Union Tank Car Company *and* International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART). Cases 12–CA–210779 12–CA–219374 12–CA–220822, 12–CA–222661, and 12–RC–221465

July 17, 2020

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On January 11, 2019, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief in support of cross-exceptions.

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.[2] Further, having carefully considered the entire record in this proceeding, and for the reasons stated below, we set aside the election held on June 22, 2018, and remand Case 12–RC–221465 to the Regional Director to direct a second election.

On February 23, 2017, the Board conducted an election in a unit consisting of the Respondent's production and maintenance employees at its Valdosta, Georgia facility, in which the unit employees selected the International Association of Sheet Metal, Air and Rail Transportation Workers (Union) as their bargaining representative. However, the parties did not reach agreement on an initial contract, and the Respondent withdrew recognition from the Union in March 2018 based on a decertification petition. The Union filed another representation petition in June 2018, and an election was held on June 22, 2018, in which 54 unit employees voted for representation and 55 voted against. The Union timely filed objections that generally mirrored and referred to the pending unfair labor practice charges.

Discussion

There are no exceptions to the judge's finding that the Respondent, by Supervisor Graham Bridges, violated Section 8(a)(1) of the Act in March 2018 by threatening employee Quinn Sowell that the Respondent would find a pretextual reason to discharge Sowell if he did not sign the decertification petition and suggesting that Sowell would have greater opportunities with the Respondent if he signed the petition. The judge also found that the Respondent violated Section 8(a)(1) by confiscating union literature from an employee break room on June 21, 2018, the day before the election. We adopt this finding for the reasons stated by the judge. For the reasons stated below, we reverse the judge's dismissal of the allegation that the Respondent, through Bridges, violated the Act in March 2018 by telling employee Ridge Wallace that he received a suspension for failing to fill out a hot work permit but would have received only a warning if he were not represented by the Union.

The judge also considered allegations that the Respondent violated Section 8(a)(1) of the Act by maintaining two work rules. We agree with the judge, for the reasons he stated, that the Respondent unlawfully maintained a rule prohibiting the use of cell phones "during work hours . . . at any time."[3] Contrary to the judge, however, we find that the Respondent also violated the Act by maintaining a rule prohibiting statements that "are intended to injure

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

[2] We shall modify the judge's recommended Order to conform to our findings and our standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). Although we find below that the Respondent unlawfully maintained two work rules, a rescission remedy is unwarranted, given that the Respondent informed employees in October 2018 that one of those rules was no longer in effect and the other had been revised. See *Lily Transportation Corp.*, 362 NLRB 406 (2015). We shall substitute a new notice in accordance with *Lily Transportation* and to conform to the Order as modified.

[3] The rule in its entirety provided that "[c]ell phones will not be allowed in use during work hours or in work areas at any time unless approved by management." However, the complaint alleged as unlawful only the portion of the rule that prohibited use of cell phones "during work hours . . . at any time." Accordingly, this case is distinguishable from two recent cases involving rules that prohibited employees from possessing cell phones in work areas. See *Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26 (2020); *Cott Beverages Inc.*, 369 NLRB No. 82 (2020).

Member Emanuel agrees that the Respondent's cell phone policy is unlawful based on the prohibition of cell phones during "work hours." Board law is clear that the term "work hours" or "working hours" means all business hours, including break, rest, and other personal times when employees are on site but not actually required to work. *United Services Automobile Assn.*, 340 NLRB 784 (2003), enfd. 387 F.3d 908 (D.C. Cir. 2004).

the reputation of the Company or its management personnel with customers or employees."

Finally, we reverse the judge's finding that the objections to the June 2018 election should be overruled and the results certified. As explained below, we find that the election must be set aside based on the unlawful confiscation of union literature the day before the election.

1. In March 2018, during the decertification drive leading to the withdrawal of recognition, Supervisor Bridges told employee Ridge Wallace that although Wallace had been suspended for 30 days for failing to sign a hot work permit, absent the Union he would have received only a written warning. As the judge accurately observed, an employer may lawfully inform employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." *Tri-Cast, Inc.*, 274 NLRB 377, 377 (1985). But that principle does not apply here because there is no evidence that the Respondent had maintained a more lenient policy concerning failures to sign hot work permits prior to the Union's certification in 2017. Thus, Bridges' statement, in context, implied that the Respondent would apply its disciplinary policies more leniently if the decertification drive were successful. The Board has found that an employer violates Section 8(a)(1) by telling an employee that harsher discipline would be imposed if a union is voted in. See *Medcare Associates, Inc.*, 330 NLRB 935, 943 (2000) (finding unlawful a statement to employee that a verbal reminder regarding absences would have been a suspension under a union contract). Inversely, telling an employee who is represented by a union that his suspension would have been only a warning if he were no longer represented by the union is equally coercive. Accordingly, we find that the Respondent violated Section 8(a)(1) by telling Wallace that, absent union representation, he would have received less severe discipline.

2. Applying *Boeing Co.*, 365 NLRB No. 154 (2017), the judge dismissed the allegation that the Respondent unlawfully maintained a rule prohibiting "[s]tatements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees." We disagree and find this rule to be unlawful.

Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Section 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Section 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Section 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Section 7 rights outweighs the legitimate interests they serve. Categories 1(a), (b), and 3 designate types of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.,* 368 NLRB No. 93, slip op. at 2–3 (2019).

