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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MERCEDES-BENZ U.S. INTERNATIONAL, INC.,	
Petitioner,	**CASE NO. _____**
v.	**PETITION FOR REVIEW**
NATIONAL LABOR RELATIONS BOARD,	
Respondent.	

COMES NOW Petitioner Mercedes-Benz U.S. International, Inc., an Alabama corporation with its principal place of business in Tuscaloosa, Alabama, by and through its undersigned counsel, pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, and hereby petitions this Court to review and to set aside the Decision and Order of the National Labor Relations Board in Case Nos. 10-CA-112406, 10-CA-115917, and 10-CA-121232, which was entered on November 26, 2014, and reported at 361 NLRB No. 120, on grounds, including without limitation, it is contrary to law and lacks substantial evidence supporting the findings. A copy of the National Labor Relations Board's Decision and Order to be reviewed by this Court is attached hereto as Exhibit "A."

Respectfully submitted this the 23rd day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via Overnight Mail on this the 23rd day of January, 2015:

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OF COUNSEL

Exhibit A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Mercedes-Benz U.S. International, Inc. (MBUSI) *and* Kirk Garner *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America. Cases 10–CA–112406, 10–CA–115917, and 10–CA–121232

November 26, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On July 24, 2014, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed an answering brief, and the Respondent filed a reply brief.

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

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

[1] In adopting the judge's finding that the Respondent's team relations specialists are its agents within the meaning of Sec. 2(13) of the Act, we do not rely on the judge's statement that the Respondent's answer to the complaint admitted that the team relations specialists were its agents, as the Respondent's answer to the second consolidated complaint denied the agency allegation. Instead, we find that the Respondent did not specifically except to the judge's agency finding and therefore has waived its right to do so. See Sec. 102.46(b)(2) of the Board's Rules and Regulations. Even if the Respondent had properly excepted to this finding, an agency finding would still be appropriate because the Respondent stipulated that the team relations specialists were agents for the purposes of conduct falling within their job description, which includes the conduct at issue in this case. In light of our disposition of the agency issue, we find it unnecessary to pass on the judge's additional finding that the team relations specialists are statutory supervisors.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by prohibiting distribution of literature in the Atrium, a mixed use area, we find no merit in the Respondent's contention that it corrected its unlawful prohibition by subsequently permitting employee distribution there. The Respondent did not take the steps required to effectively repudiate its unlawful conduct under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and therefore the finding of a violation is warranted.

Member Johnson agrees with his colleagues that the team center at issue here was a mixed use area, and that the Respondent did not show special circumstances that would justify its prohibition of distribution. He finds it unnecessary to pass on the status of the Respondent's team centers that are adjacent to its production line.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mercedes-Benz U.S. International, Inc. (MBUSI), Vance, Alabama, its officers, agents, successors, and assigns shall take the actions set in the Order as modified.

1. Insert the following as paragraphs 2(a) and (b) and reletter the subsequent paragraphs accordingly.

"(a) Rescind the rule in its employee handbook that prohibits solicitation of employees not on working time by other employees not on working time in working areas.

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

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

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

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. November 26, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule prohibiting employees who are not on working time from discussing the union, or other matters relating to wages, hours, terms and conditions of employment, with other such employees in work areas of our plant.

WE WILL NOT prohibit employees who are not on working time from distributing literature to other such employees in nonwork areas and mixed use areas of our plant, including team centers and atriums.

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

WE WILL rescind the rule in our employee handbook that prohibits solicitation of employees not on working time by other employees not on working time in working areas.

WE WILL supply you with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

MERCEDES-BENZ U.S. INTERNATIONAL, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-112406 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Nicholas A. Rowe, Esq. and *Katherine Chahrouri, Esq.*, for the General Counsel.

Frank McRight, Esq. and *Marcel DeBruge, Esq. (Burr & Forman, LLP)*, of Birmingham, Alabama, for the Respondent.

Mr. James A. Britton, of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Because I conclude that the atriums and team centers in Respondent's plant are mixed use areas, I find that Respondent violated Section 8(a)(1) of the Act by telling employees that they could not distribute union literature in those areas. Respondent also violated Section 8(a)(1) by maintaining a solicitation and distribution rule which employees reasonably could understand to prohibit all solicitation in work areas.

Procedural History

This case began on September 3, 2013, when Charging Party Kirk Garner, an individual, filed the unfair labor practice charge in Case 10–CA–112406 against the Respondent, Mercedes-Benz U.S. International, Inc. (referred to below as Respondent or MBUSI). The charge was served on Respondent the same date.

On October 25, 2013, the Union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, filed a charge against Respondent in Case 10–CA–115917, and amended that charge on November 22, 2013. The charge and amended charge were served on Respondent on October 30, and November 25, 2013, respectively.

On January 22, 2014, the Union filed a charge against Respondent in Case 10–CA–121232. It was served on Respondent on January 27, 2014.

On December 31, 2013, the Regional Director for Region 10 of the Board issued an order consolidating cases, consolidated complaint, and notice of nearing in Cases 10–CA–112406 and 10–CA–115917 and, Respondent filed a timely answer.

On February 21, 2014, the Acting Regional Director for Region 10 issued an order further consolidating cases, second consolidated complaint, and notice of hearing, which consolidated the most recently filed charge, in Case 10–CA–121232, with the earlier field Cases 10–CA–112406 and 10–CA–115917. (For brevity, I will refer to this pleading simply as the "Complaint.") Respondent filed a timely answer.

On April 7, 2014, a hearing opened before me in Birmingham, Alabama. On that day and the next 2 days, the parties presented evidence. On April 9, 2014, the hearing closed. Thereafter, counsel filed briefs, which I have carefully considered.

Admitted Allegations

In its answer to the complaint, Respondent admitted certain allegations. Based on those admissions, I make the findings described in this section of the Decision.

Respondent's answer admitted that it received service of the various charges, but otherwise denied the allegations raised in paragraphs 1(a) through 1(d) of the complaint. A literal reading of Respondent's answer might suggest that it was denying the

filing of the charges, but that would be inconsistent with the Respondent's admissions that it received copies of these charges. Neither at the hearing nor elsewhere in the pleadings has Respondent denied that the Charging Parties filed the charges. Based on all the evidence, including the charges themselves, and applying the unrebutted presumption of administrative regularity, I find that the Charging Parties did file the respective charges. Therefore, I further find that the General Counsel has proven the allegations raised by complaint paragraphs 1(a) through 1(d).

Respondent admits that at all material times, it has been a corporation with an office and place of business in Vance, Alabama, and has been engaged in the manufacture and nonretail sale of automobiles, as alleged in complaint paragraph 2. I so find.

Respondent also has admitted that during the 12 months preceding issuance of the complaint, it sold and shipped from its Vance, Alabama facility goods valued in excess of $50,000 directly to points outside the State of Alabama, as alleged in complaint paragraph 3. I so find. Further, I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2) of the Act and that it meets the Board's discretionary standards for the exercise of its jurisdiction.

