

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

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

And

Case 10-CA-169466

KIRK GARNER, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
REPLY TO RESPONDENT MERCEDES-BENZ U.S. INTERNATIONAL, INC.'S
OPPOSITION TO THE GENERAL COUNSEL'S
MOTION FOR SUMMARY JUDGMENT**

Counsel for the General Counsel submits this brief in reply to Mercedes-Benz U.S. International, Inc.'s (MBUSI or Respondent) Opposition to the General Counsel's Motion for Summary Judgment. Respondent's Opposition does not raise any issue of material fact, nor does it establish that any of the asserted business interests are sufficient under Board law to justify its broad and unqualified rule requiring employees to obtain managerial consent to make recordings in the workplace. Because Respondent has not raised any issue of material fact, summary judgment is appropriate as a matter of law.

I. Respondent's Opposition does not raise any issue of material fact, and summary judgment is appropriate as a matter of law.

The facts in this case are not in dispute. Respondent admits that it is a corporation with an office and place of business in Vance, Alabama; that it is engaged in the manufacture and nonretail sale of automobiles, and that in the preceding 12 months, it has sold and shipped from its Vance, Alabama, facility goods valued in excess of \$50,000 directly to points outside the state

of Alabama. Thus, there is no dispute that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is likewise undisputed that, at all material times, Respondent has maintained the following rule in its MBUSI Team Member Handbook (Handbook)¹:

CAMERAS AND PICTURE TAKING

Cameras and video recording devices are not allowed without proper authorization and require approval by MBUSI Security and Communications Department prior to any photos or recordings being made. If you need photos or video recordings for any purpose, you must submit a Video Authorization Form to Security for review. If approved, a special Camera Approval Pass will be issued and must be worn at all times when the picture and video recordings are being made. Visitors taking pictures will require this approval as well as a MBUSI escort.

As further explained below, contrary to Respondent's assertions, there is no dispute of material fact which would warrant a hearing in this matter. Therefore, summary judgment is appropriate.

A. The *Lutheran Heritage* test is the proper test to determine whether Respondent's camera rule violates Section 8(a)(1) of the Act.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board found that a rule violates Section 8(a)(1) of the Act if "(1) employees would reasonably construe the 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." *Id.* at 647. In conducting this analysis, the Board also considers whether any employer business interests outweigh the affected Section 7 rights. Specifically, the Board balances the rule against the asserted business interests to determine whether the rule at issue is "narrowly tailored to protect legitimate employer interests or to

¹ MBUSI calls its employees "Team Members." In its Opposition, Respondent claims that neither the undisputed facts nor the Complaint establish that the rule has been communicated to employees. However, as alleged in the Complaint, and admitted by Respondent in its Answer, the rule is in the employee's handbook. Therefore, this claim by Respondent should be disregarded as disingenuous.

reasonably exclude Section 7 activity from the reach of the prohibition.” See *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4 (April 29, 2016); see also *Whole Foods*, 363 NLRB No. 87, slip op. at 4.

Applying current Board law to the undisputed facts of this case, Respondent’s broad and unqualified ban on recording requiring managerial consent violates Section 8(a)(1) of the Act. Respondent essentially acknowledges that its rule violates the Act under current Board law, but argues in its Opposition that the legal standard should be changed. However, a respondent is not entitled to have the legal standard changed simply to accommodate its violation of the Act. The *Lutheran Heritage* test properly analyzes whether a rule prohibits Section 7 activity and balances employees’ Section 7 rights against an employer’s legitimate business interests.

Lutheran Heritage is the fair and equitable standard for the Board to apply when determining whether the rule at issue violates the Act. As the Board’s precedent has established, Respondent’s broad and unqualified rule banning recording absent managerial consent would be reasonably construed by employees to prohibit Section 7 activity. As there are no disputed facts proffered by Respondent which would establish that the rule is “narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition,” the rule violates Section 8(a)(1) of the Act.

B. The Board has recently applied the *Lutheran Heritage* test to find a rule just like the Respondent’s to be unlawful.

In the case of *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), the Board analyzed rules very similar to Respondent’s rule here. In *Whole Foods*, the Board considered the following two (2) rules:

It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior

approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

It is a violation of Whole Foods Market policy to record conversations with a tape record or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership. The purpose of this policy is to eliminate a chilling effect on the expression of views that may exist when one person is concerned that his or her conversation with another is being secretly recorded. This concern can inhibit spontaneous and honest dialogue especially when sensitive or confidential matters are being discussed.

Id. at 1. The Board held that the policy violated Section 8(a)(1) of the Act by reasonably prohibiting Section 7 activity, stating:

Photograph and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Rio All-Suite Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). ... The rules at issue here unqualifiedly prohibit all workplace recording. ... In light of the broad and unqualified language of the rules and the Respondent's admission as to their scope, we find that employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7. ... Accordingly, we find that the rules would reasonably chill employees in the exercise of their Section 7 rights.

