, clocked out, and left the facility. Later that same day, Kennedy called Excellent and told him not to report to work the next day. (Tr. 114.)

On March 6, Kennedy called Excellent and told him that the investigation was ongoing and not to report to work. Kennedy told Excellent that they wanted him back at the facility and requested that Excellent submit his cell phone records for the 2 months leading up to and including March 3 to verify that he had not used his cell phone while working away from the facility. Excellent adamantly refused to provide any of his cell phone records and directed Kennedy to speak to the Union about this matter. (Tr. 116, 352–353.)

On March 8, Beer emailed Rolle informing him that Excellent had been suspended pending investigation. (Tr. 192, 194; GC Exh. 8.) This was the first communication that the Union received concerning Excellent's unpaid suspension. (Tr. 117, 192, 194.) Beer and Rolle communicated multiple times by telephone and email over the next 7 weeks attempting to resolve the situation. Beer continued to request Excellent's cell phone records and offered to shorten the timeframe of the requested period. Beer provided Rolle with utilization records illustrating how he could compare the trip times to Excellent's cell phone call history if provided. (R. Exh. 11(a)–(k).) Beer explained that based upon the circumstances, Respondent believed that Excellent had his cell phone with him in the cab of the truck. Respondent was willing to disregard that conclusion if Excellent's phone records verified that he had not made calls when the utilization record evidences that he was working away from the facility. For example, Beer's March 9, 2017 email to Rolle included copies of the driver utilization report for Excellent from January 1 to March 3, 2017. Beer explained how to read the report and stated: "This report should address your concerns about the company being able to match [Excellent's] phone records to his being in the truck versus just being punched in." (R. Exh. 11(a) at p. 1.) Beer testified that he was willing to work with Rolle to attempt to verify Excellent's claim that he did not possess the phone in his work truck, because Excellent was an efficient, reliable driver. Excellent was still unwilling to provide the requested records.

Ultimately Respondent decided that the available evidence supported its conclusion that Excellent had his cell phone with him in the cab of the ready-mix truck and that he dropped it when he exited the truck to use the slump rack, which resulted in Chadwick finding it immediately thereafter. Respondent determined

[10] When asked why he would use his cell phone at work, Excellent responded that he would use it to keep in touch with his family. (Tr. 137–138.) General Counsel did not solicit any testimony concerning employee use of cell phones for Sec. 7 purposes. Beer testified that Respondent lost the representation election 13 to 1 with the cell phone policy in place in support of Respondent's argument that employees have sufficient opportunity to communicate with each other. I find that the election results do little to evidence employees' opportunity to communicate with each other. I have no way of knowing if or how much they communicated with other employees. The employees may have favored unionization for various reasons without significant communication with each other.

that Excellent's failure to provide another reliable explanation for why the cell phone was found in that location and his unwillingness to provide any of his cell phone records supported that conclusion. (GC Exh. 6.) On April 26, 2017, Beer communicated this determination to Rolle by email marking the point of impasse in the parties' negotiations.

On about April 28, 2017, Respondent issued a discharge letter to Excellent informing him of the termination of his employment for violating the cell phone policy. (GC Exh. 6; Tr. 117.) The letter stated in pertinent part:

> As we have made clear from the outset of your employment, Argos, USA has zero tolerance for the use or possession of a cellular telephone while operating a commercial motor vehicle or while on any job site…Management has consistently adhered to a past practice of terminating all employees who violate the company's cell phone policy. After a thorough review of the facts before us and after carefully considering the arguments and proposals advanced by the Union on your behalf; management has decided to apply that practice to the circumstances of your case, and to terminate your employment effective immediately. [GC Exh. 6.]

On May 25, 2017, Beer made another attempt to resolve the matter by requesting that Excellent provide cell phone records and the parties meet to compare the records to the driver utilization report. (R. Exh. 11(k).) Neither Excellent nor the Union agreed to this offer.

5. Comparable discipline for violating the cell phone policy

Beer, Marion, and Kennedy testified that Respondent has a consistent policy of immediately suspending employees pending investigation in situations involving a suspected cell phone policy violation. (Tr. 283, 314, 349, 365, 401, 437.) As Respondent asserts, no testimony rebuts these claims as far as the suspension pending investigation and subsequent discharge practice that managers in the south Florida Region practiced.

The evidence from Respondent's Florida operations shows that 10 alleged cell phone policy violations resulted in suspensions, pending investigation and culminated in discharge. (See Tr. 235–237 and GC Exhs. 12 and 13; Tr. 304 and R. Exh. 3; Tr. 304 and R. Exh. 5; Tr. 356–357 and R. Exh. 6; Tr. 358 and R. Exh. 7; Tr. 359–361; Tr. 362 and R. Exh. 9; Tr. 425 and R. Exh. 12; Tr. 436 and R. Exh. 13; R. Exh. 15; Tr. 426 and R. Exh. 16.) These incidents ranged from employees being observed using cell phones while driving to employees only possessing cell phones or blue tooth devices in Respondent's commercial vehicles. An example of the types of cell phone use that resulted in employees being discharge is ready–mix driver Bello's situation. Bello spilled concrete while making a delivery. He used his cell phone to take pictures of the spill and called management. His termination notice cited both the use of his cell phone for taking a picture of the spill and for calling management as evidence that he violated the policy. (R. Exh. 8.) There was no contention that Bello had used his cell phone while driving.

In one incident arising in Florida, Respondent was unable to verify whether the driver was suspended before being discharged, but Beer testified that the policy should have been followed. (Tr. 436–437 and R. Exh. 14.) According to Beer this policy was implemented company wide, but the records do not reflect that this was ever a written policy. Beer testified that as Respondent has acquired more and more facilities, implementing uniform policies and uniformly enforcing them has been an ongoing process. This is apparent in the varying discipline forms used and discipline issued at various locations. The record reflects that these locations maintained the cell phone policy forbidding the presence of a cell phone in the cab of a ready-mix truck, but their procedures in handling cell phone violations differ greatly. (GC Exh. 16–24; R. Exh. 17–53.)

In reviewing the documents from outside the south Florida region, Beer's assertion that he enforced a company-wide policy of suspension pending investigation before discharge is not reflected in Respondent's records. In 14 incidents where employees were found to have violated the cell phone policy by having and/or using a cell phone in the cab of a ready-mix truck, the employees were suspended typically for 3 days or given some other punishment short of discharge. There is no evidence that these employees were suspended pending investigation before they were issued discipline. (GC Exhs. 16–24; R. Exhs. 25, 45, 52, 53.) In four of these incidents employees where issued discipline short of termination for violating the cell phone policy, and those disciplines were used later in the progressive discipline process to discharge them only after they violated some other policy, as the Company's discipline policy states. (GC Exhs. 23, 24: R. Exhs. 25, 45, 52, 53.) In 33 situations, the employees were discharged for violating the cell phone rule, but the records do not indicate that they were suspended pending investigation before they were discharged. (R. Exh. 17–42, 46–52.) Often the records reflect that the discharge was effective immediately and no passage of time between the incident and the date of discharge occurred. In two other incidents, the employees were suspended and then later discharged for violating the cell phone policy similar to what occurs in Respondent's Florida region. (R. Exhs. 43 and 45.) In each of these discipline situations, Respondent had more direct evidence that an employee had violated the policy in comparison to Excellent's situation.