Complaint paragraph 5 alleges that group leaders Joel Stewart and Jason Vick, and human resources representatives Dawn Burton, Octave Roberts, and Dave Foreman are Respondent's supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act. Respondent's answer admits that these individuals have been supervisors "for some purposes within the meaning of Section 2(11) of the Act and denies the remaining allegations."

The actions which the complaint alleges to be violative, and other actions attributed to these individuals by various witnesses, all fall within the scope of their normal job duties. Respondent has not asserted that they were acting outside that scope. Accordingly, I conclude that the admission in Respondent's answer suffices to establish the status of these individuals as supervisors and agents.

Complaint paragraph 4 alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act. The Respondent admits this allegation and I so find.

Complaint paragraph 8 alleges that at all material times, Respondent has maintained the following rule:

SOLICITATION AND DISTRIBUTION OF MATERIALS

> It is the goal of MBUSI to produce the highest quality vehicle at the most competitive cost. Activities, which interfere with these efforts, cannot be permitted. MBUSI prohibits solicitation and/or distribution of non-work related materials by Team Members during work time or in working areas. Solicitation and distribution on Company property by those who are not Team Members is strictly prohibited at all times. Examples of prohibited solicitation and distribution of materials include the following:
>
> - Buying and selling of goods, services, materials, or memberships. Solicitation for charitable contributions outside of MBUSI sponsored charities and selling tickets and chances to activities as stated above.
> - Distribution of handbills, notices, literature, etc., during working time or in work areas.
> - Personal, written, telephone, e-mail or distribution/posting of non-work, related materials.

Respondent's answer admits only that at all relevant times, "the quoted policy was part of its handbook." I conclude that this response constitutes an admission that Respondent *maintained* the rule. Inclusion of the rule in its handbook amounts to maintaining it, and no evidence suggests that Respondent rescinded the rule, notified employees that it would not be enforced or otherwise contradicts the assumption that the appearance of this rule in a book of rules governing employee conduct signified that the rule was in effect. Therefore, I conclude that the General Counsel has proven the allegations raised in complaint paragraph 8.

Respondent has denied other allegations raised by the complaint. Those matters will be discussed below.

Disputed Allegations

Complaint Paragraph 6

Complaint paragraph 6 alleges that about May 19, 2013, Respondent, by Joel Stewart, at Respondent's facility, threatened its employees with discipline if they talked about the union during work time while permitting employees to talk about other nonwork subjects. Respondent denies this allegation.

Respondent's employees work under the immediate supervision of "group leaders," and the employees assigned to a particular group leader comprise his or her team. The members of each team gather in a designated "team center" before they begin work.

For employees who work on an assembly line, Respondent has established 14 team centers immediately adjacent to the lines. Respondent also has established another 5 team centers for other employees, such as those responsible for quality control. Four of these 5 team centers are not located adjacent to the production line but are at a distance which, depending on the particular team center, ranges from 10 feet to 20 yards.

A team center resembles an office in some respects and a breakroom in others. Each team center has desks and computer equipment used by the team leader and sometimes by others, such as human resources staff. However, each team center also has one or more refrigerators, microwave ovens, and picnic tables where employees eat lunch and can take their breaks.

Employees assemble in the team centers before the beginning of each shift. Then, immediately when the shift begins, the group leader conducts a meeting. This meeting provides an opportunity for the employees to become focused on work, and also for the group leaders to pass along any new information the employees will need in performing their jobs. The group leaders, who begin work a little earlier, attend a supervisors meeting at which they receive such information.

One of the assembly line team centers is called "Trim 3." In May 2013, Joel Stewart was one of the group leaders who worked at this team center. On Sunday evenings, the employees he supervised began their shift at 9:39 p.m., and on other nights an hour later.

Complaint paragraph 6 concerns events which took place at Trim 3 on the evening of Sunday, May 19, 2013. Respondent had mailed to employees a letter from its vice president of human resources, Archie Craft, dated May 15, 2013. An assembly line employee, Jeremy Kimbrell, became vexed at the letter, which he considered untruthful, and decided to talk to employees after they assembled in the team center for their shift, but before the shift actually began.

According to Kimbrell, on May 19 at 9:37 p.m.—2 minutes before the shift started—he held up a union card and "began to explain to the team members in the Team Center what the union card was and going over line by line what it actually meant to sign that union card and that it wasn't something to be terrified of and it wasn't giving the Union the right to bargain for us, that it's simply required to petition for a vote."

When Kimbrell began talking to the employees, Group Leader Stewart was not in the team center. However, at some point Stewart returned. Kimbrell testified as follows:

> [W]hen he [Stewart] saw that I was up front talking he hollered out my name several times, Jeremy, Jeremy. He said stop, stop, you can't do that Jeremy. And I responded back to him. I said this is my time, and I'm going to talk and when it's your time we'll let you have the floor. And then I continued to do what I was doing with the card and then he ended that meeting and come around in there and picked up the microphone. And I sat down and then he got on the microphone and said I want everybody to know this is a Right to Work state and it will be your choice whether you have a union or not but you don't need to take the word of one person. And if any of you all have any concerns, you can voice your concerns with management.

One difference between the testimony of Kimbrell and that of other witnesses—a difference which does not rise to the level of a clear cut contradiction—raises some concerns about Kimbrell's credibility. Kimbrell's testimony makes clear that the May 15 letter from Respondent's vice president Craft vexed him and motivated him to make the short speech to employees in the team center. Yet, when he described the content of that speech on direct examination, his testimony, quoted above, created the impression that his speech was about a union authorization card.

Other witnesses, however, recall Kimbrell talking about the Craft letter. Employee David Cooper testified, in part, as follows:

> Q. What happened?
>
> A. Well, we were sitting in the Team Center minutes before our time to start work, which would have been about 10:39, and Jeremy stood up and began to talk to everybody about—I think about a letter that was mailed to everybody by Archie Craft, and he talked for a little while, maybe a minute, maybe less, and then Joel Stewart, who was our group leader, was standing outside the Team Center, actually in the aisleway between Trim 3 and Trim 4 on the other side of the railing, and Joel heard what Jeremy was saying, and Joel began to talk over him and saying—and I can't remember his words exactly, I can't quote them verbatim, but to the effect of hey, wait a minute, we don't need to be talking about this right now, you can talk about that later, we've got work to do, we've got to get this meeting started. . .

Group Leader Joel Stewart also testified that Kimbrell was talking to the employees about the Craft letter:

> Q. Okay. Please continue now with what happened.
>
> A. After I'd asked him what was going on, then I let him finish, he held up a piece of paper and he said that he made a statement he said, Uncle Archie, referring to the letter that Archie Craft, our Vice President of Human Resources, wrote, he said Uncle Archie overstepped his bounds on this one. And he went on to say why he felt it was– it wasn't right and shouldn't have been done and he started giving this – to the best of my ability more or less speaking about what, you know, they need to make as far as decision making they needed to give the pro-union speech, more or less, without going into detail.