Applying these principles, we find, contrary to the judge, that the Respondent's nondisparagement rule is unlawful. The rule's prohibition against statements *to other employees* "that are intended to injure the reputation of the Company or its management personnel" significantly restricts Section 7 rights. "It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). Such discussions are often inseparably linked to complaints about the employer itself and the managers who establish and enforce those terms and conditions. See, e.g., *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (concerted activity includes "an employee complaining to a coworker about a supervisor"). The rule thus potentially interferes with the exercise of the right to engage in activities that lie at the core of Section 7 of the Act.

No justification outweighs this significant impairment of Section 7 rights. In agreement with our dissenting colleague, we recognize, of course, that employers have a legitimate and compelling interest in enforcing the expectation that their employees will be loyal partners in the common enterprise. See *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953) ("There is no more elemental cause for discharge of an employee than disloyalty to his employer."). Employers are clearly justified in preventing employees from making statements reasonably calculated to injure the company's reputation or that of management personnel. But employees' duty of loyalty, and the employer's justifiable

expectation that the duty will be honored, are inapplicable to a rule that prohibits certain statements made by employees *to each other*. The Respondent contends that the prohibition is warranted by the goal of "maintaining civility." To be sure, rules requiring employees to abide by basic standards of civility are lawful to maintain. See *Boeing*, 365 NLRB No. 154, slip op. at 15. But the rule at issue here prohibits certain statements based on the speaker's intent, whether or not the speaker conveys those statements in a polite and civil manner. Accordingly, this justification is inapplicable as well. Indeed, we can perceive no justification that could outweigh the infringement on Section 7 rights imposed by the maintenance of a rule that prohibits employees from discussing—regardless of their intent—their employer or managers *among themselves* in light of the strong protection the Act affords to such discussions when they concern terms and conditions of employment. Accordingly, we find the Respondent's rule unlawful and place rules prohibiting communications between or among employees that are intended to disparage the employer in *Boeing* Category 3.[4]

3. During the critical period prior to the June 22, 2018 election, the Respondent unlawfully maintained nondisparagement and cell phone use rules and, by Supervisor Jody James, confiscated union literature from the break room. We have adopted the judge's finding that by confiscating union literature, the Respondent violated Section 8(a)(1) of the Act. Contrary to the judge, we find that the confiscation of the union literature is also properly before the Board as objectionable conduct. And we further find that this objectionable conduct, in combination with the closeness of the vote, warrants setting aside the election.[5]

The objection filed by the Union on June 25, 2018, alleged as objectionable conduct the "[o]utstanding and unresolved ULP's in Consolidated Complaint (Cases 12–CA–209024, 214382, 216226, 216231, 219374) and a new ULP filed on Jody James regarding his conduct on or about the week of June 18, 2018." The original charge in Case 12–CA–222661, filed on June 25, 2018, alleged that James had interfered with, restrained, and coerced employees on about June 21, 2018, by threatening retaliation and engaging in surveillance and creating the impression of surveillance. The charge did not specifically mention confiscation of union literature. Nevertheless, the Board may consider allegations of objectionable conduct that do not exactly coincide with the precise wording of the objections so long as the allegations are sufficiently related to the timely filed objections. See *Fred Meyer Stores*, 355 NLRB 541, 543 fn. 7 (2010); *Fiber Industries*, 267 NLRB 840, 840 fn. 2 (1983); see also *Nelson Tree Service, Inc.*, 361 NLRB 1485, 1485 (2014) ("[I]f the Regional Director receives or discovers evidence during his investigation that shows that the election has been tainted, he has no discretion to ignore such evidence and it is reversible error if he fails to set aside the election.") (internal quotation marks omitted). The allegation that James confiscated union literature was specifically referenced in an offer of proof accompanying the Union's objections.[6] Under these circumstances, the allegation that James engaged in objectionable conduct by confiscating union literature is properly before us.

In determining whether this conduct warrants setting aside the election, "it is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election.'" *Clark Equipment Co.,* 278 NLRB 498, 505 (1986) (quoting *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962)). The only exception to this policy is when the Board determines it is virtually impossible to conclude that the unlawful conduct could have affected the election results. Id.

Here, the day before the election, the Respondent confiscated prounion literature from first-shift employees in

[4] We need not decide here whether maintenance of a nondisparagement rule like the Respondent's, but not extending the prohibition in the rule to communications between and among employees, would be lawful. We will address that issue when directly presented in a future case.

We agree with our dissenting colleague that rules must be read as a whole, in context, and from the perspective of a reasonable employee, but we disagree with his charge that we have failed to do so. Our finding rests on a reading of the rule in its entirety, including its prohibition of certain statements about the Respondent or its managers made by employees to other employees. Unlike our colleague, we are unwilling to read the word "employees" out of the rule.

[5] Despite finding that the cell phone rule and the union literature confiscation violated the Act, the judge declined to set aside the election. He found that the union literature confiscation allegation was not encompassed by any timely objection. He also found that the maintenance of the unlawful cell phone rule did not warrant setting aside the election because the record did not establish that employees were aware that the rule, which had been maintained since 2010, prohibited the use of cell phones during breaks. As noted above, the judge found that the nondisparagement rule was lawful.