Additionally, the records in two discipline situations reflect that as late as October 2016, Respondent allowed some of its employees to transport a cell phone in a yellow box attached to the outside of the ready-mix truck, but the employees were forbidden from having the cell phone in the cab of the truck. (R. Exhs. 53 and 18.)

ANALYSIS

1. Respondent's work rules

a. Board precedent analyzing employee rules

The Board has long found that employers' rules, policies or handbook provisions that reasonably tend to chill employees' exercise of their rights guaranteed by Section 7 of the Act, whether enforced or not, violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824,825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), enfd. sob nom *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002). Some rules on their face blatantly interfere with employees' Section 7 rights, such as a rule that directly prohibits employees from discussing their wages. Other rules clearly do not involve

employees' Section 7 rights, such as a rule prohibiting working under the influence of a controlled substance.[11] Other employee rules, intentionally or not, are facially neutral but written in ambiguous or broad language or in the context of other language that requires the employee to interpret the meaning of the rule and its implications on their Section 7 rights. These rules that touch upon Section 7 rights and lend themselves to interpretation due to vague, ambiguous, or broad terms are the subjects of much litigation before the Board.

The Board's latest attempt to develop a standard to analyze whether employer rules infringe upon their employees' Section 7 rights is set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing*, the Board's new standard specifically overruled the holding in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), finding a facially neutral rule violates the Act when employees "would reasonably construe" it to interfere with, coerce or restrain them in the exercise of Section 7 rights. Id. at slip op. 2. Instead, the Board applied a "reasonable employee" standard to determine if employees could reasonably interpret a facially neutral rule to infringe upon their Section 7 rights. Id. The *Boeing* standard requires that:

> 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. We emphasize 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).[12] Id. at slip op. 3.

I agree with General Counsel that the rules at issue in this case are facially neutral rules that, when reasonably interpreted, would potentially interfere with the exercise of rights afforded by the Act, and therefore, should be given individual scrutiny under the standard set forth in *Boeing* "to strike the *proper balance* between…asserted business justifications and the invasion of employee rights in light of the Act." Id. The Board in *Boeing* clarified that:

> when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful. Again, the Board must carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights, in addition to potential justifications, and the rule's maintenance will violate Section 8(a)(1) if the Board determines that the justifications are outweighed by the adverse impact on rights protected by Section 7. Id. at slip op. 16.

In *Boeing*, the Board majority did not specifically address the concept of a facially neutral rule being unlawful because it is overbroad and more tailored language would protect the employer's legitimate business justifications without or with less infringement on employees' Section 7 rights. See *Cintas Corp.,* 344 NLRB 943, 945 (2005), enfd. by *Cintas Corp. v NLRB,* 482 F.3 463 (D.C. Cir. 2007). The Board's emphasis in *Boeing* on its duty to "carefully evaluate the nature and extent of a rule's adverse impact on NLRA rights" seems to support the idea that the extent of the infringement on employees' rights (i.e. the broadness of the rule) is part of the balancing test.

Furthermore, the Board did not overturn *Lafayette Park Hotel* in which the Board reaffirmed its precedent finding that the mere maintenance of overbroad work rules can violate Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825, 828 (1998); *American Cast Iron Pipe Co.*, 234 NLRB 1126 (1978), enfd. 600 F.2d 132 (8th Cir. 1979). Therefore, I must assess the lawfulness of Respondent's employee confidential information agreement and its electronic communications policy; even though, there is no evidence in the record that these rules have been used to discipline any employee.

b. Employee confidential information agreement

Respondent's employee confidential information agreement recognizes that employees may have access to "confidential Company information" and limits employees' "use" of that information for "only" the "purposes of carrying out Argos' business." The policy goes on to specifically forbid the use or disclosure of such confidential information "without the express written consent of the General Counsel of Argos." The policy defines confidential information as "all private information not generally known in the industry and not readily available, written or otherwise including, but not limited to, information regarding…earnings…[and] employee information…"

The string of items listed in the definition initially are confined to information concerning Respondent's proprietary interests such as customers, suppliers, subcontractors, production methods, contracts, pricing, and business plan. I agree with Respondent that confidentiality provisions limited to these investment and proprietary information of a company do not impact employees' Section 7 rights or to the extent that they may, a company's legitimate business interests would outweigh the infringement on employee rights.[13] If the list contained only terms confined

[11] While any rule could be discriminatorily promulgated or applied in retaliation for employees' protected activity in violation of Sec. 8(a)(3) and (1) of the Act, there are no allegations that the rules at issue in this matter were discriminatorily promulgated or applied.

[12] In *Boeing*, the Board stated that through future cases it will place rules into 3 categories: Category 1—will consist of facially neutral rules that when, reasonably interpreted, would interfere with the exercise of NLRA rights but that the Board designates as lawful to maintain (i.e. rules prohibiting certain conduct, at least in a certain types of industries, for which the Board has determined that employer business justifications outweigh the impact on employees' rights under the Act); Category 2—rules that warrant individualized scrutiny using the standard set forth above; and Category 3—rules that the Board designates as unlawful to maintain apparently in any setting. Since the *Boeing* decision, the Board has yet to provide additional guidance in subsequent decisions allotting specific rules to these categories. Therefore, I find it necessary to apply individual scrutiny to the rules at issue in this matter by evaluating them in light of the two-part standard set forth in *Boeing*.

[13] Respondent relies heavily on NLRB General Counsel Memorandum 18-04 and Advice Memorandum re: Case 20–CA–171751 in contending that its confidentiality policy should be considered lawful under *Boeing* as a Category I, lawful rule. (R. Br. at pp. 66–69.) First, I note

to Respondent's proprietary interests, a reasonable employee may read the term "earnings" to apply solely to earnings of the company, but the inclusion of the term "employee information" in the list clarifies to the reader that the definition encompasses more than company proprietary business information. Thus, applying the reasonable employee standard articulated in *Boeing*, I find that a reasonable employee would interpret the inclusion of the term earnings to include employee wages in the context of this rule.[14] The Board has long held that the ability for employees to discuss their wages amongst themselves is a core right protected by Section 7 of the Act. See *Victory, LLC d/b/a Victory Cruises II*, 363 NLRB No. 167, slip op. at 6–7 (2016); *Waco, Inc.*, 273 NLRB 746, 748 (1984); In re *Alaska Ship & Drydock, Inc.*, 340 NLRB 874, 878 (2003); *Continental Chemical Co.*, 232 NLRB 705 (1977).

I further find that a reasonable employee would likely interpret the term "employee information" to include a broad range of information about employees, such as names, addresses, phone numbers, wages, raises, benefits, promotions, discipline, etc. I find that it is difficult to derive another meaning of the term based upon the context of the list, because it is not a logical extension of that list and sticks out as not being related to the other terms. The language of the rule in no way limits the rule to more sensitive employee information and is not limited to employees who have knowledge of such information solely from access to employee files which contain personal information such as bank account and social security numbers, medical information, etc. Without a readily apparent alternative meaning based upon the context of the provision, reasonable employees will interpret it to mean that no employee is permitted to share employee information despite how they acquired that information. Furthermore, I find no language noting exceptions to the confidentiality rule which would permit employees to discuss their general knowledge of employee contact information, compensation, discipline, or any other specific terms and conditions of employment with fellow employees or the public.