Considering the testimony of Cooper and Stewart, that Kimbrell spoke to the employees about Vice President Craft's letter, and also considering Kimbrell's testimony that he decided to address the employees after he received and read this letter, it would seem likely that Kimbrell made the Craft letter the focus of his brief talk. However, Kimbrell's testimony on direct examination created the impression that he spoke to employees about the union authorization card, going over it "line by line."

Kimbrell's testimony on direct examination does not indicate that Kimbrell said anything in his speech about the letter from Craft. On cross-examination, Kimbrell did not deny referring to Craft as "Uncle Archie." When asked why he had not mentioned this matter on direct examination, Kimbrell initially answered that he forgot. However, he later gave a different answer:

> Q. And you just forgot about the part where you called the Senior Vice President Uncle Archie?
>
> A. It's not relevant.
>
> Q. Just slipped your mind, right?
>
> A. It's not relevant.
>
> Q. Not relevant?
>
> A. No.

This testimony does not strike me as being particularly candid. On direct examination, Kimbrell had testified that he had decided to speak to the employees after he received and read the Craft letter. Because the Craft letter had motivated him to address the employees, and because two other witnesses testified that they heard Kimbrell talking about it in his speech, it is difficult to believe he simply "forgot" about it.

Kimbrell's answers to some other questions during cross-examination also affect my conclusions about his credibility. The following testimony is particularly significant:

> Q. Okay. Did you say that Archie Crafts' letter, Archie, you referred to as Uncle Archie, that the letter was "a bunch of BS"?
>
> A. It's possible.
>
> Q. It's possible?

A. It's possible. I am a free speaker and what gets me by, it's just like the term Uncle Archie. You would refer to that as disrespect but that's a term that all of us on the line refer to him, as Uncle Archie, so--

Q. And I guess when you stood up to call him a liar in that letter that you meant it in a respectful way when you referred to him as Uncle Archie and you said he was full of BS?

A. I would never have meant it as intentional disrespect, just as free speaking, which is how I am. Loose for words, whatever you want to call it.

Kimbrell's characterization of himself as "loose for words," as well as my impression that he tailored his testimony on direct examination to place himself in a better light, limits my confidence in the reliability of that testimony. Therefore, to the extent that Kimbrell's testimony diverges from that of other witnesses, I do not credit it.

In particular, based on my observations of the witnesses, I credit the testimony of group leader Stewart, and rely on it resolve credibility conflicts. Based on this credited testimony, I find that, when Kimbrell addressed the employees, he used a microphone connected to a system which amplified his voice. This was the same system the group leader used to overcome the noise of the assembly line, but on this particular occasion, the line was not running.

Although Stewart was not in the team center when Kimbrell began speaking, he was close enough to hear Kimbrell's amplified voice. Stewart credibly testified that he heard Kimbrell say "we need to get this meeting started a little early today."

Returning to the team center, Stewart asked Kimbrell what he was doing. Kimbrell replied that he had "something to talk to these guys about. It's before shift. It's my time. I'm going to talk to them." Stewart gave the following testimony, which I credit:

Q. Did you let him finish what he wanted to say?

A. I waited until it was time to start the meeting and at the time to start the meeting I took over the meeting.

Q. So—and this is important I think—so is it correct that other than asking him what he was doing you let him continue on with his criticism of Archie Craft's letter until it was time for you to begin your start of shift meeting.

A. Yes, sir.

To some extent, Cooper's testimony can be read to conflict with Stewart's on one point, whether Stewart allowed Kimbrell to finish speaking. Specifically, Cooper testified that "Joel [Stewart] immediately started the meeting, which we later realized he had started the meeting early but it was all done for the purpose of quieting Jeremy, you know, to stop what he was saying."

Cooper's use of the words "we later realized" underscores the conclusory nature of his testimony about group leader Stewart's motivation. On cross-examination, Cooper testified that it was not his "understanding of the situation" that Stewart allowed Kimbrell to finish speaking. Therefore, it is somewhat difficult to ascertain how much of Cooper's testimony is based on observation and how much flows from inference.

In these circumstances, I have more confidence in Stewart's version. Crediting Stewart, I find that he allowed Kimbrell to finish speaking. Based on other portions of Stewart's credited testimony, I find that the Respondent did not discipline Kimbrell or threaten him with discipline in connection with this incident.

Later, Stewart had a brief discussion with Kimbrell. Crediting Stewart's version, I find that he told Kimbrell that it would have been "a different situation if the line had been running" but that he did not elaborate on this statement. It might be argued that an employee reasonably would understand this remark to indicate that Kimbrell would not have been allowed to address the employees had the line been in operation. However, in my view, the comment was too cryptic to communicate this, or indeed, any message.

Kimbrell's testimony differs markedly from Stewart's concerning this later conversation. In Kimbrell's version, Stewart did not seek him out but rather Kimbrell initiated the discussion:

And he [Stewart] came down the line and I stopped him and I said, Joel, I just want to let you know I think what you did tonight at the shift startup, I believe you violated my rights. And you need to be careful about that. And he told me, he said, I would advise you to be careful because you were in violation because the Team Center is a work area, and you're not allowed to talk about the Union in a work area. And I told him, I said, I disagree because, first of all, I wasn't on the clock. It was pre shift, and we talk about stuff all the time in the Team Centers and talk about whatever we want to and it's a break in a lunch area. And on top of that we've had people stand up and announce taking up money for the death of relatives and taking up money to have a group lunch or whatever. It's all made in the same place where I was standing when I was talking about signing the union authorization card. And we may have went back and forth and we just, at that time, we just agreed to disagree.

For the reasons discussed above, I do not credit this testimony. Therefore, I do not find that Stewart made the statements Kimbrell attributed to him.

In sum, based on Stewart's credited testimony, I conclude that Respondent did not interfere with, restrain, or coerce employees as alleged in complaint paragraph 6. Therefore, I recommend that the Board dismiss this allegation.

Complaint Paragraph 7

Complaint paragraph 7 alleges that about May 21, 2013, Respondent, by Dawn Burton and Jason Vick, at Respondent's facility: (a) Prohibited employees from talking about the union during working time while permitting employees to talk about other nonwork subjects, (b) Threatened employees with discipline up to and including termination if they discussed the union during work time and inside the plant while permitting employees to discuss other nonwork subjects, and (c) Threatened employees with discipline up to and including termination if they solicited for the union anywhere inside the plant. Respondent has denied these allegations.

To support these allegations, the General Counsel presented testimony by employee Alonzo Archibald about his meeting

with his immediate supervisor, Jason Vick and a team relations specialist, Dawn Burton, from Respondent's human resources department. Only those three individuals attended the meeting, which took place at a team center in Respondent's plant.

The testimony of all three witnesses paint a consistent picture of how the meeting began. Burton explained the reason for the meeting, to investigate a report that Archibald had been riding a motorized cart (informally called a "cheese wagon") and soliciting employees to sign union cards while these employees were on working time. Supervisor Vick then stated that Archibald did not drive a cheese wagon, but instead worked on the assembly line as a panel adjuster.