[6] Specifically, the offer of proof stated:

> On June 21, 2018 in the Company Employee Break Room, Supervisor Jody James entered while eligible voters were reviewing literature that was distributed by supporters of the Union. After entering the room Supervisor Jody James picked up one of the several "flyers" that were lying on tables in the Employee Break Room and began reading it. After he appeared to finish reading the flyer he began collecting the other flyers on the table and even snatched flyers from at least two employee's hands that were reading the flyers. There were approximately 12 eligible voters in the Employee's Break Room during this time that witnessed this intimidating action by Supervisor Jody James. In addition to confiscating the Union distributed literature, Jody James made a threatening statement that "this is a violation of Federal Law".

the break room, while telling employees that it was a violation of Federal law for the Union to distribute such material.[7] This confiscation necessarily also prevented the second- and third-shift employees from seeing the material. Further, the June 2018 election was decided by a single vote. In such circumstances, we cannot find that it was "virtually impossible" that the Respondent's misconduct affected the results of the election. *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (2000) (overturning an election based on unfair labor practices in the weeks leading up the election where "a switch of one vote to oppose the Petitioner would have been decisive"). Accordingly, we set aside the election and remand the representation case for a new election.[8]

ORDER

The Respondent, Union Tank Car Company, Valdosta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or loss of promotion opportunities if they decline to sign a petition to decertify the International Association of Sheet Metal, Air, Rail and Transportation Workers (the Union) as their bargaining representative.

(b) Telling employees that they are likely to have better opportunities with Union Tank Car if they sign a petition to decertify or otherwise abandon support for the Union.

(c) Telling employees that they would receive lesser discipline absent union representation.

(d) Confiscating union material from employee break rooms.

(e) Maintaining a rule that prohibits the use of cell phones by employees in nonwork areas during times when they are not working.

(f) Maintaining a rule that prohibits disparaging statements between or among employees about the Respondent or its management personnel.

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

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

(a) Post at its Valdosta, Georgia facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2018.

(b) 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.

IT IS FURTHER ORDERED that the election held on June 22, 2018, is set aside, and Case 12–RC–221465 is severed and remanded to the Regional Director for Region 12 to conduct a second election whenever the Regional Director shall deem appropriate.

Dated, Washington, D.C. July 17, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[7] The Respondent's statement that it was a violation of Federal law for the Union to distribute the material was not alleged to be unlawful.

[8] In ordering a second election, we rely only on the closeness of the vote and the confiscation of union literature the day before the election. There is no evidence that the mere maintenance of the cell phone or nondisparagement rule affected the results of the election. On these facts, we find it unnecessary to address the broader issue of whether the maintenance of unlawful rules during the pre-election critical period constitutes grounds for setting aside an election.

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

MEMBER EMANUEL, dissenting in part.

My colleagues find that the Respondent's facially neutral nondisparagement rule, which prohibits statements "intended to injure the reputation of the Company," is unlawful. In my view, they reach that result by reading one word of the rule—a reference to "employees"—in isolation. The rule, when reasonably read in its entirety, restricts intentionally disloyal conduct, not activity protected by the Act. Accordingly, I respectfully dissent.

The Respondent repairs and maintains railroad tank cars nationally. The rule, published in its employee handbook, provides that "[s]tatements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees" will result in discharge.

The Supreme Court long ago recognized that, notwithstanding the passage of the Act, employers need to be able to rely on the loyalty of their employees. In *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, the Supreme Court explicitly acknowledged that "[t]here is no more elemental cause for discharge of an employee than disloyalty." 346 U.S. 464, 472 (1953). The Court also recognized that, in providing employees the statutory right to engage in protected activities under the Act, Congress "did not weaken the underlying contractual bonds and loyalties of employer and employee." Id. The Court held that, even if the employees who made the disparaging comments about the employer did so in a concerted manner within the scope of Section 7, "the means used by the [employees] in conducting the attack have deprived the attackers of the protection of that section when read in the light and context of the purpose of the Act." Id. at 477–478.

Such fundamental bonds and loyalties integral to the employment relationship underscored by the Court in *Jefferson Standard* cannot be adequately protected if an employer is prohibited from maintaining facially neutral rules against intentional disparagement. An employer has a legitimate interest in conveying to employees its expectation that they will perform their jobs in a manner that will do the employer proud, without sabotaging or otherwise impairing its operations. After all, the success—if not the continued existence—of an employer is often dependent on maintaining its reputation and preventing the harm to its commercial image from having its products or services disparaged or misrepresented. At the same time, the employer has an interest in insuring that employees are invested in building a collaborative work environment in which the employer, for whom they work and on whom they depend for their livelihood, can be its most successful.

These fundamental principles inform the Board's analysis of the Respondent's rule. Against that backdrop, I agree with my colleagues that the appropriate standard for evaluating the rule is set forth in *Boeing Co.*, 365 NLRB No. 154, slip op. at 3 (2017). In *Boeing*, the Board overruled the "reasonably construe" prong delineated in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that a work rule that did not otherwise violate Section 8(a)(1) would be found unlawful if employees would reasonably construe it to prohibit Section 7 activity. Id., slip op. at 1, 2. (2004). Instead, the Board in *Boeing* held that

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

Id., slip op. at 3 (emphasis in original). In conducting this evaluation, the Board will "strike the *proper balance* between . . . asserted business justifications behind the policies, on the one hand, and the invasion of employees' rights in light of the Act and its policy." Id., slip op. at 3 (emphasis in original) (quoting *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967)). In considering the latter, the Board will rely on a reasonable employee's perspective. Id., slip op. at 16. As explained in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019), the General Counsel has the initial burden to prove that a facially neutral rule would, when read in context, be interpreted by a reasonable employee as potentially interfering with the exercise of Section 7 rights. If that burden is not met, then the Board does not need to address the employer's legitimate justifications for the rule; the rule is lawful and fits within *Boeing* Category 1(a). Id.