The Board has long held that rules enforcing nondisclosure of confidential employee information to infringe upon employees' Section 7 rights. In *Flex Frac Logistics*, 358 NLRB 1131 (2012), affd. in relevant part 198 LRRM 2789 (5th Cir. 2014), the Board restated established precedent that "…nondisclosure rules with very similar language are unlawfully overbroad because employees would reasonably believe that they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives—an activity protected by Section 7 of the Act." *IRIS U.S.A., Inc.*, 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that stated all information about "employees is strictly confidential"); *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) (rule prohibiting employees from discussing grievance/complaint information, disciplinary information and other work-related matters unlawful).

Therefore, I find that Respondent's confidentiality rule "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights," necessitating an analysis of "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." Any rule that is reasonably interpreted, as I have found here, to prevent employees from discussing their wages, compensation, promotions, hours, discipline, contact information, etc. has the potential for significant impact on employee exercise of Section 7 rights. Such employee information is the subject of and the foundation for most protected concerted activities under the NLRA. While Respondent, like most any company, has a substantial interest in protecting its trade secrets, customer and supplier lists, and other proprietary interests, these legitimate employer interests are not demonstratively furthered by prohibiting employees from discussing or sharing employee information including employee earnings. In some circumstances, employers may have a duty to prevent employees with access to human resource files from divulging certain employee information such as medical information, but Respondent's rule is not narrowly tailored to address this concern. Significantly, Respondent failed to assert any justification for the necessity of including these terms in the confidentiality definition in order to protect its legitimate proprietary interests.

Accordingly, I find under the circumstances of this case that the Respondent's maintenance of a rule requiring employees to keep confidential earnings and employee information violates Section 8(a)(1) of the Act.

c. Respondent's electronic communications policy

In *Purple Communications, Inc.*, 361 NLRB 1050 (2014), the Board overturned prior precedent and found that it:

> will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, [the Board] anticipate[d] that it will be the rare case where special circumstances justify a total ban on nonwork email use by employees. In more typical cases, where special circumstances do not justify a total ban,

---

that such memoranda are not Board precedent. Instead, they are only the position of General Counsel, one of the parties to any complaint before the Board. Furthermore, neither of these memoranda addresses the issue in this matter: whether the inclusion of the terms "earnings" and "employee information" in a confidentiality rule that would otherwise be limited to a company's investment and proprietary information is unlawful? Notably, the confidentiality clause at issue in the Advice Memorandum does not include the term "employee information."

[14] Respondent argues that no evidence of record refutes its assertion that the term "earnings" in the confidentiality agreement refers to company earnings. No evidence of record supports that assertion or a finding that such a clarification of the term was ever published or communicated to the employees. I note that Respondent's brief does not cite actual evidence to support the assertion that the term meant company earnings. Instead, it cites only to Respondent's opening statement for the proposition that the term refers to "company earnings." (R. Br. at p. 68; Tr. 51.) Respondent's asserted, but uncommunicated meaning does not shed light on how a reasonable employee would interpret the term in the context of Respondent's published rule. Thus, I give no weight to this argument.

> employers may nonetheless apply uniform and consistently enforced controls over their email systems to the extent that such controls are necessary to maintain production and discipline. Id. at 1063.

I agree with General Counsel and Respondent that the holding in *Boeing* does not overturn the Board's holding and standard set forth in *Purple Communications*.[15] (GC Br. at pp. 41–42.) In *Purple Communications*, the Board balanced the competing property rights of a company over its email system and the rights of employees Section 7 rights in favor of the employees' rights. If an employer maintains a ban on employee use of its email system for personal communications during nonwork time the rule is presumed unlawful, then it is the employer's burden to prove that special circumstances exist in its operations sufficient to tilt the balance of competing rights in the employer's favor.[16]

As discussed above, there is scant evidence in the record about who utilizes Respondent's email system or to whom the rule limiting its use "for business purposes and not for personal purposes" is applicable. The fact that the ready-mix unit employees focused upon in this case did not have access to the email system is not dispositive of the issue of whether the rule unlawfully infringes on any of Respondent's employees' Section 7 rights. The evidence reflects that Respondent requires all of its employees to sign the policy. Respondent witnesses never testified that the rule is not applicable to any of Respondent's employees. I note that the questions posed by Respondent's counsel to its witnesses were specifically limited to batch plant employees and thereby tailored to avoid the issue of whether it is applicable to other statutory employees of Respondent. Despite what appeared to be active avoidance by Respondent and a failure by General Counsel in soliciting relevant evidence on this issue, I can only conclude that there are some statutory employees assisting in the operations of a company the size of Respondent's with access to its email system, hence Respondent's requirement that employees sign the policy.

To the extent that Respondent employs statutory employees with access to its email system, the Board presumes the policy to be an unlawful invasion on their Section 7 rights. Respondent presented no evidence to rebut that presumption. Accordingly, I find that to the extent Respondent's policy stating that its email system "is to be used for business purposes and not for personal purposes," is applied to statutory employees with access to the email system, it is a violation of Section 8(a)(1) of the Act.

d. Respondent's limits on personal cell phone usage

General Counsel concedes that Respondent has a legitimate safety interest in forbidding employees from using cell phones while driving heavy commercial vehicles, including ready-mix trucks. General Counsel has not taken the position that the ready-mix truckdrivers should be allowed to use cell phones via hands-free devices while operating the trucks as is allowed by the FMCSA regulations. Instead, General Counsel contends that Respondent's cell phone policy's prohibition on mere possession of a cell phone in its heavy commercial vehicles is overly broad and not narrowly tailored to address its legitimate safety interests in violation of its employees' protected Section 7 rights, because it denies them access to their cell phones during nonwork time. Respondent contends that its policy against possessing a cell phone in its heavy commercial vehicles is necessary to ensure that drivers do not use cell phones while driving. Respondent claims that the weight of the ready-mix trucks, 70,000 pounds when loaded, makes them more dangerous than other vehicles operated by some of its employees necessitating the more stringent rule applied to them.

"The Board has long held, with court approval, that the Section 7 right to organize and bargain collectively 'necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.'" *Purple Communications*, supra at 1062, quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). See also, *Estex Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972); *Republic Aviation*, 324 U.S. 793, 803 (1945); *Parexel International, LLC*, 356 NLRB 516, 518 (2011). "The place of work is a place uniquely appropriate for dissemination of views" by employees. *NLRB v. Magnavox Co*., 415 U.S. 322, 325 (1974). The Board has also held that employees may use personal devices to record and photograph information in furtherance of their Section 7 rights, absent a legitimate business reason to prohibit such conduct. *Boeing,* supra at slip op. 18-19; *Hawaii Tribune-Herald*, 356 NLRB 661, 661 (2011), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *Republic Aviation*, 324 U.S. 793, 803 (1945).

While Respondent's cell phone policy does not facially prohibit employees from discussing, photographing, or recording information about their terms and conditions of employment, it effectively prevents them from doing so while away from the facility. Accordingly, under *Boeing*, I must evaluate (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.

Employees' personal cell phones are by far the most commonly used devices by which employees engage in non-face-to-face conversations (via text, talk, or email), take photographs, and make recordings. Respondent's ready-mix drivers have a greater need for non-face-to-face conversations because of their staggered shift start and end times, the time that they spend away from the facility, and their erratic break and lunch schedules.