However, Archibald's testimony markedly diverges from that of Burton and Vick concerning what happened next. Archibald testified as follows:

> Q. What did she say to the best of your recollection?
>
> A. She said passing the union cards out is not prohibited online or inside the plant. She said you can talk about Union on your break times or at lunchtime. That's the only time you can talk about Union. I also discussed with her the fact that she continued to say the Company was neutral. I asked her how can the Company be neutral when we have the VP of Operations—VP of HR send out a letter saying that his opinion on the Union.
>
> . . . .
>
> Q. BY MR. ROWE: Were you told that you'd be disciplined or anything if you did any of these?
>
> MR. DEBRUGE: Judge, I object to any leading of the witness.
>
> JUDGE LOCKE: Overruled. Please proceed.
>
> THE WITNESS: Yes.
>
> Q. BY MR. ROWE: Who said that and what did they say?
>
> A. Dawn said if I'm caught talking about Union or passing union cards out online, I'd be subject to disciplinary action all the way up to termination.
>
> Q. Was anything else discussed during this meeting with Dawn and Jason?
>
> A. The only thing I can remember that was discussed right now at the time were about the fact, she just kept on complaining saying that Union—not the Union but the Company was neutral, and I told her the Company is not neutral. I said we're allowed to talk about everything else online but we can't talk about the Union. And also she said, well, I'll reiterate we are neutral, you cannot talk about the Union online. You cannot pass flyers out online, you cannot pass union cards out online.

However, Burton specifically denied these statements which Archibald attributed to her. According to Burton, she only told Archibald that he could not interrupt employees while they were at work. Vick's testimony corroborates Burton.

Resolving this credibility conflict poses a challenge. On the one hand, Archibald's uncorroborated testimony is contrary to that of two other witnesses. On the other hand, although all three witnesses appeared credible, Archibald's demeanor particularly impressed me.

Contrary to the General Counsel's brief, I do not believe it significant that Vick's pretrial affidavit did not use the words "interfere" or "interference." The General Counsel's brief further states that on cross-examination, Vick admitted "in complete contradiction to his prior testimony on direct examination, that the word 'interference' was, in fact, never uttered in the meeting with Burton and Archibald." Such an admission, in my view, has little effect on Vick's credibility.

On direct examination, Vick did testify that Burton told Archibald he could not interfere with employees while they were working. However, he was not trying to quote Burton verbatim but rather was describing the gist of what she said. Vick also used the word "interfering" in the following testimony:

> Q. And tell us—tell the Judge, if you would, what she told him.
>
> A. We sat down with Alonzo and told him what we were told, which was basically that he was seen riding around on the cheese wagon interfering with team members on the day shift while they were working trying to get them to sign union cards. He denied it. I asked a question, was he even on a cheese wagon because his job at that time doesn't detail him to be on one, you know? He's got to be with the car—or with the line on each car. And he said, no, he wasn't.

Vick's use of the qualifying phrase "which was basically" indicates that he was not attempting to quote Burton word for word but rather was summarizing. So the fact that he may have used some word other than "interfering" does not suggest that Vick's testimony was unreliable.

On the other hand, certain portions of Archibald's testimony raise questions, notwithstanding his demeanor. Thus, at one point, Archibald testified that Burton told him "passing the union cards out is not prohibited online or inside the plant." At another point, he testified that "Dawn [Burton] said if I'm caught talking about Union or passing union cards out online, I'd be subject to disciplinary action all the way up to termination." Obviously, both of those statements cannot be correct.

In these circumstances, I conclude that the mutually corroborated testimony of Vick and Burton likely is more reliable than the uncorroborated testimony of Archibald. Therefore, I credit Vick and Burton.

Because I do not credit Archibald's testimony, I conclude that the General Counsel has not proven the allegations raised by complaint paragraph 7. Therefore, I recommend that the Board dismiss this allegation.

Complaint Paragraph 8

Complaint paragraph 8 alleges that at all material times, Respondent has maintained in effect the rule, set forth in full above, under "Admitted Allegations," titled "Solicitation and Distribution of Materials." Respondent has admitted that the quoted policy was part of its handbook. Complaint paragraph 11 alleges that this rule violates Section 8(a)(1) of the Act, which Respondent denies.

Before considering whether the language in Respondent's employee handbook violates Section 8(a)(1), I will address a

procedural matter. Respondent's posthearing brief asserts, in effect, that the General Counsel waited until the hearing began to raise any issue concerning the solicitation policy:

> The General Counsel argued in his opening statement that MBUSI's solicitation policy is overly broad. This allegation, raised for the first time at the hearing, was not raised in the Complaint. It was flung into the case at the last minute without explanation. The General Counsel should not be allowed this unrestrained power.
>
> "The propriety of a pleading is today judged by its effectiveness as a mechanism for giving an adverse party notice of the claim upon which relief is sought." *Curtiss Wright Corp. v. NLRB*, 347 F.2d 61, 72 (3d Cir. 1965). A valid complaint gives proper notice of an unfair labor practice so that "the respondent may be put upon his defense." *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951) (citations omitted). Here, no prior notice that MBUSI's solicitation policy was being challenged as overbroad was given, and allowing the claim to go forward robs MBUSI of its due process rights to properly prepare a defense. Further, no excuse justifies General Counsel's failure to raise the issue prior to Hearing. [Footnote omitted.]

In its brief, Respondent further states that it had known before the hearing that it would be defending against allegations that it had enforced its solicitation policy disparately. However, it argued, "defending against an overly broad rule is much different and requires different evidence."

Contrary to Respondent's argument, I conclude that the complaint itself placed Respondent on notice of the allegation. Before quoting the language of the rule, complaint paragraph 8 alleged "At all material times, Respondent has *maintained* the following rule." (Italics added)

Complaint paragraph 11 alleges that by "the conduct described above in paragraphs 6—10" Respondent violated Section 8(a)(1) of the Act. The conduct described in paragraph 8 was Respondent's maintenance of the rule. Therefore, I conclude the complaint was sufficient to place the Respondent on notice of the allegation litigated.

The Respondent concedes, in effect, that it received notice of the allegation through the General Counsel's opening statement which, of course, was at the beginning of the hearing. Respondent thus had time to call witnesses to explain its work rules and policies and to testify concerning any instance when management communicated to employees any interpretation or modification of the solicitation and distribution policy. Indeed, its witnesses did offer testimony about such policies.

Respondent also could have requested an adjournment in the hearing to investigate the allegation and find witnesses to testify about it, but did not do so. Moreover, because the Respondent's answer admitted that at "relevant times, the quoted policy was part of its handbook," the main issue concerns the legal import of the rule rather than its existence. Respondent thus had sufficient time to address the issue in its brief, and did so.

Accordingly, I conclude that the complaint placed Respondent on sufficient notice that the government was alleging unlawful maintenance of the rule, thus placing the substance of the rule at issue. Further, considering all the circumstances, I conclude that the Respondent suffered no prejudice.