"The reasonable interpretation of a rule is based upon 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." *Colt Beverages Inc.,* 369 NLRB No. 82, slip op. 2 fn. 5 (2020) (citing *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (internal quotations omitted). In my view, the rule, when reasonably read, would not potentially interfere with Section 7 activity, and is therefore lawful under *Boeing*

Category 1(a).[1] Employees have a Section 7 right to communicate with one another, and to appeal to third parties, when acting concertedly for mutual aid or protection. Certainly, this activity may at times involve airing criticism of the employer or its policies, in connection with a labor dispute, with the intent of improving working conditions. Reasonably read, however, the Respondent's nondisparagement rule prohibits none of this. Instead, it prevents conduct that has the *intent of injuring* the Respondent's reputation—and that purpose would be obvious to Respondent's employees, whose livelihoods depend on the Respondent's reputation.

In reversing the judge, my colleagues fail to read the rule in context. Instead, they focus on a single word—the reference to "employees"—in isolation. They assert that employees would reasonably believe that their discussions with coworkers about terms and conditions of employment or their complaints about the Respondent might be deemed injurious to the Respondent's reputation and therefore that the rule potentially interferes with employee exercise of the right to engage in activities that lie at the core of Section 7. Such a piecemeal analysis has been rejected. See *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (stating that allegedly unlawful language in a rule must be read in context); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (rejecting "parsing the language of the rule, viewing [a] phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights"), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Contrary to my colleagues' assertion, I have not "read the word 'employees' out of the rule," but have considered it in context, as Board and court precedents require. Reasonably read and interpreted, the rule in this case does not suggest any restriction on Section 7-related employee discussions. To the extent that an employee complains to other employees about working conditions, such a complaint might under some circumstances affect the Respondent's reputation in the mind of the other employees, but it would not be an intentional act of disloyalty by the complaining employee. Likewise, while Section 7 activity at times might include criticism of "management personnel," nothing in the rule prohibits mere criticism, and employees would not reasonably read it to do so. In sum, the rule is consistent with the fundamental principles set forth in *Jefferson Standard*, and its limited scope—intentionally injurious conduct—would not reasonably be read to interfere with Section 7 activity. Accordingly, I would find the rule lawful.

[1] Therefore, no balancing is required. I note, however, that the business justifications supporting general nondisparagement rules are substantial and self-evident.

Dated, Washington, D.C. July 17, 2020

William J. Emanuel, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

In October 2018, we informed you that we had rescinded one rule and revised a second rule. The prior rules had been alleged to violate Federal labor law. The National Labor Relations Board has now found that those rules were unlawful.

WE WILL NOT threaten you with discharge or loss of promotion opportunities if you decline to sign a petition to decertify the International Association of Sheet Metal, Air, Rail and Transportation Workers (the Union).

WE WILL NOT tell you that you are likely to have better opportunities with us if you sign a petition to decertify or otherwise abandon support for the Union.

WE WILL NOT tell you that you will receive lesser discipline absent union representation.

WE WILL NOT confiscate union material from employee break rooms.

WE WILL NOT maintain a rule that prohibits the use of cell phones by you in nonwork areas during times when you are not working.

WE WILL NOT maintain a rule that prohibits you from making disparaging statements to each other about the Company or its management personnel.

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

UNION TANK CAR CO.

The Board's decision can be found at www.nlrb.gov/case/12-RC-221465 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.

Caroline Leonard, Esq., for the General Counsel.
Hope Abramov and *Conor P. Neusel, Esqs. (Thompson Coburn LLP),* of St. Louis, Missouri, for the Respondent.
Thomas E. Fisher, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Valdosta, Georgia, on November 14, 2018. The Charging Party Union filed the charges in this case between November 30, 2017, and June 25, 2018. The General Counsel issued a complaint which included case number 12–CA–219374 on May 31, 2018. On June 28, he issued a complaint including case 12-CA-220822. A complaint including cases 12–CA–210779 and 12–CA–222661 issued on August 27, 2018. An order severing other matters and consolidating the 4 unfair labor practice cases herein and the representation case was issued on October 26, 2018.

The General Counsel alleges that Respondent has violated the Act in the following respects:

1. Maintaining an employee handbook containing rules threatening discipline, including discharge if an employee makes written or oral statements intended to injure the reputation of Union Tank Car Company or its management personnel with customers or employees; and using cell phones during work hours unless approved by management (complaint paragraph 5 (a) and (b).
2. By supervisor Graham Bridges:

   a. In telling employees that there would be harsher discipline because they selected the Union as their bargaining representative (complaint paragraph 6);

   b. Threatening employees with discharge if they did not sign a decertification petition (complaint paragraph 7(a));

   c. Promising employees promotions if they signed the decertification petition (complaint paragraph 7(b)).

3. By Supervisor Jody James in confiscating union literature (complaint paragraph 8).

In addition, the Union contends that Respondent, by Jody James, committed objectionable conduct warranting setting aside the representation election of 2018 by confiscating union literature during the critical period. That is the period between the filing of the Union's representation petition on June 5, 2018, and the representation election on June 22, 2018.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

Respondent, which has headquarters in Chicago, Illinois, repairs and maintains railroad tank cars at a number of facilities throughout the United States, including the one involved in this case in Valdosta, Georgia. Respondent annually sells and ships goods valued in excess of $50,000 directly to and from points outside the State of Georgia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Representation Election of June 22, 2018, the Union's Objection to Conduct Affecting the Results of the Election and Complaint Paragraphs 5 and 8

The Union won a representation election conducted on February 23, 2017, and was certified as the exclusive bargaining representative of a unit of Respondent's Valdosta, Georgia employees on March 6, 2017. In early 2018, employees circulated a decertification petition. Respondent withdrew recognition of the Union on March 9, 2018. On June 5, the Union filed another petition to represent all full-time and regular part-time production and maintenance employees, including leadsmen at Respondent's Valdosta, Georgia facility. An election was held in the employee break room between 5:30 and 7:30 a.m. and between 3 and 4 p.m. on June 22, 2018. 54 votes were case in favor of the Union; 55 were cast against union representation.