Whole Foods, 363 NLRB No. 87 at 3-4. Like the rules at issue in *Whole Foods*, MBUSI's policy is broad and unqualified and requires managerial consent. As such, it violates Section 8(a)(1) of the Act.

C. The Board uses an objective standard to determine whether a rule would be reasonably read to prohibit activity protected by Section 7 of the Act.

Respondent argues that there is an issue of material fact as to whether its employees understood the rule to restrict Section 7 rights. However, the issue is not how employees understood the rule. The issue is whether employees "would reasonably read the rule[s] as prohibiting recording activity that would be protected by Section 7." See id. at 4, citing *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 5. The question of whether a rule would

be reasonably read as prohibiting activity protected by Section 7 of the Act is an objective one. See generally *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 33 (2011). The requirement is that the Board give the rule a reasonable reading. See *Lafayette Park Hotel*, 326 NLRB 824, 825-827 (1998).

In *T-Mobile USA, Inc.*, 363 NLRB No. 171 (April 29, 2016), the Board evaluated the following rule:

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work related or workplace discussions. Exceptions may be granted when participating in an authorized TMUSA activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

Id. at 3. Analyzing only the language of the rule, the Board concluded, "because of the rule's broad language, employees would reasonably read the rule to prohibit recording that would be protected by Section 7 of the Act." Id. at 4.

There is no dispute as to the language of the rule maintained by Respondent. Whether a rule would be reasonably read to prohibit Section 7 rights is assessed under an objective standard based on the Board's reasonable reading of the rule. Thus, Respondent's assertions urging consideration of subjective factors do not create an issue of material fact.

D. Respondent's claimed business interests do not create an issue of material fact, as none of its claimed business interests justify a broad and unqualified recording ban requiring managerial consent.

Respondent claims that its business interests create fact questions regarding whether its business interests outweigh the Section 7 rights implicated. However, Respondent does not

assert any interests that would justify its broad and unqualified recording rule requiring managerial consent.

Respondent claims its business interests for the camera rule include: protecting propriety information and confidential information, protecting proprietary and confidential information discussed in meetings, safety concerns, marketing concerns, workplace culture and employee privacy concerns, production concerns, property concerns, and the competitive market and workplace setting.

The claimed interests in proprietary and confidential information, property concerns, marketing concerns, property concerns, and “the competitive automotive market and industrial workplace setting” all constitute Respondent’s same argument that its interests in protecting its confidential and proprietary information justify its blanket ban on recording.

As the Board explained in *T-Mobile USA, Inc.*, where an employer claimed that its similar blanket ban on recording was designed, in part, to protect confidential information:

That the Respondent’s proffered intent is not aimed at restricting Section 7 activity does not cure the rule’s overbreadth, as neither the rule nor the proffered justifications are narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition.

T-Mobile USA, Inc., 363 NLRB No. 171, slip op. at 4. In this case, neither the undisputed rule, nor the justification proffered by Respondent, is at all tailored to protect Section 7 activity. Respondent does not allege that it would present any facts to establish that its rule is sufficiently tailored to protect Section 7 rights. As such, there is no dispute of material fact created by this proffered justification.

Respondent also asserts an interest in proprietary and confidential information discussed in meetings. As discussed above, the rule is not narrowly tailored to this interest, nor to protect Section 7 rights. No dispute of material fact is created by this proffered justification.

Next, Respondent turns to safety concerns in its attempt to establish an interest that could justify its broad and unqualified ban on recording. Specifically, Respondent argues that in some areas of the plant, such as the assembly line and the logistics aisle, fast-moving objects could pose a danger to employees taking pictures. However, Respondent's recording rule is not narrowly tailored to this interest, nor to any particular areas of the plant, nor does Respondent allege that it is. As such, this asserted interest does not create any disputed fact that would justify Respondent's blanket plant-wide ban on recording.

Finally, Respondent tries to justify its broad and unqualified ban by arguing that it will present facts to show that its ban on recording is necessary to promote "candid and constructive communication." However, the Board has previously determined that such business interests, "while not without merit," fail to justify an unqualified restriction on Section 7 activity. *Whole Foods*, 363 NLRB No. 87, slip op. at 4. None of the business interests proffered by Respondent create a dispute of material fact.

Respondent also argues that its business interests, if established as a matter of fact, should be found to outweigh its employees' Section 7 interests, as in *Flagstaff Medical Center*, 365 NLRB No. 65 (2011). The Board upheld the blanket ban on recording in *Flagstaff* because it found the employer's concerns about protecting information outweighed the affected employee interest. However, the Board came to this conclusion because federal statute 42 U.S.C. §1320-6 ("HIPAA") makes it illegal to disclose sensitive, private medical information. *Id.* at 6.