Now, I turn to the allegations raised in complaint paragraph 8. Although that paragraph sets forth Respondent's "Solicitation and Distribution of Materials" rule in full, the General Counsel's theory of violation arises from a small part of it. The alleged violation centers on these words:

> MBUSI prohibits solicitation and/or distribution of non-work related materials by Team Members during work time or in working areas.

As a rule of thumb, if an employer allows its employees to discuss any nonjob-related subject while they work, they may discuss forming a union. The government asserts the words quoted reasonably would be interpreted to prohibit an off-duty employee from discussing the Union with another off-duty employee in a work area, thereby violating Section 8(a)(1).

In assessing the legality of the rule, I will follow the framework the Board has established for such analysis. In doing so, I will keep in mind the determinative principle: The legality of a rule turns on whether employees would reasonably construe its language to prohibit protected Section 7 activity. *First Transit, Inc.*, 360 NLRB No. 73 (2014); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

The Board has developed a framework for analyzing the legality of rules restricting solicitation or distribution and, under this framework, the analysis proceeds step by step. The Board first considers whether the rule *explicitly* restricts activities protected by the Act. Such an explicit restriction interferes with the exercise of statutory rights and violates Section 8(a)(1), so the analysis need proceed no further.

If the rule in question harbors no explicit restriction, it still may imply one which chills employees in the exercise of their rights. Therefore, a conclusion that the rule does not include an explicit restriction sends the trier-of-fact to the next step of the analysis. Even absent an explicit restriction, a rule may violate Section 8(a)(1) in any of the following 3 circumstances: (1) employees reasonably would construe the rule's language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village—Livonia*, above; *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

The rule quoted in complaint paragraph 8 and alleged to violate Section 8(a)(1) does not include any explicit restriction on the exercise of Section 7 rights. Therefore, I must determine whether it falls into any of the three categories discussed above. As I understand the General Counsel's argument, the government is not contending either that Respondent had promulgated the rule in response to union activity or that it has been applied to restrict the exercise of Section 7 rights.

Rather, the General Counsel argues that the rule violates the Act because employees reasonably would construe its language to prohibit activity which Section 7 protects. Thus, the General Counsel's brief states, in part:

> This provision can only be reasonably read as "prohibiting solicitation by team members in working areas." As written, this policy prohibits any solicitation at any time in working areas,

> regardless of whether the employees are on working time or not. Respondent's rule is ambiguous and does not clearly convey that employees may lawfully solicit in working areas on nonworking time and it does not describe what is a working area. [Citing *Laidlaw Transit, Inc.*, 315 NLRB 79 (1994).]

The language in question here closely resembles this portion of a rule found unlawful in *UPS Supply Chain Solutions, Inc.*, 357 NLRB No. 106 (2011):

> Employees of the company may not solicit or distribute literature during work time or in work areas for any purpose.

The core words, "during work time or in work areas" essentially are identical to those in Respondent's rule, "during work time or in working areas." Although the judge in *UPS Supply Chain Solutions* concluded that the rule did not violate the Act, the Board reversed. It stated:

> [T]he judge focused solely on the restrictions placed on employees' work time. However, the Respondent's rule also prohibits solicitation in work areas, and does so without qualification. Fairly read, an employee would reasonably understand the rule to ban solicitation in work areas even during nonwork time. The rule is therefore impermissibly overbroad and violates Section 8(a)(1). [Footnote omitted.]

357 NLRB No. 104, slip op. at 2.

Similarly, in *Food Services of America, Inc.*, 360 NLRB No. 123 (2014), the Board, reversing the judge, found the following language to be violative:

> Solicitation discussions of a non-commercial nature, by Associates, are limited to the non-working hours of the solicitor as well as the person being solicited and in non-work areas. (Working hours do not include meal breaks or designated break periods.)

The Board, citing *UPS Supply Chain Solutions*, above, stated that, absent special circumstances not present, employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. The Board further stated:

> The Respondent argues that the rule permits solicitation in work areas when both employees are on nonwork time. Perhaps that was what the Respondent meant to say, but it is not what the rule says. Accordingly, by maintaining the rule, the Respondent violated Section 8(a)(1).

360 NLRB No. 123, slip op. at 6. Based on these precedents, I conclude that the rule under consideration here violates Section 8(a)(1).

Respondent did not concede, either at the hearing or in its posthearing brief, that the phrasing of its rule was overly broad. However, its brief says little specifically in defense of the rule. Rather, the Respondent's brief stresses that its policy, as actually applied in the plant, was lawful:

> Even assuming arguendo the claim is proper and that MBUSI promulgated and overly broad solicitation policy, MBUSI permitted lawful solicitations, Team Members understood the policy did not impede Section 7 activities, and Team Members routinely solicited without interference. *Our Way Inc.*, 268 NLRB 394, 395 (1983) (if invalid rule, employer can show that it applied the rule in such a way as to permit lawful solicitation). In fact, since MBUSI's inception, and throughout this most recent organizing campaign, Team Members have freely solicited uninterrupted. (T 715:22–716:13 (Burton); T 340:10–19 (Archibald); 114:10–23 (Garner); 238:1–5, 271:3–24 (Kimbrell)).
>
> . . . .
>
> [Describing *American Safety Equipment Corp. v. NLRB*, 643 F.2d 693 (10th Cir. 1981)] Specifically, the company established, through the testimony of its industrial relations manager and three employees, that it applied its work rule to permit lawful solicitation; the rule's application was communicated to four employees, and employees openly solicited without discipline. Id. General Counsel proffered no evidence to the contrary. Id. Under those facts, the court found no violation of the Act. Id.; *NLRB v. United Techs. Corps.*, 706 F.2d 1254 (2d Cir. 1983) (company overcome presumption of invalid rule because the record showed employees understood the ban on solicitation during "work hours" to mean "work time."); *Essex International, Inc.*, 211 NLRB 749, 750 (NLRB 1974)(facially unlawful rule found lawful in part because the record evidence made clear that employees did not understand the rule to inhibit Section 7 rights, with the Board stating "[t]he record discloses that, during the current campaign, employees openly engaged in union solicitation without interference or discipline during their breaktimes, lunchtimes, and before and after work."); *Phillips Industrial Components, Inc.*, 216 NLRB 885 (NLRB 1975) (unlawful no-solicitation rule was cured in part because there was no evidence that any employee was precluded from engaging in lawful solicitation activity).

From the record, I have no doubt that Respondent generally allowed employees to discuss the union in the workplace. However, the respondent in *UPS Supply Chain Solutions*, above, raised a similar argument, which the Board rejected:

> In the alternative, the Respondent argues that because it does not enforce the no-solicitation rule, the rule is permissible despite being overbroad. The Respondent's argument is flawed, because mere maintenance of the rule, even without enforcement, violates the Act. See *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000) ("Evidence of enforcement of the rule is not required to find a violation of the Act. . .mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees.") (citations omitted), enfd. sub nom *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

357 NLRB No. 106, slip op. at 2, fn. 8.

Clearly, a rule does not have to be enforced to be unlawful. However, Respondent's defense may extend beyond the argument that it did not enforce the rule in its handbook. In certain circumstances, an employer can cure an ambiguity in a work

rule by communicating further with employees. In that event, what would an employee aware of both the rule and the clarification reasonably understand the actual rule to be?