Respondent contends that the drivers have other means by which to communicate and take photographs while away from the facility. Respondent asserts that its employees can use company provided two-way radios to communicate with each other, including apparently engaging in protected concerted communications. This argument fails for two reasons. First, Respondent's two-way radios are constantly monitored by batch plant supervisors, admitted supervisors as defined in Section 2(11) of the Act, and often by other management officials. Respondent's monitoring of the two-way radio communications is very likely to chill reasonable employees' communication about work related issues. Second, employees' ability to communicate via the

[15] Respondent argues further that *Purple Communications* should be overturned, but I am bound by the Board's current precedent. (R. Br. at pp. 71–73.)

[16] The Board's balancing test in *Purple Communications* is similar to the balancing test required by *Boeing*.

two-way radios is limited by Respondent to communications about the current stage of or complications with work. While some short casual chat among drivers occurs without repercussions, Respondent's reminders about its limits on the use of the two-way radios is highly likely to chill employees' exercise of their Section 7 rights via the two-way radios.

Respondent also claims that disposable cameras are available for employees in the cab of each truck. The drivers are trained that these cameras should be used to take pictures of accidents or situations involving the trucks for use by Respondent. Employees are unlikely to use them in furtherance of their Section 7 rights because Respondent has not informed employees that they are free to use them for other purposes without any repercussions or questions. Even if Respondent told employees that they could use the disposable cameras, it would put employees in the uncomfortable position of asking for replacement cameras if they opted to use the company provided camera for documenting terms and conditions of work that they wanted to share with other employees or a union representative but not Respondent. Again, I find that Respondent's asserted solution for the issue is untenable because it is likely to chill reasonable employees from exercising their Section 7 rights.

In making ready-mix deliveries, the time to document safety issues or other difficulties on the jobsites or incidents that occur between jobsites and the facility is in the moment. Employees cannot take a picture or make a recording of a condition of work away from the facility after they return to the facility. For example, when driver Bello spilled concrete while making a delivery, he took a picture with his cell phone. While the record does not establish that Bello intended to or did use the picture for any concerted activity, such use is conceivable. Respondent's discharge of Bello in part for using his cell phone to take a picture of the spill is very likely to chill other employees from taking pictures for use in concerted activities.

Similarly, employees who regularly take breaks away from the facility are denied the opportunity to make a call, text, or email to or receive a message from other workers or a union representative during that break. Respondent's policy prohibiting employees from possessing a cell phone while away from the facility virtually eliminates the drivers' ability to communicate with other employees, take pictures, or make recordings concerning their wages, hours, and working conditions during as much as 85 percent of their shifts. During much of the time that they are at the facility, they are not allowed to possess or use their cell phones because they are in and out of the truck cab to perform work (e.g. pretrip check, fueling, loading, inspecting the load, and washing and parking the truck). Therefore, I must assess whether Respondent has legitimate business justifications for maintaining its prohibition on the possession of cell phones in its commercial trucks which warrants the nature and extent of this impact to its drivers' rights guaranteed by Section 7 of the Act.

Respondent's prohibition on the possession of cell phones in its heavy commercial trucks is considerably more restrictive than the FMCSA regulations allowing the use of cell phones while driving such vehicles providing that certain standards for hands-free operations are met. The FMCSA allows cell phone use requiring no more than an on/off button touch. Similarly, Respondent allows its drivers to use two-way radios while driving for short communications; even though, the radios require the use of one hand throughout the communication. Respondent allows the use of cell phones with hands-free devices in its work vehicles driven by mechanics and managers. Respondent also issued Nextel phones to its block truckdrivers which can be utilized like a cell phone and at a minimum require one hand to operate as a two-way radio. While these vehicles are not as heavy as ready-mix trucks, they too can cause serious bodily harm or death and damage to property if the driver is distracted by a cell phone and wrecks the vehicle.

Respondent's main arguments for the complete prohibition on cell phones in its ready-mix trucks is to remove drivers' temptation to use them while driving and that the weight of these vehicles warrants the extra precautions.[17] While no party disputes that a ban on cell phone usage while driving a ready-mix truck reasonably furthers Respondent's safety goals, there is no evidence that the prohibition on the mere presence of a cell phone in the ready-mix trucks furthers this goal. Respondent contends that forbidding employees from having their cell phones in the trucks prevents employees who are willing to use cell phones while they are driving from doing so. A review of Respondent's discipline documents illustrates that in many cases employees' use of cell phones while driving company commercial trucks is what alerted management to their possession of a cell phone in violation of the policy. Hence, the prohibition on the presence of cell phones in the trucks did not prevent these employees from using them. Some employees are simply less risk adverse than others. Employees who are willing to risk discharge, substantial property loss, and more importantly serious injuries or death of themselves and others, in order to use a cell phone while driving a ready-mix truck are not likely to be deterred by the threat of discipline or discharge for the possession of a cell phone in their truck.

The standard for balancing employers' legitimate interests against employees' Section 7 rights cannot be that employers may institute the most restrictive rules possible because some employees will break less stringent rules that adequately protect the employer's legitimate interests. Such a standard would not be in line with the *Boeing* decision's emphasis on balancing the nature and extent of the rule's impact on employee rights with the employer's legitimate interests. Taken to its logical conclusion such a reading of the standard would allow an employer to preclude employees from discussing any employee information including wages because the employer has a legitimate business reason for prohibiting certain employees from disclosing a

[17] Respondent argues that employees would be allowed to use the disposable cameras to document safety issues or performance issues at the jobsite. Thus, Respondent asserts no legitimate business reason for why employees should be precluded from taking photographs or recordings of their working conditions and no justification for why a cell phone could not be used for that purpose, but for its prohibition on them being in the vehicle. Thus, this case is distinguishable from *Boeing* where the Board found that the employer had legitimate security and contractual reasons for forbidding photography and recording in its facilities via cell phones or other personal devices. Supra at slip op. 19-21.

limited type of employee information, as discussed above. Instead, a rule that fulfills Respondent's legitimate safety needs, if followed, but does significantly interfere with employees' exercise of their Section 7 rights is the balance the *Boeing* standard intends to reach. As General Counsel concedes, Respondent can have restrictions on cell phone use in its company trucks short of a full ban on the possession of such devices (i.e. requiring cell phones to be powered off and/or in a glove compartment when the truck is not safely parked).[18]

Thus, I find that the employees' Section 7 rights to communicate with other employees and union representatives and to take pictures or recordings of their terms or conditions of work during the majority of their workday outweighs Respondent's asserted business justification for the total ban on the possession of a cell phone in its commercial vehicles/ready-mix trucks. Accordingly, I find that Respondent's cell phone policy, as written, violates Section 8(a)(1).

2. The discharge of Excellent pursuant to the cell phone rule

In *Continental Group*, 357 NLRB 409 (2011), the Board held that discipline pursuant to an unlawfully overbroad rule is unlawful only if the employee "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7." Id. at 412. See also, *Flex Frac Logistics, LLC*, 360 NLRB 1004 (2014). No party contends that the conduct for which Excellent was suspended and discharge is protected conduct meeting the first prong of the standard. General Counsel contends that Excellent's conduct meets the second prong because possessing a cell phone to take pictures, make recordings or communicate with other workers during the majority of their working time is conduct that implicates the concerns underlying Section 7.