The Union filed objections to conduct affecting the June 22, 2018 election.

On September 5, 2018, the Regional Director issued a Report on these Objections and an Order directing a hearing on issues that mirror complaint paragraphs 5 and 8.

[1] Much of this case turns on credibility resolutions. Where demeanor is not determinative, an administrative law judge may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that can be drawn from the record as a whole, *Daikichi Sushi,* 335 NLRB 623, 622 (2001). In no instance of controverted testimony in this case do I find demeanor determinative.

Complaint Paragraph 5

Respondent issued an employee handbook in August 2010, which was in effect the time of the June 22, 2018 representation election. This handbook contains 2 rules which the General Counsel contends violate the Act and that the Union contends constitutes objectionable conduct affecting the election.

At pages 21–22, the handbook list 33 rules with respect to which an employee may be disciplined or discharged for not obeying. Rule 32 prohibits, "Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees."

The last sentence of Respondent's "Use of Telephone" policy on page 28 of the handbook states that, "Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management."

In December 2017, on advice of counsel, John Bauer, Respondent's director of shop operations, advised Valdosta Repair Manager William Giddens and managers at other Union Tank installations that Rule 32 and the prohibition against cell phones would no longer be enforced. Employees are now allowed to use their cellphones while on break. Employees at Valdosta were not told that Rule 32 was no longer being enforced and that the cell phone policy had been changed until October 2018, months after the June 22, 2018 election.

Procedural Issue regarding alleged objectionable conduct

The Union's filed objections to the June 22, 2018 election based on, "outstanding and unresolved ULP's in consolidated complaint (Cases 12–CA–209024, 24382, 216226, 216231, 219374) and a new ULP filed on Jody James regarding his conduct on or about the week of June 18, 2018." It did not mention the charge in Case 12–CA–210779, which was filed on November 30, 2017, alleging that maintenance of the handbook rules was illegal. The Regional Director concluded that a hearing should be held on this issue because it appears that the Union likely intended its objections to encompass all outstanding unfair labor practice charges, even those not included in a complaint at the time it filed its objections on June 25, 2018. A complaint covering the charge in 12–CA–210779 was not issued until August 27, 2018, GC Exh. 1(u).

Respondent contends that the Board should not consider whether the maintenance of the rules or Jody James' alleged confiscation of union literature constitutes objectionable conduct because to do so is inconsistent with the Board's Rules of Procedure. Rule 102.69(a) states that objections must be filed within 7 days of the tallying of ballots with a short statement of the reasons. Section 102.69(b) provides that if no timely objections are filed, the Regional Director shall issue a certification of the results of the election.

Complaint Paragraph 8

Terrell Daugherty, then a tank car repairman,[2] passed out or placed union flyers on tables in Respondent's break room on June 21, 2018, the day prior to the representation election at about 8:30 a.m. The first shift (repair and other departments) was on break between 8:30 and 8:45 a.m. Somewhere in the vicinity of 18–22 employees took this break in this break room on June 21.

Shortly after the break started Jody James, a repair supervisor, entered the room. Prior to the beginning of the weekly safety meeting that James was about to conduct at 8:45 a.m., he walked around the table or tables in the break room and picked up all the flyers.[3] When he sat down, James said that the Union had committed a "federal violation" by distributing the flyers.[4] James did not replace the flyers after his safety meeting ended.

Daugherty also left the same union flyer in the employee restroom/locker room. These were not disturbed by management. Management also did not interfere with the wearing of pro-union employee t-shirts or, so far as this record shows, otherwise interfere with the union's campaigning.

Procedural Issue Regarding the Whether the Union's Claim that James Committed Objectionable Conduct is Properly Before the Board

When the Union filed objections to conduct affecting the results of the election it mentioned a number of outstanding charges filed prior to the beginning of the critical period and "a new ULP filed on Jody James regarding his conduct on or about the week of June 18, 2018." That charge, 12–CA–222661 alleged that James threatened retaliation against employees who joined or supported the Union and that James engaged in surveillance or created the impression of surveillance of employees' union activities. This charge did not allege that James engaged in objectionable conduct in confiscating union literature during the critical period.

Jones' alleged confiscation of literature was first raised by the Union in its second amended charge in case 12–CA–222661

[2] Since the election Daugherty has been promoted to a quality assurance inspector position, which is outside of the bargaining unit.

[3] There is a dispute as to how many flyers James picked up. Daugherty testified that he distributed 20–30; repairman Joe Queen testified he saw about 10 flyers, but in an affidavit stated that James picked up about three. James testified he picked up three flyers. Chad Morgan testified that he saw two to three flyers in the break room. Leadman Tim McEady testified that he saw about three flyers. Zachary Timpson, called by Respondent as a witness, was sitting in the back of the break room between 8:30 and 8:45 a.m. on June 21. He testified to seeing 20 or more union papers on the tables in the break room. George Padgett testified that he was sitting alone in the back of the break room that morning, a fact about which he is obviously wrong. Padgett testified to seeing two to three flyers. I find that the number of flyers James picked up is irrelevant to whether Respondent, by James, violated Sec. 8(a)(1).