Arguably, the clarification of an ambiguous rule would not have to be by formal amendment and republication in the employee handbook, but could be accomplished by memo or perhaps even orally. The way an employer actually enforced the rule also would contribute to how employees reasonably would understand its meaning.

However, written words, particularly those in a formal statement of rules, such as the employee handbook, likely will weigh more heavily in an employee's mind than an oral comment, particularly when the comment does not specifically state that "the rule in the employee handbook is hereby modified." Indeed, if any disagreement should arise concerning a rule's specific requirements, both employees and their supervisors naturally would turn to the handbook for a definitive answer.

Moreover, as long as the rule is "on the books," it continues to have potential to chill employees' exercise of their Section 7 rights. Its existence requires a remedy.

Based on the entire record, I find that the Respondent truly sought to be neutral and did not intend its rule to be construed in a way which discouraged employees from engaging in protected activities. However, the Respondent's intent is not relevant. As recently as May 30, 2014, the Board, reversing the judge, found a similar rule violative. The Board's words, rejecting the employer's argument for a saving construction, apply here: "Perhaps that was what the Respondent meant to say, but it is not what the rule says." *Food Services of America, Inc.*, above, slip op. at 6.

Therefore, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act by maintaining the rule set forth in complaint paragraph 8.

Complaint Paragraph 9

Complaint paragraph 9 alleges that about "June 20, 2013, Respondent, by Octave Roberts, enforced the rule described above in paragraph 8 selectively and disparately by prohibiting union solicitation and distribution in the Team Center, an area used both as a non-work area and a work area, while permitting non-union solicitations and distributions." Respondent denies this allegation.

This language clearly alleges a disparate enforcement violation. That is, it alleges the Respondent prohibited distribution of union-related literature while allowing employees to pass out materials not related to the organizing campaign. Such a violation does not depend on whether the team centers are work areas or nonwork areas but rather would involve, for example, a supervisor turning a blind eye to someone passing out handbills advertising a little theater production of "Arsenic and Old Lace" while being eagle eyed in preventing the distribution of union flyers.

However, complaint paragraph 9 also describes a team center as being "an area used both as a non-work area and a work area." Thus, at least by implication, this complaint paragraph alleges another theory of violation, that Respondent unlawfully applied its no-distribution policy to locations where the Act gave off-duty employees the right to hand out literature to other off-duty employees.[1]

The General Counsel included this second theory in his opening argument and in his brief and the Respondent's brief addresses it as well. In reviewing the briefs and the record, I do not discern that Respondent objected to the General Counsel pursuing this "mixed use area" theory. Although Respondent objected to the General Counsel's argument that the employee handbook's distribution/solicitation policy was unlawful on its face—a matter discussed above in connection with complaint paragraph 8—I do not understand this objection to extend to complaint paragraph 9.

Accordingly, I will treat complaint paragraph 9 as alleging two separate theories, each of which has been fully litigated. The first theory involves the alleged disparate application of Respondent's distribution policy to those handing out union flyers to other employees while not applying it to those passing out reading materials not related to the Union. The second theory concerns whether the restrictions on distribution in the team centers were unlawful because the team centers were, allegedly, mixed use areas.

The government relies on the testimony of assembly line worker David Gilbert that on June 20, 2013, in his team center at the Respondent's plant, he passed out a prounion flyer to other employees. Neither he nor the recipients of the flyer were on working time.

When Gilbert went to his locker, his group leader, Jacqueline Harris, approached him. According to Gilbert, Harris told him "not that she cared, but I wasn't supposed to pass those out."

Gilbert replied that he thought he was within his rights because he was passing the flyers out to employees who were off the clock and in a nonwork area. Harris replied that they (presumably meaning the supervisors) had been told that employees could pass out flyers before shift started on Sunday and during breaks and lunch thereafter, but not during the time the assembly line was moving.

Later, about a half hour after the shift started, Gilbert's team leader called him off the line and told him to go to the team center. There, Gilbert spoke with O. J. Roberts, a representative from the human resources department. Respondent has admitted that Roberts is a supervisor and its agent.

According to Gilbert, Roberts told him that he was not in any trouble and had done nothing wrong. Roberts said that he just wanted to be sure they had a clear understanding that Gilbert was not supposed to pass out any literature during the time the line was moving, that he could pass things out before shift started on Sunday and during breaks and lunch after that. Gilbert further testified:

> Q. Did you say anything in response to O.J.?
>
> A. Yes, I told him that I didn't know that I'd done anything wrong, that I wanted to make sure that we had a

[1] An employer lawfully may forbid employees who are on working time from distributing literature because "working time is for work." Likewise, it lawfully can prohibit employees who are off the clock from handing literature to other employees who are on working time. Because it is cumbersome to include this qualification, sometimes below it is omitted for the sake of brevity, but it nonetheless applies.

> clear understanding that, that, I asked him if that included football schedules and birthday cards and Christmas gifts and just things in general. And he said that if I'd asked him a month ago that he wouldn't have known there was going to be a problem.
>
> Q. And did he say anything back to you, to the best of your recollection?
>
> A. He, well he told me—I asked him about the cards, I'm sorry. He said that it was all new. He didn't quite understand and I said that I didn't think it was all that new and if I knew it was a problem that I wouldn't have done it.

Neither Roberts nor Harris testified. Crediting Gilbert's uncontradicted testimony, I find that the events occurred as he described them.

With respect to the government's disparate enforcement theory, the General Counsel's brief states as follows:

> Multiple employees testified to observing other employees distribute non-union, non-work items in the Team Centers, including football schedules, magazines, and Girl Scout cookie order forms (Tr. 33-4; 144–45; 154; 173-4; 213; 361-2).

The first of these transcript citations refers to testimony by employee Michael Garner that he saw one person, Regina Taylor, passing around an order form for cookie dough, and another person, Twilene Jefferson, selling raffle tickets in a team center. When asked whether the assembly line was moving at any time when Jefferson was selling the tickets, Garner answered that he could not remember.

Neither Taylor nor Jefferson testified. The record does not establish whether or not any supervisor or manager either saw them engaged in this activity or spoke to them about it. Further, the record does not reveal whether the assembly line was running at the time, a necessary fact because Respondent only prohibited distribution of literature in the team centers when the assembly line was in operation.

The second set of transcript citations refers to the testimony of David Gilbert, who recalled instances when Girl Scout cookie forms and football schedules had been circulated. Those instances took place about 4 years before the hearing, and Gilbert recalled little about them. He also testified he recalled employees giving each other magazines to read, which occurred about a year before his testimony.

Gilbert's testimony was quite general. He did not know whether management had seen these incidents. His testimony also does not shed light on whether anyone from management talked to the individuals involved.