In distinguishing *Flagstaff*, the Board has pointed out that the employer in *Flagstaff* was under a statutory obligation to protect sensitive patient information, and that, because of the statutory requirements, employees would reasonably understand the rule was designed to ensure that they abide by the statutory requirements of HIPAA. *Whole Foods*, 363 NLRB No. 87, slip

op. at 4. Just like the employers in *Whole Foods* and *T-Mobile USA, Inc.*, Respondent here is under no statutory obligation comparable to that found by the Board in *Flagstaff*.

Under current Board law, Respondent has not cited any business interests that, if true, would justify its broad and unqualified recording rule requiring managerial consent. Therefore there is no dispute of material fact.²

II. Summary judgment is appropriate as a matter of law.

The parties do not dispute the material facts of this case. There is no dispute regarding the maintenance of the rule at issue. Whether employees “would reasonably read the rule as prohibiting recording activity that would be protected by Section 7” is assessed under an objective standard, and the application of this standard to the undisputed facts is purely a matter of law. Respondent has proffered no business interest that, if established as a matter of fact,

² In its Opposition, Respondent also cited several court decisions it claimed stood for its proposition that there are disputed issues of material fact. However, with the exception of one case cited by Respondent, the cases involved solicitation rules. None of the cases cited by Respondent involve recording rules. Furthermore, all but three of the cases cited by Respondent involve rules in which the employers asserted that their rules were narrowly tailored to their business interests or to reasonably exclude activity from the protection of Section 7 of the Act. See *Our Way, Inc.*, 268 NLRB No. 61 (1983); *American Safety Equipment Corp. v. NLRB*, 643 F.2d 693 (10th Cir. 1981); *NLRB v. United Technologies Corp.*, 706 F.2d 1254 (2nd Cir. 1983); *United Service Auto Ass’n v. NLRB*, 387 F.3d 908 (D.C. Cir. 2004). In *NLRB v. Aluminum Casting & Engineering Co., Inc.*, 230 F.3d 286 (7th Cir. 2000), another case cited by Respondent, the court enforced the Board’s finding that the employer’s solicitation rule violated Section 8(a)(1) of the Act and concluded that the rule would be reasonably read to prohibit Section 7 rights because “(t)he Board regularly finds (like phrases) to be objectionable.” *Id.* at 293. The 1981 Sixth Circuit case of *Motor Inn of Perrysburg, Inc. v. NLRB*, 747 F.2d 692, cited by Respondent, concluded that the maintenance of an overly broad no solicitation policy did not violate the Act because it was never enforced and did not create actual chill. But countless cases more recent than the 1981 case cited by Respondent support the proposition that maintenance of an unlawful rule violates the Act. Finally, the *Birmingham Ornamental Iron Co.* case cited by Respondent is a test of certification case. See *Birmingham Ornamental Iron Co. v. NLRB*, 615 F.2d 661 (5th Cir. 1980). None of these cases cited by Respondent support Respondent’s claim that it has established a dispute of material fact, nor does the case law suggest that courts would overturn the Board’s grant of the General Counsel’s Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order.

would justify its broad and unqualified recording rule requiring managerial consent under Board precedent. Respondent has failed to establish that there is a dispute over any material fact.³ In the absence of substantial, material or genuine issues warranting an evidentiary hearing, it has long been the practice of the Board to grant Summary Judgment. *Henderson Trumbell Supply Co.*, 205 NLRB 245 (1973); *Richmond, Division of Pak-Well*, 206 NLRB 260 (1973); *Tri-City Linen Supply*, 226 NLRB 669 (1970).

As explained by the Board in *Whole Foods* and *T-Mobile USA, Inc.*, broad unqualified bans on recording which require managerial consent can be reasonably construed by employees to prohibit Section 7 activity. See *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3-4; see also *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4.

None of the business interests alleged by Respondent outweigh the employees' Section 7 interests under Board law. Respondent has not alleged any version of facts that, if true, would establish the rule as narrowly tailored to legitimate business interests or to reasonably exempt Section 7 activity. Therefore, the rule violates Section 8(a)(1) of the Act. See *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3-4; see also *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4.

There is no dispute of material fact. Respondent is violating Section 8(a)(1) of the Act by maintaining a complete and unqualified ban on recording absent management consent. For these reasons, the Motion to Transfer Proceedings to the Board for Summary Judgment and Issuance of a Decision and Order should be GRANTED.

³ In its Opposition, Respondent also reiterates its affirmative defenses. As explained in the Motion to Transfer Proceedings to the Board for Summary Judgment, none of these affirmative defenses raise an issue of material fact.

Respectfully submitted this, the 1st day of August, 2016.

/s Joseph W. Webb

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing General Counsel's Reply to Respondent Mercedes-Benz U.S. International, Inc.'s Opposition to the General Counsel's Motion for Summary Judgment by electronic transmission on this date to:

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