The Board has issued limited examples of conduct that implicates Section 7 activities. In discussing the second prong in *Continental Group*, the Board focused on whether disciplining an employee for the conduct at issue is likely to chill other employees' exercise of Section 7 rights. As an illustration of this concept, the Board provided an example of an employee who complained about his own wage but did not complain about wages in concert with other employees, thus the employee had not engaged in concerted activity. The Board explained that employees are not likely to know the distinctions between individual and concerted activity addressing wages, hours, and other terms and conditions of work. Based upon learning that their coworker was discharged for discussing his wage pursuant to the overly broad rule, then employees are likely to avoid protected concerted discussions about wages and/or raises as well. *Continental Group*, supra at 412. In contract, the discharged employee in *Continental Group* was living out of his car which he frequently parked overnight on the employer's premises. The employer discharged the employee pursuant to an overly broad rule prohibiting employees from being on company property, but specifically for sleeping on the property. The Board found that his discharge was lawful, because the conduct was totally distinct from and did not implicate protected conduct (i.e. employees would perceive sleeping on company property as distinct from protected conduct on company property). Id. at 413.

Considering the Board's emphasis on how employees would reasonably interpret the implications of another employee's discipline pursuant to an overbroad rule on their freedom to engage in protected concerted activity, I find that the circumstances of this case meet the standard set forth in the second prong. I agree with General Counsel that employees learning that Excellent was suspended and discharged because Respondent suspected he possessed his cell phone in the commercial vehicle he drove is very likely to chill employees protected use of cell phones in similar circumstances. Changes to the wording in the policy will not erase the employees understanding that Excellent was discharged because Respondent suspected he had his phone and will continue to deter them from exercising their Section 7 rights. Accordingly, I find that Excellent engaged in conduct that otherwise implicates the concerns underlying Section 7.

An employer can "avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." Id. Mere evidence that the employee violated the overbroad rule is insufficient to meet this burden; the employer must demonstrate that the employee's conduct interfered with the performance of the employer's operations and the employer must cite that interference as a reason for the discharge. Id.

In *Flex Frac*, the employer maintained an overly broad confidentiality rule. An employee intentionally disclosed the rates that Flex Frac charged its customers for deliveries, which caused the trucking companies performing the deliveries for Flex Frac to demand higher reimbursement rates. The employer cited the disclosure of the proprietary information, for which it had a legitimate business reason to prohibit, as the reason it discharged the employee pursuant to its overly broad confidentiality rule. The Board found the discharge lawful because Flex Frac proved that the employee's conduct interfered with its business operations and cited that interference as the reason for the employee's discharge. Supra at 1004–1005.

The record contains no evidence that Excellent's conduct interfered with the performance of his or other employees' work. Respondent presented no evidence of any costumer complaint about Excellent's work performance. To the contrary, Excellent was considered an efficient driver because his average trip time of 2.08 hours was close the facility average of 2.0 hours. (Tr. 131, 295, 367.) Respondent was willing to return Excellent to work if his cell phone records verified that he did not break its cell phone policy.

Respondent contends that Excellent's refusal to produce his

[18] Based upon Respondent's discipline records, as late as October 2016, it allowed ready mix drivers in some locations to store their cell phones in yellow boxes on the outside of the ready mix trucks for use outside the truck while away from the facility. (GC Exh. 18 and R. Exh. 53.) Neither General Counsel nor Respondent addressed this arrangement. I cite this practice here only as an example of how Respondent could keep cell phones out of the cabs of ready-mix trucks, if it so wishes, but give employees access to them to document working conditions and for communication purposes while outside of their trucks away from the facility.

cell phone records prevented it from proving it had cause to discharge him or to prove that he was unfit to return him to work. I find that this argument could meet the Board's test in *Continental*, if, prior to his discharge, Respondent had taken the position that it would discharge him only for using his cell phone while he was actually operating the ready-mix truck. Respondent then could contend that it discharged him because of the risk associated with using cell phones while driving the truck which interferes with Respondent's safe operations. The record does not support such an assertion.

First, Excellent was suspended pending investigation, which in all frankness meant he was suspended pending discharge, for the mere suspicion that he had his cell phone in the cab of the truck. Respondent did not request his cell phone records until after he was suspended; therefore, his refusal to provide them played not role in that decision. Second, Beer's March 9 email to Rolle clarifies that he was seeking Excellent's cell phone records to determine if Excellent ever used the phone "in his truck versus just being punched in," meaning away from the facility regardless whether he was driving at the time. Furthermore, Respondent stated in his discharge letter that Excellent was being discharged pursuant to its policy prohibiting the possession or use of a cell phone in a ready-mix truck as was Respondent's practice to enforce the rule. I find no evidence that supports a conclusion that Respondent would have discharged Excellent only if his phone records proved he had used the phone while driving. Thus, I find that when Respondent suspended and later followed through with the discharge, it had no evidence that Excellent's conduct actually interfered with his or other employees' work performance or with Respondent's business operations.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by discharging Excellent pursuant to its unlawfully cell phone policy.

3. Respondent's suspension of Excellent

General Counsel cites *Total Security Management Illinois 1, LLC.*, 364 NLRB No. 106 (2016), to support its contention that Respondent had a duty to bargain with the Union before suspending Excellent pending investigation and that its failure to do so violated Section 8(a)(5) and (1). In *Total Security*, the Board extended its longstanding precedent prohibiting employers from making unilateral changes in terms and conditions of employment while it is bargaining with the employees' representative for an initial contract to individual employee discipline that significantly impacts the employee's terms and conditions of work. The Board held "that an employer must provide its employees' bargaining representative notice and the opportunity to bargain before exercising its discretion to impose certain discipline on individual employees, absent an agreement with the union providing for a process, such as a grievance-arbitration system, to address such disputes." Id. at slip op. 1.

The Board found that disciplining employees, including demoting or suspending without pay, alters their terms and conditions of employment if the discipline "is not controlled by preexisting, nondiscretionary employer policies or practices." Id. at slip op. 3. An employer has the duty to bargain if "the changes had a *material, substantial, and significant impact* on the employees' terms and conditions of employment." Id., citing *Toledo Blade Co.*, 343 NLRB 385, 387 (2004) (emphasis added). The Board determined that "actions such as suspension, demotion, and discharge plainly have an inevitable and immediate impact on employees' tenure, status, or earnings…requiring bargaining *before* these sanctions are imposed." Id. Other actions, such as oral and written warnings that do not automatically result in further discipline, do not require bargaining unless or until they result in further discipline that has a material, substantial, and significant impact on terms and conditions of employment. Id. at slip op. 4. "And if the change is consistent with established practice in some respects but also involves an exercise of discretion by the employer, the employer must bargain over the discretionary aspects of the change." Id. See also, *Oneita Knitting Mills*, 205 NLRB 500 (1973); *Washoe Medical Center*, 337 NLRB 202 (2001).