[4] James and other witnesses deny that James made this statement. However, in explaining why he picked up the flyers, James testified that he had been told by higher company management that there could not be any kind of flyers or posters in the polling area within 24 hours of the election, Tr. 186–187. It is likely that James gave the employees some explanation as to why he was collecting the flyers. He did not tell employees that he collected them because he needed their undivided attention. Thus, I credit Daugherty and others that he said he collected them because the Union had violated federal rules since James' understanding was that the Union had done so. James could have been confused by the *Peerless Plywood* rule (107 NLRB 427 (1953), which prohibits mass meetings within 24 hours of a Board election. However, that rule does not prohibit the distribution of literature within 24 hours of an election, *General Electric Co.,* 161 NLRB 618 (1966).

filed on August 3, 2018.

Complaint Paragraph 6

In early 2018, Respondent suspended employee Ridge Wallace for 30 days for failing to sign a hot work permit. Respondent allowed Wallace to serve his suspension between Tuesdays and Thursdays of each week for 10 weeks. This allowed Wallace to retain his health insurance. Sometime in March 2018, Wallace had a conversation with Welding Supervisor Graham Bridges. Bridges told Wallace that if it were not for the Union, he would have received a written warning instead of a 30-day suspension.[5] I credit Wallace's testimony over that of Graham Bridges. First of all, Wallace, who left Respondent's employ voluntarily in September 2018, had less motive to make up his story than Bridges had to deny it.

Complaint Paragraph 7

Sometime in about March 2018, while employees were circulating a decertification petition, Quinn Sowell, a repairman then on second shift, went to the office of Graham Bridges, the second shift supervisor. Sowell went to Graham because he felt that leadman Michael Weeks was being too hard on him, and/or because a leadperson circulating the decertification petition told Sowell that employees would lose their jobs if they did not sign it, Tr. 88-90, 171–172.

> Sowell's testimony, which I credit, is as follows:
>
> I went to Graham Bridges to worry about my job, losing my job. I didn't sign it. And we have a conversation that went with—that he knew they can't technically fire me for not signing it. They can find the reasons to fire me.
>
> . . . .
>
> We mostly talk about how if I did sign the petition there'll be more likely more opportunities in Union Tank Car that I would not have if I signed it.[6]

(Tr. 89–90.)

The allegations in complaint paragraph 7 present a clear cut case for a credibility resolution. I credit Sowell's testimony over that of Bridges and Weeks. Bridges and Weeks had far more motivation to deny Sowell's account than Sowell had to invent his story whole-cloth. There is no presumption that the testimony of a current employee, which is adverse to their employer, is credible. However, the Board recognizes that "the testimony of current employees which contradicts statements of their supervisors is like to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries,* 316 NLRB 745 (1995); *Gold Standard Enterprises,* 234 NLRB 618, 619 (1978); *Georgia Rug Mill,* 134 NLRB 1304, 1305 fn. 2 (1961).

Moreover, neither Bridges nor leadman Michael Weeks directly contradicted any of Sowell's testimony. Bridges did not *remember* or *recall* a conversation with Sowell regarding the decertification petition or meeting alone with Sowell in his office. Sowell testified that leadman Michael Weeks was present for the conversation. Weeks unconvincingly denied being present, but recalls Sowell meeting alone with Bridges, Tr. 171–172.

Analysis

The Rules Violations

This case is governed by the Board's recent decision in *The Boeing Company,* 365 NLRB No. 154 (2017). In *Boeing,* the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Section 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with section 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Section 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, application of Respondent's rules is not an issue in this case.

Rule 32 Prohibition

Under the pre-*Boeing* standard, the Board found that rules very similar to Respondent's rule 32 ["Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees."] *would* not be reasonably read as encompassing Section 7 activity. In *Albertson's* 351 NLRB 254, 258–259, the Board held that a rule prohibiting off-the -job conduct which has a negative effect on the company's reputation. . ." did not violate the Act. In *Lafayette Park Hotel,* 326 NLRB 824, 826–827 (1998), the employer maintained a rule prohibiting improper conduct off the hotel's premises or during non-working hours…which affect the hotel's reputation or good will in the community. The Board also found that this rule did not violate the Act. I find these cases dispositive and therefore find that Respondent's rule 32 is a category 1 rule and does not violate the Act. I would note that Respondent's rule at least requires intent to injure the company's reputation, while the rules found non-

[5] Respondent admitted that Bridges and Jody James were employed as supervisors from 2007 and 2001 respectively, but in its answer denied the General Counsel's reliance on the term "all material times." I find that in not denying that Bridges and James were statutory supervisors and agents, Respondent admitted this allegation. Moreover, in Bridges' case the record establishes his authority to effectively recommend discipline, Tr. 161, *Oakwood HealthCare, Inc.,* 348 NLRB 686, 687–688 (2006). This in of itself is sufficient to deem Bridges a statutory supervisor.

[6] I infer that the import of what Bridges said to Sowell was that he would be more likely to be promoted if he signed the decertification petition than if he did not sign it. The General Counsel moves in his brief to correct the transcript to read, " We mostly talk about how if I did sign the petition there'll be more likely more opportunities in Union Tank Car than I would not have if I *didn't* signed it." I find this unnecessary since from the context what Sowell intended to convey is perfectly clear.