The last transcript citations refer to the testimony of Alonzo Archibald that he had seen Girl Scout cookie order forms circulated, but his testimony is similarly vague. Neither the testimony cited in the General Counsel's brief nor other parts of the record establish the facts necessary to prove disparate enforcement. Credible evidence fails to establish that Respondent knew about any of the incidents. Similarly, credible evidence does not establish that Respondent knew about any other distribution, by employees, of material unrelated to the union campaign.

The General Counsel correctly notes that in certain circumstances, such knowledge may be inferred: "Even in the absence of evidence of direct supervisor knowledge of nonwork distributions, an ALJ can draw a reasonable inference of supervisor knowledge if the distributions were open and routine and supervisors were in and around the area during the period the distributions were made." (GC Br. at 30, citing *United Parcel Service*, 327 NLRB 317 (1998).) Thus, in *The Timken Co.*, 236 NLRB 757 (1978), the Board, reversing its judge, stated:

> Contrary to the Administrative Law Judge, we find that the open, frequent, and widespread solicitations described by the employees justifies drawing an inference that Respondent had knowledge of these nonunion solicitations. See, in this connection, *Sunnyland Packing Company*, 227 NLRB 590 (1976).

However, the present record does not establish that such instances of circulating or distributing materials unrelated to the union campaign were open, frequent, widespread, or routine. Therefore, I conclude it would not be appropriate to infer that management knew about these actions.

In view of the generality of the information, I conclude that the government has not proven disparate or selective enforcement of its distribution rule. Now, I turn to the General Counsel's second theory, that the rule violated the act when applied to the team centers because they were mixed use areas.

The Board has long held that an employer may lawfully prohibit employees from distributing literature in work areas to prevent the hazard to production that could be created by littering the premises. *Stoddard Quirk Mfg. Co.*, 138 NLRB 615 (1962). However, the Board has also held, with court approval, that this rule does not apply to a mixed use area. *Transcon Lines*, 235 NLRB 1163, 1165 (1978), affd. in pertinent part 599 F.2d 719 (5th Cir. 1979) (employer failed to meet burden of establishing that distribution, which took place in area used for recreation as well as work, occurred in a work area or during worktime). *United Parcel Service*, 327 NLRB 295 (1998).

The General Counsel asserts that the team centers are mixed use areas. If so, the Respondent violated the Act by prohibiting the distribution of literature in them. With equal vigor, the Respondent contends that the team centers are only production areas. In considering this issue, whether the team centers are mixed use areas, it should be kept in mind that the issue is distinct from another question, whether unique circumstances warrant granting a special exception to the rule that mixed use areas are to be treated in the same way as nonwork areas.

As described above, each of the team centers has a refrigerator, microwave oven, and picnic table, used by employees during their lunch and break times. However, the team centers also serve as offices for the group leaders and have filing cabinets, computers, and related equipment. In addition to the group leaders, members of management, and human resources representatives use the team centers when they come to the production area to confer with employees. The fact that the team centers serve as meeting and eating places for off-the clock employees taking lunch or break time and also as offices for Respondent's supervisors clearly weighs in favor of finding the centers to be mixed use areas.

The Respondent introduced into the record a video showing

one team center in use. The video does not change my conclusion that team centers are mixed use areas, but it certainly is relevant to the question of whether exceptional circumstances exist.

The team center depicted in the video was so close to the production line and so proximate to the hustle and bustle of the assembly process it produced an intuitive feeling that this busy place certainly must be a work area, even if there is picnic table for workers to use on breaks and at lunch. At the least, it created the impression that unique circumstances warranted an exception to the general rule that an employer could not prohibit distribution of union literature in a mixed use area.

However, Respondent's plant has at least 19 team centers, five of which are not on the production line. At least one of them is 20 yards away. The team centers also vary in design. Some, for example, have walls. Because of these variations, it would not be appropriate to generalize from the video.

Respondent's brief does not dispute that some of the team centers are not adjacent to the assembly line but it notes that all of the team centers are close to "logistics aisles" paths used by forklifts and other equipment. To support its argument that proximity to the logistics aisles makes the team centers work areas, Respondent relies on four cases, *Washington Fruit & Produce Co.*, 343 NLRB 1215 (2004); *UARCO, Inc.*, 286 NLRB 55 (1987); *Vapor Corp.*, 242 NLRB 776 (1979); and *The Timken Co.*, 236 NLRB 757 (1978). In its brief, the Respondent states, in part, as follows:

> Here, the General Counsel apparently contends that Team Members should be able to distribute in Team Centers literally inches from MBUSI's logistics aisles. . .However, the decisions in *UARCO, Timken* and *Vapor* require a contrary conclusion. Those decisions mandate a determination that Team Centers are work areas based on their physical proximity to the logistics aisles. MBUSI Team Members build vehicles 24 hours a day, 7 days a week, as part of highly organized, and very complicated, Just-In-Time manufacturing system. The system depends on a continuous and accurate flow of parts and supplies transported by the forklifts and tuggers on the logistics aisles. Any forms of delay or potential disruption to that supply system are both costly and unacceptable. Further, the Team Centers physical proximity - a matter of inches - to logistics aisles which are critical to MBUSI's plant operations mandates a finding that the Team Centers are work areas. See *UARCO, Timken, Vapor*, supra.; see also, *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1233 (2004) (walkway adjacent to a production line was a work area where distribution could be prohibited based on walkway's proximity to the line).

The cases cited by Respondent do not address the precise issue to be decided here and do not convince me that the team centers should be classified as work areas rather than mixed use areas. I conclude that the team centers, which employees use to eat lunch while on nonworking time, properly are classified as mixed use areas. See *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456 (2003) ("if an area is used for production during most of the day, but serves as a lunchroom during the lunch period, distribution of literature may not be prohibited."); *United Parcel Service*, above, citing *Rockingham Sleepwear*, 188 NLRB 698, 701 (1971).

Respondent's arguments remain relevant to the issue of whether special circumstances exist warranting an exception to the rule that employees not on working time have the right to distribute union literature to other such employees in a mixed use area. Respondent bears the burden of proving the existence of such special circumstances. Here, I conclude that Respondent has not met that burden.

More exactly, I conclude that Respondent has not shown that special circumstances existed at the team center where Gilbert distributed the union-related materials, which is the only team center relevant to the allegations in complaint paragraph 9. I need not, and do not, decide whether such special circumstances existed at any other team center, such as the one depicted in the video. Unlike that one, the team center used by Gilbert and described in his testimony had walls 7 to 8 feet high, "all the way around." The record does not establish that the distribution of flyers inside these walls created any problem for forklifts and other machinery using the logistics aisle outside.

In these circumstances, I recommend that the Board find that, by restricting employees' right to distribute literature in a mixed use area, Respondent violated Section 8(a)(1) of the Act.