Respondent asserts that it was not required to bargain with the Union about Excellent's suspension pursuant to the Board's holding in *Total Security*. First, Respondent contends that Excellent's suspension pending investigation did not have an inevitable and immediate impact on Excellent's tenure, status or earnings, and even if it did, Respondent was excused by exigent circumstances from bargaining with the Union over the suspension. To support this contention Respondent cited *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), vacated by *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and *Pallet Companies, Inc. GC Advice Memo,* Case 04–CA–102068 (Feb. 25, 2015), which relied upon the reasoning in *Alan Ritchey*. I agree with Respondent that the reasoning set forth in *Alan Ritchey* is consistent with the Board's reasoning in *Total Security*, but *Alan Ritchey* is not precedent which can be relied upon.[19] In asserting that the reasoning in *Alan* Ritchey is instructive in this case, Respondent points to the finding in *Alan Ritchey* that an investigation does not impact an employee's tenure, status or earnings. Respondent asserts that this reasoning supports a finding that Excellent's suspension pending investigation did not impact his terms or conditions of work.

This argument is contrary to the Board's findings in *Total Security,* and an inaccurate statement of the reasoning in *Alan Ritchey.* In discussing employer's ability to respond to exigent circumstances, such as an employee who had engaged in unlawful conduct or threatening behavior, *Total Security* considered the situation where an employer suspends an employee pending investigation. "An employer who takes such action should promptly notify the union of its action and the basis for it and bargain over the suspension after the fact, as well as bargain with the union regarding any subsequent disciplinary decisions resulting from the employer's investigation." *Total Security*, supra at slip op. 9, fn. 20; See also, *Alan Ritchey*, supra at 404 fn. 19 (containing the same quoted language).

The clear implication of this statement is that a suspension pending investigation is a change in the employee's terms and

[19] As discussed above, Advice Memoranda and General Counsel Memoranda are not precedent but the position of one party before the Board.

conditions of employment. This result follows from the Board's holding and reasoning in *Total Security* that "the obligation to bargain is triggered before a suspension, demotion, discharge or analogous sanction is imposed." Supra, at slip op. 5. I note that the evidence of suspensions pending investigation for violations of the cell phone policy at Respondent's Florida facilities are more aptly described as suspensions pending discharge absent some exonerating evidence. Beer's reasoning for suspending employees pending investigation was to allow employees to assert a defense to Respondent's determination to discharge them, as what was done in Excellent's case. Even if Excellent was later exonerated and reimbursed for his backpay, he was immediately suspended without pay, which is clearly a material, substantial, and significant impact on his terms and conditions at that time. Therefore, I find that only exigent circumstances that required immediate action by Respondent for safety or significant liability reasons could have excused Respondent from giving the Union notice and the opportunity to bargain regarding the suspension before its implementation.

I find that no exigent circumstances existed at the time Excellent was suspended. The available evidence led Respondent to believe that Excellent had his cell phone in the ready-mix truck cab. Respondent had no evidence that Excellent ever used his phone while driving the ready-mix truck. As discussed above, there is no evidence of record that the mere presence of a cell phone in a ready-mix truck cab increases the likelihood of an accident. Even the FMCSA regulations do not forbid cell phone presence or use in these vehicles with the right precautions. Respondent's own rules recommend only temporary suspensions for the first violation of this policy. Managers in other geographic regions have issued mere warnings or temporary suspensions that allow employees, for which there was direct evidence that they had violated the policy, including by using the phone while driving, to return to work within 4 days. Based upon the record evidence, I do not find that exigent circumstances excused Respondent from giving the Union notice and opportunity to bargain about the suspension of Excellent. Even if the situation involving Excellent constituted exigent circumstances, Respondent had a duty to immediately give the Union notice and an opportunity to bargain about his suspension, which Respondent admits that it did not do. *Total Security*, supra at slip op. 9, fn. 20. (GC Exh. 1(l).)

Respondent contends that its managers were compelled to suspend Excellent by its practice of suspending pending investigation employees for violating its cell phone policy prior to discharging them absent exonerating evidence. Respondent admits that this practice was not implemented or at least not followed companywide but contends that its consistent practice in its Florida operations, where the Naples facility is located, proves that its managers were exercising a nondiscretionary policy when they suspended Excellent.[20]

Respondent's written policies do not support these claims. No written policy of record states that managers should suspend employees pending investigation in preparation for discharge or for suspected violations of the cell phone policy. Respondent's written disciplinary action policy for violation of the cell phone policy allows for "a minimum of a three (3) day suspension and final written warning for the first offense" and up to termination if the employee's progressive discipline status warrants termination. The 2014 "Cellular Telephone Acknowledgement" form states that violation of the policy "can lead to immediate termination" and that Respondent has "a zero tolerance for the use of cell phones while operating a commercial vehicle" without stating what will be the discipline for violating the zero-tolerance policy. Finally, Respondent's "Progressive Discipline Table—A Guideline" suggests only a step 2, written warning with a document to the employee's file for a violation of the cell phone policy. Inherent in each of these suggested disciplines for violations of the cell phone policy is that the managers do have discretion in what punishment to levy.

Furthermore, the documentary evidence illustrates the discretionary nature of how managers handled violations of the cell phone policy. Managers in other geographical regions have used their discretion to apply the policies in various manners. The fact that many managers, including those who work in the South Florida geographic region, discharge employees for violating the cell phone policy does not mean that they do not have the discretion to take other actions as outlined in Respondent's policies, and as other managers have done.

I note that the specific allegation at issue in this case is whether Respondent had a duty to give notice and opportunity to bargain over Excellent's suspension pending investigation. General Counsel concedes that Respondent notified and bargained with the Union about Excellent's discharge but asserts that they were also required to give notice and opportunity to bargain before suspending Excellent as the Board noted in *Total Security*. I find that the totality of the evidence does not support Respondent's assertion that Marion and Kennedy had no discretion in determining to suspend Excellent pending investigation. Respondent does not point to a written policy to support this assertion and outside of the Florida region, the documentary evidence shows that other managers rarely follow this practice. Except in a few incidents, other managers decided to discharge or impose some punishment short of discharge without first suspending the employee. Again, just because it was Marion's and Kennedy's practice, does not mean that they did not have the discretion to act differently under Respondent's disciplinary rules as other managers applying the policies clearly do. Accordingly, I find that Respondent was exercising discretion when it suspended Excellent, and therefore, Respondent breached its duty to give the Union notice and opportunity to bargain.

An employer can avoid liability for remedying a violation of

[20] Even if Respondent's assertion that its managers' decision to suspend Excellent pending investigation is found to be nondiscretionary because of those managers' past practice, it was discretionary to apply that practice to Excellent. The circumstances under which Excellent was suspended differ significantly than other employees that were suspended in that geographic region pursuant to the cell phone policy. A review of the disciplines that occurred in the Florida region shows that in each of those cases Respondent had some sort of direct evidence that the driver had a cell phone or hands-free cell phone device in one of Respondent's commercial vehicles while operating it. Respondent only had circumstantial evidence that Excellent had his cell phone in his work truck when they suspended him. Thus, discretion was used because this was a unique situation.