I specifically discredit the testimony of Shop Operations Director John Bauer regarding Graham Bridges' role in selecting leadmen. Michael Weeks testified that supervisors choose their own leadmen, and that Bridges selected him, Tr. 173–174. Weeks'testimony is this regard is evidence of a motive to testify in such manner so as to not implicate Bridges in the commission of an unfair labor practice.

violative in the above cited cases did not do so.

I would also distinguish *Claremont Resort & Spa,* 344 NLRB 832 (2005), cited by the General Counsel, from this case as well. Claremont's rule prohibiting "negative conversations about associates and/or mangers" is more directly aimed at protected conversations in which employees criticize their managers with regard to working conditions. Moreover, Claremont's rule says nothing about intent. Respondent's rule in prohibiting statements intended to injure the reputation of management personnel, at least suggests that the rule is aimed at maliciously false statements.[8]

Prohibition of Cell Phones

While Respondent's witnesses testified that employees were allowed to use their cell phone during breaks and lunches in non-work areas, that is not what Respondent's use of telephone policy states. There is similarly no evidence that Respondent ever advised employees that cell phone use was allowed during breaks, lunches, etc. The rule, as written, clearly prohibits cell phone use in non-work areas at any time during the workday and is presumptively invalid, *Our Way,* 268 NLRB 394 (1983); *Whole Foods,* 363 NLRB No. 83, slip op. at 3 (2015). Respondent has not provided any convincing justification for the rule as written and thus has not overcome the presumption. The fact that the rule was rescinded sub silento is irrelevant to whether it was violative in June 2018. Since the rule violates the Act on its face, the fact that it may not have been enforced or was ignored is also irrelevant. Moreover, pursuant to *Boeing,* the fact that Respondent rescinded the rule establishes that the employer's justification for the rule did not outweigh the potential adverse impact on protected rights. Finally, the fact that the Union had other means of communicating its message does not negate the violative nature of Respondent's illegal prohibition on cell phone use during non-work time in non-work areas, see, *Bon Marche,* 308 NLRB 184, 185 fn. 7 (1992).

The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period. However, the "Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results." In determining whether the misconduct could have affected the election result, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors, *Clark Equipment Co.,* 278 NLRB 498, 505 (1986).

This record does not even establish that employees were aware that the cell phone rule that had been maintained since 2010 prohibited their use on breaks. Therefore, I find that it is virtually impossible to conclude that maintenance of this rule could have affected the election results.

Alleged Violative Statements

The test as to whether an employer's statement or conduct violates Section 8(a)(1) is whether it may reasonably be said that the conduct or statement tends to interfere with employee rights under the Act. The employer's motive in making the statement or engaging in the conduct is irrelevant to whether it violated Section 8(a)(1), *American Freightways Co.,* 124 NLRB 146, 147 (1959).

Respondent, by Jody James, Violated Section 8(a)(1) by Confiscating the Union's Flyers in the Break Room

Employees generally have a protected right to possess union materials at their place of work absent evidence that possession of union materials interferes with production or discipline. Thus, employer confiscation of union materials from a non-working area violates Section 8(a)(1), *Brooklyn Hospital,* 302 NLRB 785 fn. 3 (1991);[9] *Intertape Polymer Corp.,* 360 NLRB 957, 969 (2014), enfd. in relevant part 801 F. 3d 224 (4th Cir. 2015); on remand 363 NLRB No. 187 (2016); *Ozburn-Hessey Logistics, LLC*., 357 NLRB 1632 and fn. 5, 1637–1638 (2011).

The Violation by James Does not Warrant Directing a New Election

The Board's usual policy is to direct a new election whenever an unfair labor practice occurs during the critical period. However, the "Board has departed from this policy in cases where it is virtually impossible to conclude that the misconduct could have affected the election results." In determining whether the misconduct could have affected the election result, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit and other relevant factors, *Clark Equipment Co.,* 278 NLRB 498, 505 (1986).

In this instant case, the timing of the unfair labor practice on the day before the election and the closeness of the election result (55–54) would support ordering a second election. The number of employees witnessing the violation, 18–22 out of 116 eligible voters would also support a new election.[10] Nevertheless, I conclude that the results of the June 22, 2018, should be certified. First of all, the number of violations and the nature of the violation tend to support a conclusion that James' violation could not have affected the election result. Moreover, I am influenced by the fact that in filing timely objections, the Union did not mention James' confiscation of literature even though it was aware of it almost immediately (Tr. 35). Finally, without necessarily deciding whether the objection to James' conduct is properly before me, I conclude that Respondent has raised a non-frivolous issue that it is not.[11]

[8] The Board's decision in *Southern Maryland Hospital,* 293 NLRB 1209, 1222 (1989), is harder to distinguish from the instant case. The hospital's rule provided for discipline for "malicious gossip or derogatory attacks on fellow employees, patients, physicians or hospital representatives." Thus, one could posit that derogatory attacks would have to be malicious to warrant discipline. I suspect subsequent Boards may have come out differently with regard to the employer's rule in that case.

[9] Another exception would be if the employer had a rule prohibiting possession of other personal items-although I doubt that in most instances this would save a rule prohibiting union materials in non-work areas.

[10] It is also likely that James' confiscation of the flyers prevented second and third-shift employees from having access to the flyers in the break room.