Complaint Paragraph 10

Complaint paragraph 10 alleges that about August 30, 2013, the Respondent, by human resources representatives Dave Foreman and Octave Roberts, "selectively and disparately by prohibiting union solicitations and distributions, while permitting non-union solicitations and distributions." Respondent has denied this allegation, but has admitted that Foreman and Roberts are its supervisors and agents.

This complaint allegation concerns events in a room called the atrium, which is roughly 60 by 100 feet and mostly open space. When they enter and leave the plant each workday, employees go through it. On the walls, bulletin boards display notices about work. The General Counsel's brief summarizes the relevant events as follows:

> In around late August 2013, team relations specialists Octave (O.J.) Roberts and Dave Foreman prohibited off-duty employees, including Kirk Garner, from distributing pro-union flyers in the Atrium. (Tr. 35–6). Roberts approached Garner several hours later and told Garner that he could, in fact, distribute materials in the Atrium. (Tr. 117). Respondent, through Dawn Burton's testimony, asserts that the Atrium is a work area but "for purposes of neutrality for the team members, the Company allowed handbilling and distribution in the Atriums." (Tr. 660-61).

Based on the uncontradicted testimony of employees Michael Kirk Garner and David Gilbert, which I credit, I find that sometime in late August 2013 they were passing out union literature in the atrium. Human resources representatives O. J. Roberts and Dave Foreman approached them. Roberts told them that they could not pass out literature in the atrium.

A couple of hours later, Roberts and Foreman met with Garner. Roberts told Garner that he, Roberts, had talked with man-

agement, which had decided to allow distribution of union literature in the atrium.

The record does not establish that Respondent ever convened the employees and told them that it would allow distribution in the atrium. Indeed, employee Gilbert received this information from Garner, not from a supervisor or human resources representative. However, Respondent did issue a September 3, 2013 internal memo stating where distribution of "non-work material" would be allowed. This memo included the following sentence:

> It has been clarified that the atriums are non-work areas and therefore distribution can occur there during non-work times.

The record establishes, and I find, that since about August 30, 2013, Respondent's policy has been to allow distribution of union literature in the atrium. The government does not allege that Respondent prohibited the distribution of such literature in the atrium at any time since August 30, 2013, and no evidence suggests that the change in policy was anything but genuine.

Therefore, it is somewhat difficult to understand what might be called Respondent's "official" position, that the atrium is a work area. Thus, Respondent's post-hearing brief states "Despite the change in policy, MBUSI continues to maintain that the Atriums are work areas."

Indeed, Respondent's brief makes a point of listing the various types of employees working in the atrium, to support its argument that the atrium is a work area. In the atrium, Respondent's employees staff a store which sells merchandise to both visitors and employees. Security officers work out of a "kiosk" in the atrium. At a desk in the atrium, an employee helps other employees sign up for vehicle leases. Respondent's brief further states:

> Besides serving as a means of egress and ingress for Team Members, four separate classifications of MBUSI employees are regularly assigned to work in the Atrium - medical and safety employees, vehicle leasing employees, retail employees, and security employees. . . Medical and safety employees have a separate office in the Atrium and resolve Team Member medical needs that arise in the Plant. [Transcript citations omitted.]

Notwithstanding Respondent's arguments, I conclude that the atrium is, at most, a mixed use area. See, e.g., *New York New York Hotel & Casino*, 334 NLRB 772, 773-774 (2001) ("the occurrence of nonproduction work on part of an employer's property does not in itself allow the employer to declare the whole of its property to be a work area"); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000). When Respondent's production employees traverse the atrium for egress or ingress, they are not on working time, either having clocked out or not yet clocked in. The record does not indicate whether employees who visit the medical office, lease a vehicle or buy merchandise in the retail store are "on the clock," but I will not assume so without evidence.

Because I conclude that the atrium is, at most, a mixed use area, I further conclude that Respondent violated the Act when Roberts told Garner and Gilbert that distribution was not allowed in the atrium. However, Respondent essentially remedied the violation within a couple of hours by informing Garner that he could distribute literature in the atrium.

Because Respondent took prompt remedial action, I have considered whether it would effectuate the purposes and policies of the Act to recommend that the Board find that the violation was de minimis. At first glance, it might seem that a separate remedy for this violation would be cumulative. However, the Respondent's continued position that the atrium is a work area leaves open the possibility that it might decide to reverse its distribution policy sometime in the future. Therefore, I believe that it would be advisable to resolve this issue now.

Accordingly, I recommend that the Board find that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in complaint paragraph 10.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Mercedes-Benz U.S. International, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent violated Section 8(a)(1) of the Act:

(a) Maintaining an overly broad solicitation and distribution rule which employees reasonably would understand to prohibit solicitation, in work areas, by employees not on working time of other employees not on working time.

(b) Prohibiting an employee not on working time from distributing union literature in one of Respondent's team centers, which are mixed use areas within the Respondent's plant.

(c) Prohibiting employees not on working time from distributing union literature in the atrium, which is a mixed use area within the Respondent's plant.

4. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

To remedy its violations of the Act, the Respondent must revise its rule, "SOLICITATION AND DISTRIBUTION OF MATERIALS," which appears in its employee handbook to make clear that it does not prohibit an employee not on working time from soliciting another employee not on working time in a work area. The Respondent must distribute the revised rule to all current employees who received an employee handbook.

The Respondent also must post the Notice to Employees which is attached to this decision as Appendix A.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[2]

[2] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 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, Mercedes-Benz U.S. International, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining a work rule which employees reasonably could understand to prohibit solicitation of employees not on working time by other employees not on working time in working areas.

(b) Prohibiting employees not on working time from distributing literature to other employees not on working time in a mixed use area. In the Respondent's plant, mixed use areas include its atriums and its team centers.

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

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

(a) Within 14 days from the date of this Order, revise the employee handbook rule titled SOLICITATION AND DISTRIBUTION OF MATERIALS to clarify that it does not prohibit employees not on working time from soliciting other employees not on working time in work areas, and provide copies of this revision to all employees who received the employee handbook.

(b) Within 14 days after service by the Region, post at its facility in Vance, Alabama, copies of the Notice to Employees attached hereto as "Appendix A."[1] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). 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 June 20, 2013. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(c) Notify the Regional Director for Region 10, in writing, within 21 days from the date of the administrative law judge's Order, what steps have been taken to comply with this Order.

Dated, Washington, D.C. July 24, 2014

[1] If this Order is enforced by a judgment of the 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."

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 do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a rule prohibiting employees who are not on working time from discussing the union, or other matters relating to wages, hours, terms and conditions of employment, with other such employees in work areas of our plant.

WE WILL NOT prohibit employees who are not on working time from distributing literature to other such employees in nonwork areas and mixed use areas of our plant, including team centers and atriums.

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

WE WILL revise our solicitation and distribution rule to make clear that it does not prohibit employees who are not on working time from discussing the union or other matters relating to wages, hours, terms and conditions of employment, with other such employees in work areas of our plant.

WE WILL provide copies of the revised rule to all employees.

MERCEDES-BENZ U.S. INTERNATIONAL, INC. (MBUSI)

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-112406 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.