Section 8(a)(5) and (1) under the *Total Security* bargaining duty if it shows that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. Supra at slip op. 18. This is where the two theories of violations of the Act alleged in the complaint intersect. Respondent contends that Excellent engaged in the misconduct of possessing a cell phone in his vehicle and that misconduct was why it had cause to suspend him. As I found above, Respondent was not privileged, under the circumstances of this case, to suspend and subsequent discharge Excellent pursuant to its cell phone policy. Therefore, Respondent cannot successfully argue here that Excellent engaged in misconduct for which it was privileged to suspend or discharge him.[21]

Accordingly, I find that on March 3, 2017, Respondent failed and refused to bargain collectively and in good faith with the Union, the exclusive collective-bargaining representative of its employees, regarding Excellent's suspension in violation of Section 8(a)(5) and (1) and of the Act.

4. Remedial principles at issue

General Counsel asserts that because Respondent failed to bargain with the Union before suspending Excellent, any information gathered during its investigation after his suspension cannot be used to justify his later discharge. Furthermore, General Counsel contends that Respondent's subsequent discharge flowed from the unlawful suspension and the investigation that occurred during that suspension, and therefore, the discharge must be remedied. In discussing the rationale for its make whole remedy in *Total Security*, the Board found that *"*the unfair labor practice is chronologically and causally inseparable from the discipline: the employer's unlawful failure to bargain over the imposition of discipline is itself what makes the discipline unlawful." Supra, at slip op. 17. Thus, Respondent's failure to bargain over the suspension is what made Excellent's suspension unlawful and that act should be remedied.

The Board's remedial aim is to restore "the situation, as nearly as possible, to that which would have been obtained but for" the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Unilateral changes that give rise to disciplinary actions such as suspension and discharge typically require backpay and reinstatement to make affected employees whole. *Total Security*, supra at slip op. 16. In *Total Security*, the Board addressed limits to these typical remedies. "In cases in which the respondent failed to provide notice and an opportunity to bargain before imposing discipline but the parties have bargained in good faith [to an agreement or] to impasse after the discipline, backpay will be ordered for the prediscipline bargaining violation. Backpay in such a case would normally run from the date of the discipline until the date on which the parties reached [agreement or] impasse." Id. "Because the employer may impose the discretionary discipline after the parties have reached impasse, ordering a reinstatement or rescission remedy would appear to be impractical in most circumstances where the parties are at impasse." Id. at fn. 33.

The record reflects that Respondent engaged in significant back and forth bargaining with the Union about how to resolve Excellent's situation before reaching impasse on April 26, 2017, and concluding to discharge him. Under the circumstances, I find that the appropriate remedy for failing to bargain about the suspension is backpay for the period of the suspension until the parties negotiated to an impasse on April 26, 2017. [22]

CONCLUSIONS OF LAW

1. Argos USA LLC, d/b/a Argos Ready Mix, LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO (Union) is a labor organization within the meaning of the Act and is and has been since July 8, 2015, the exclusive collective-bargaining representative of the following appropriate unit of Respondent's employees:

> All full-time and regular part-time ready-mix drivers employed by the Respondent at its Naples, Florida facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

3. Since at least January 26, 2017, Respondent has violated Section 8(a)(1) of the Act by maintaining work rules that would reasonably tend to chill employees in the exercise of their Section 7 rights either by expressly prohibiting or restraining the exercise of NLRA rights, or by potentially impacting the exercise of those rights and the justifications for the work rules do not outweigh the potential impact on Section 7 rights; specifically, the Respondent has been violating the Act by maintaining the following rules or policies as written:

> -Employee Confidential Information Agreement;
> -Electronic Communications Policy Acknowledgment Form;
> -Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment provision; and
> -Cellular Telephone Acknowledgement forms.

4. On March 3, 2017, Respondent violated Section 8(a)(1) of the Act by suspending Emanuel Excellent pursuant to its unlawful "Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment and related Cellular Telephone Acknowledgement" forms.

5. On about March 3, 2017, Respondent failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act by failing and refusing to give the Union notice and opportunity to bargain with Respondent before suspending its employee Emanuel Excellent.

[21] I consider whether Excellent's refusal to provide his cell phone records to Respondent affect the outcome of my decision that his suspension without notice and opportunity to bargain was a violation of Sec. 8(a)(5) and (1). At the time of the suspension, Respondent had not asked Excellent for his cell phone records. Therefore, I find that Excellent's refusal to provide his cell phone records and any inferences that may be drawn from that refusal played no part in the decision to suspend him or Respondent's failure to give the Union notice and opportunity to bargain prior to suspending him.

[22] I note here that while the remedy for the 8(a)(5) and (1) violation does not warrant reinstatement or backpay beyond April 26, 2017, that does not alter the make whole remedy for the 8(a)(1) violation of suspending and discharging Excellent pursuant to an unlawful rule.

6. On about April 28, 2017, Respondent violated Section 8(a)(1) of the Act by discharging its employee Emanuel Excellent pursuant to its unlawful "Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment and Cellular Telephone Acknowledgement" forms.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having violated Section 8(a)(1) of the Act by maintaining unlawful employee work rules, policies and/or acknowledgement forms, I recommend that Respondent be ordered to take the following actions. Within 14 days, at all of its facilities where the unlawful rules, policies, and acknowledgement forms are or have been in effect, Respondent shall rescind the rules, policies, and acknowledgement forms to the extent that they have been found unlawful. See, e.g., *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), and cases cited therein. Respondent may comply with the Order by rescinding the unlawful provisions and republishing its employee rules, policies, and acknowledgement forms without them. The Board recognizes, however, that republishing such documents could entail significant costs. Accordingly, the Respondent may supply the employees either with documents stating that the unlawful documents have been rescinded, or with new and lawfully worded documents on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the employee rules, policies, and acknowledgement forms without the unlawful provisions. Thereafter, any copies of the documents that are printed with the unlawful rules must include the republished documents without the unlawful provisions before being distributed to employees." *Guardsmark,* 344 NLRB at 812 fn. 8.

Respondent, having violated Section 8(a)(5) and (1) of the Act by failing to give the Union notice and opportunity to bargain before suspending Emanuel Excellent, I recommend that Respondent be ordered to bargain in good faith with the Union by giving it notice and opportunity to bargain before imposing serious discipline (e.g., suspension, discharge, demotion), while an initial collective-bargaining agreement or a method for dispute resolution has not been agreed to or is not yet in effect.

Respondent, having unlawfully suspended and discharged Excellent, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with the Board's decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Excellent for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Excellent for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB 518 (2012). Respondent shall expunge from its records any and all references to the suspension and discharge of Excellent.

Respondent having been found to have engaged violations of the Act, I recommend that Respondent be ordered to post nationwide in all Respondent's facilities, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate 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. 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 in each appropriate language to all current employees and former employees employed by the Respondent at any time since January 26, 2017.

Respondent having been found to have engaged violations of the Act, I recommend that Respondent be ordered to post in Respondent's Naples, Florida facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate 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. 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 in each appropriate language to all current employees and former employees employed by the Respondent at any time since January 26, 2017.

On these findings of fact and conclusions of law and on the

entire record, I issue the following recommended[23]

ORDER

Respondent Argos USA LLC, d/b/a Argos Ready Mix, LLC, Alpharetta, Georgia and Naples, Florida its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an overly broad confidentiality policy that prohibits employees from discussing earnings and employee information.

(b) Maintaining an overly broad electronic communications policy that unlawfully interferes with employees' use of Respondent's email system for Section 7 purposes.

(c) Maintaining an overly broad cell phone use policy that unlawfully interferes with employees' use of their personal cell phones for Section 7 purposes.