[11] The General Counsel's failure to support the Union's position with regard to a new election, indicates some misgivings on his part as to whether the objection regarding James' confiscation of materials is properly before me. Given the Board's decision in *Intertape* it would

Finally, I recognize that my decision may be inconsistent with the Board decision on remand in *Intertape Polymer Corp.,* 363 NLRB No. 187. However, while James' confiscation of union literature was a one-time event, the confiscation in *Intertape* occurred on at least 3 occasions. Moreover, a supervisor in *Intertape* told an employee that he could not leave union materials in the break room in the future, a month after the confiscations, but still during the critical period and 4 days before the election, 360 NLRB at 965. Another distinction between this case and the Board's remand decision in *Intertape* is that the second election had already been conducted when the Board issued its remand decision. Finally, the *Intertape* case presents none of the procedural issues that are present in the instant case.

Respondent, by Graham Bridges, violated Section 8(a)(1) in suggesting to Quinn Sowell that he Might be Fired for Pretextual Reasons

Bridges' told Sowell that Respondent could find reasons to fire him even though it could not fire him for declining to sign the decertification. This was a veiled threat that Sowell might be discharged for pretextual reasons. As such it was coercive and a violation of Section 8(a)(1), *Frenchy's K & T and Earl's News Stand,* 247 NLRB 1212, 1221 (1980); *Kanawha Mfg. Co.*, 212 NLRB 51, 52 (1974). This statement would tend to inhibit Sowell from declining to sign the decertification petition and thus interfered with his rights under the Act.[12]

Respondent, by Graham Bridges, Violated Section 8(a)(1) in Telling Quinn Sowell That he Might Have Better Opportunities with Respondent if he Signed the Decertification Petition Than if he did not Sign it

An employer violates Section 8(a)(1) if it promises or suggests that an individual employee's or employees' benefits or prospects generally will improve if they sign a decertification petition, *Equipment Trucking Co.,* 336 NLRB 277, 282–283, 287 (2001). That is exactly what Graham Bridges did in his conversation with Quinn Sowell. Thus, Respondent, by Bridges violated Section 8(a)(1). This statement would tend to pressure Sowell to sign the decertification petition and thus also interfered with his rights under the Act.

Respondent, by Graham Bridges, did not Violate the Act in Telling Ridge Wallace That His 30-day Suspension Would Have Been a Written Warning but For the Union

Generally, an employer does not violate the Act by informing employees that unionization will bring about a change in the manner in which employer and the employee deal with each other, *International Baking Co. & Earthworms,* 348 NLRB 1133, 1135 (2006). I infer from this that a statement as to how the employer dealt with the employee in the past due to unionization also does not violate the Act. On the other hand, it would seem to me that such a statement is likely to influence whether or not an employee would sign a decertification petition and does interfere with his or her Section 7 rights. In this case, however, it is not clear whether Bridges made this statement before or after Respondent withdrew recognition from the Union on Friday, March 9, 2018. Thus, I dismiss the allegation in complaint paragraph 6.

CONCLUSION OF LAW

Respondent violated Section 8(a)(1) of the Act as follows:

1. By maintaining a rule that prohibited possession of cell phones and cell phone use during nonwork hours in nonwork areas.
2. By Graham Bridges in implying that an employee might be disciplined or discharged for pretextual reasons if that employee did not sign a decertification petition.
3. By Graham Bridges in suggesting that an employee or that employees generally would have greater opportunities if they signed a decertification petition.
4. By Jody James in confiscating union literature in the employee break room during the critical period between the filing of the representation petition and the Board election.

Recommendations Regarding Objections

Generally, the Board will set an election and order a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. The only exception to this policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome could be affected. In assessing whether the misconduct could have affected the result of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit, the proximity of the misconduct to the election and the closeness of the vote. It also considers the position of the managers who committed the violations, *Bon Appetit Management Co.,* 334 NLRB 1042 (2001); *Caterpillar Logistics,* 362 NLRB 395 (2015), enfd. 835 F. 3d 536 (6th Cir. 2016).

For the reasons stated herein, I recommend that the election results be certified that a majority of the valid ballots were not cast for The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and that is not the exclusive bargaining representative of Respondent's Valdosta unit employees.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

surprise me if the General Counsel agrees that the violation could not have affected the results of the election.

[12] Bridges may not have had authority to discipline or discharge an employee without approval from higher authority. However, he clearly had the authority to effectively recommend discipline. He submitted two writeups to higher level management, both of which were approved, Tr. 161.

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

ORDER

The Respondent, Union Tank Car Company, Valdosta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with job loss, loss of promotion opportunities or other means of discrimination if they decline to sign a petition to decertify the Union.

(b) Implying that employees may benefit in terms of promotion, preferential treatment or other benefits if they abandon support for the Union.

(c) Confiscating union literature from employee break rooms or other nonworking areas.

(d) Maintaining a handbook rule that on its face prohibits the use of cell phones in nonwork areas during nonworking times.

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

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

(a) Within 14 days after service by the Region, post at its Valdosta, Georgia facility copies of the attached notice marked "Appendix."[14] 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2018.

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

Dated, Washington, D.C. January 11, 2019

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with job loss or loss of promotion opportunities or otherwise discriminate against them if they decline to sign a petition to decertify the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) or any other union.

WE WILL NOT tell employees that they are likely to have better opportunities, such as promotions, preferential treatment or other benefits if they sign a petition to decertify or otherwise abandon support for the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) or any other union.

WE WILL NOT confiscate union material from employee break rooms or other nonworking areas.

WE WILL NOT maintain a rule that prohibits the use of cell phones by employees in nonwork areas during times when they are not working.

WE WILL NOT In any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

UNION TANK CAR COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-210779 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.

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