(d) Requiring employees to cellular telephone acknowledgement forms verifying that the employees are aware of Respondent's overly broad cell phone use policy that unlawfully interferes with employees' use of their personal cell phones for Section 7 purposes.

(e) Issuing suspensions or other discipline to employees for violating its unlawfully overbroad rules.

(f) Discharging employees for violating its unlawfully overbroad rules.

(g) Failing to bargain in good faith with the Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO (Union) as the exclusive collective-bargaining representative of the following appropriate unit (the unit) of Respondent's employees:

> All full-time and regular part-time ready-mix drivers employed by the Respondent at its Naples, Florida facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(h) Imposing serious discipline (e.g., suspension, discharge, demotion) upon bargaining unit employees without first notifying and providing the Union with the opportunity to bargain over the discipline to be imposed or proposed to be imposed, when an initial collective-bargaining agreement has not been agreed to or is not yet in effect.

(i) 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 the following overbroad rules, policies, and acknowledgement forms:

> -Employee Confidential Information Agreement;
> -Electronic Communications Policy Acknowledgment Form;
> -Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment provision; and
> -Cellular Telephone Acknowledgement forms.

(b) Rescind the suspension and discharge of Emanuel Excellent.

(c) On request, bargain in good faith with the Union as the exclusive representative of the employees in unit concerning terms and conditions of employment by providing prior notice and opportunity to bargain before implementing serious discipline, until a first contract is implemented or an agreement is reached regarding a method for dispute resolution.

(d) Within 14 days from the date of this Order, offer Emanuel Excellent full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Emanuel Excellent whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(f) Compensate Emanuel Excellent for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(g) Compensate Excellent for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

(h) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify Excellent in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Furnish employees with inserts for the current employee rules, policies, and acknowledgement forms that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee rules, policies and acknowledgement forms that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(k) Within 14 days after service by the Region, post nationwide in all its facilities, copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate shall be distributed electronically, such as by email, posting on an intranet or an

[23] If no exceptions are filed as provided by Sec. 102.48 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.

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. 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 in each appropriate language to all current employees and former employees employed by the Respondent at any time since January 26, 2017.

(l) Within 14 days after service by the Region, post nationwide in its Naples, Florida facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices in each language deemed appropriate 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. 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 in each appropriate language to all current employees and former employees employed by the Respondent at any time since January 26, 2017.

(m) 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.

APPENDIX A

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 a representative 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 maintain an "Employee Confidential Information Agreement" stating that employees may have access to "confidential Company information," and that they:

> understand and agree that [they] may only use such confidential information for purposes of carrying out Argos' business, and [they] may not make use of or disclose any such confidential information during or after termination of [their] employment with Argos without the express written consent of the General Counsel of Argos.
>
> In which "confidential information" is defined to include earnings and employee information.

WE WILL NOT maintain an "Electronic Communications Policy Acknowledgment Form" which states, in pertinent part, that the employee signing the form understands that Respondent's email system "is to be used for business purposes and not for personal purposes."

WE WILL NOT maintain a Cell Phone Policy for "Commercial Vehicles and Heavy Equipment" that states:

> It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle; (i.e. "commercial vehicles" are defined as having a gross vehicle weight of 10,000 lbs. or more including any heavy equipment used on the plant yard). This prohibition also extends to the use of any accompanying equipment (e.g. earpieces or hands-free devices) and applies regardless of where the commercial vehicle is being operated. Employees are encouraged to leave their cell phones in personal vehicles at all times.

WE WILL NOT require employees to sign forms acknowledging that they have received and/or understand the rules or policies discussed above.

WE WILL NOT 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.

WE WILL rescind the following overbroad rules, policies, and acknowledgement forms:

-Employee Confidential Information Agreement;
-Electronic Communications Policy Acknowledgment Form;
-Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment provision; and
-Cellular Telephone Acknowledgement forms.

WE WILL furnish our employees with inserts for the current employee rules, policies, and acknowledgement forms that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee rules, policies and acknowledgement forms that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

ARGOS USA LLC D/B/A ARGOS READY MIX, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/12-CA-196002 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.

APPENDIX B

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 a representative 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 maintain an "Employee Confidential Information Agreement" stating that employees may have access to "confidential Company information," and that they:

> understand and agree that [they] may only use such confidential information for purposes of carrying out Argos' business, and [they] may not make use of or disclose any such confidential information during or after termination of [their] employment with Argos without the express written consent of the General Counsel of Argos.
>
> In which "confidential information" is defined to include earnings and employee information.

WE WILL NOT maintain an "Electronic Communications Policy Acknowledgment Form" which states, in pertinent part, that the employee signing the form understands that Respondent's email system "is to be used for business purposes and not for personal purposes."

WE WILL NOT maintain a Cell Phone Policy for "Commercial Vehicles and Heavy Equipment" that states:

> It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle; (i.e. "commercial vehicles" are defined as having a gross vehicle weight of 10,000 lbs. or more including any heavy equipment used on the plant yard). This prohibition also extends to the use of any accompanying equipment (e.g. earpieces or hands-free devices) and applies regardless of where the commercial vehicle is being operated. Employees are encouraged to leave their cell phones in personal vehicles at all times.

WE WILL NOT require employees to sign forms acknowledging that they have received and/or understand the rules or policies discussed above.

WE WILL NOT issue suspensions or other discipline to our employees for violating the rules, policies or acknowledgement forms discussed above.

WE WILL NOT discharge employees for violating the rules, policies or acknowledgement forms discussed above.

WE WILL NOT fail to bargain in good faith with the Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL–CIO, (Union) as the exclusive collective-bargaining representative of the following appropriate unit (the unit) of Respondent's employees:

> All full-time and regular part-time ready-mix drivers employed by the Respondent at its Naples, Florida facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT impose serious discipline (e.g., suspension, discharge, demotion) upon bargaining unit employees without first notifying and providing the Union with the opportunity to bargain over the discipline to be imposed or proposed to be imposed, when an initial collective-bargaining agreement has not been agreed to or is not yet in effect.

WE WILL NOT 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.

WE WILL rescind the following overbroad rules, policies, and acknowledgement forms:

-Employee Confidential Information Agreement;
-Electronic Communications Policy Acknowledgment Form;
-Cellphone Policy While Operating a Vehicle, Commercial Vehicle and Heavy Equipment provision; and
-Cellular Telephone Acknowledgement forms.

WE WILL rescind the suspension and discharge of Emanuel Excellent.

WE WILL on request, bargain in good faith with the Union as the exclusive representative of the employees in the unit concerning terms and conditions of employment by providing prior notice and opportunity to bargain before implementing serious discipline, until a first contract is implemented or an agreement is reached regarding a method for dispute resolution.

WE WILL offer Excellent full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Excellent whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

WE WILL compensate Excellent for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL compensate Excellent for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.

WE WILL remove from our files any reference to the unlawful suspension and discharge of Excellent and notify him in writing that this has been done and that the suspension and discharge will

not be used against him in any way.

WE WILL furnish our employees with inserts for the current employee rules, policies, and acknowledgement forms that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee rules, policies and acknowledgement forms that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

ARGOS USA LLC D/B/A ARGOS READY MIX, LLC

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/12-CA-196002 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.