Component Bar Products, Inc. *and* James R. Stout.
Case 14–CA–145064

November 8, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On August 7, 2015, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions with supporting argument, and the Respondent filed an answering brief.

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

ORDER

The National Labor Relations Board orders that the Respondent, Component Bar Products, Inc., O'Fallon, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in its employee handbook that prohibits insubordination or other disrespectful conduct.

(b) Maintaining a rule in its employee handbook that prohibits boisterous or disruptive activity in the workplace.

(c) Enforcing or applying handbook rules in a manner that restricts employees' Section 7 activity, including by asserting the rules as a basis for discharging an employee for engaging in protected concerted activity.

(d) Telling employees that they or other employees were discharged because they engaged in protected concerted activity.

(e) Discharging employees for engaging in protected concerted activity.

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

In addition, some of the Respondent's exceptions allege that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

We agree with the judge's application of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to find that the Respondent violated Sec. 8(a)(1) by maintaining overly broad handbook rules prohibiting "insubordination or other disrespectful conduct" and "boisterous or other disruptive activity in the workplace." We note our dissenting colleague's view that the standard set forth in *Lutheran Heritage* should be changed. We disagree with that view for the reasons stated in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 2–6 (2016).

We also agree with the judge that employee James Stout engaged in protected concerted activity when he called another employee to warn the employee that his job was in jeopardy and that the Respondent violated Sec. 8(a)(1) by discharging Stout for this activity. In so doing, we agree with the judge, for the reasons he states, that Stout's call to the coworker constituted inherently concerted activity. We additionally find that Stout acted concertedly under *Meyers Industries,* 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Stout called his coworker to warn him that his job was in danger and to try to help him retain his employment. By his actions, Stout sought to join together with his coworker to help him avoid an adverse employment action and thus engaged in concerted activity under *Meyers II*.

Further, we agree with the judge, for the reasons he states, that under *Continental Group, Inc.*, 357 NLRB 409 (2011), the Respondent violated Sec. 8(a)(1) by discharging Stout pursuant to the Respondent's unlawfully overbroad handbook rule prohibiting insubordination or other disrespectful conduct.

Finally, the judge found that, during Stout's unemployment compensation proceeding, the Respondent asserted two handbook rules as the basis for Stout's discharge. Citing *Lutheran Heritage Village-Livonia*, above, the judge found that the Respondent applied these rules to restrict Stout's Sec. 7 activity in violation of Sec. 8(a)(1) because the conduct alleged to have violated the rules was protected concerted activity. The Respondent excepts to the judge's finding of this violation, but does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, this bare exception is disregarded. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694 fn.1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[2] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall amend the judge's recommended tax compensation and Social Security reporting remedy. In addition, in accordance with our recent decision in *King Soopers*, 364 NLRB No. 93 (2016), we amend the remedy to provide that the Respondent shall compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For the reasons stated in his separate opinion in *King Soopers*, above, slip op. at 9–16, Member Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

We shall modify the judge's recommended Order to reflect these remedial changes, and to conform to the violations found and with the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

(f) Discharging employees pursuant to the unlawful handbook rule prohibiting insubordination or other disrespectful conduct.

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

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

(a) Within 14 days from the date of this Order, rescind or revise the handbook rule prohibiting insubordination or other disrespectful conduct.

(b) Within 14 days from the date of this Order, rescind or revise the handbook rule prohibiting boisterous or disruptive activity in the workplace.

(c) Furnish all current employees with inserts for the current employee handbook that (1) advise employees that the unlawful rules prohibiting insubordination or other disrespectful conduct and boisterous or disruptive activity in the workplace have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised handbooks that (1) do not contain the unlawful rules, or (2) provide lawfully worded provisions.

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

(e) Make James Stout whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended by this decision.

(f) Compensate James Stout for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

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

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

(i) Within 14 days after service by the Region, post at its facility in O'Fallon, Missouri, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 2014.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. November 8, 2016

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Mark Gaston Pearce, Chairman

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

I concur with the majority's finding that Charging Party James Stout engaged in protected concerted activity under the standard set forth in *Meyers Industries*, 281

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

NLRB 882 (1986) (*Meyers II*),[1] when he telephoned fellow employee Shawn Burgess to warn him that his job was in jeopardy, and I agree that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) when it discharged Stout for doing so.[2] I also agree with the judge and my colleagues that the Respondent violated NLRA Section 8(a)(1) by telling Burgess that Stout was discharged for engaging in protected concerted activity. I do not agree, however, that telling *Stout* he was discharged for engaging in protected concerted activity constituted a separate violation of the Act. "Merely advising employees of the reason for their discharge is 'part of the res gestae of the unlawful termination, and is subsumed by that violation.'" *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 9 fn. 2 (2014) (Member Miscimarra, dissenting in part) (quoting *Benesight, Inc.*, 337 NLRB 282, 285 (2001) (Chairman Hurtgen, dissenting in part)). I also disagree with the majority's finding that Stout's conduct was "inherently" concerted, a theory I reject for the reasons set forth in my separate opinions in *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 5–7 (2015) (Member Miscimarra, dissenting), and *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 7–8 (2014) (Member Miscimarra, dissenting in part).[3]

Regarding the majority's finding that the Respondent violated Section 8(a)(1) by maintaining two work rules—prohibiting "[i]nsubordination or other disrespectful conduct" and "[b]oisterous or disruptive activity in the workplace"—I disagree with those violation findings, and I also disagree with the standard the judge and my colleagues apply in reaching those findings. Applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*), the judge found the maintenance of these rules unlawful on the basis that employees would "reasonably construe" them to prohibit Section 7 activity.

Unlike my colleagues and the judge, I believe the Board should not apply the "reasonably construe" standard. For the reasons I explained in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part), which are summarized below, I believe the *Lutheran Heritage* "reasonably construe" standard should be overruled by the Board or repudiated by the courts. In my view, the Board is required to evaluate an employer's workplace rules, policies and handbook provisions by striking a "proper balance" that takes into account (i) the legitimate justifications associated with the disputed rules and (ii) any potential adverse impact on NLRA-protected activity,[4] and a "facially neutral" policy, rule or handbook provision—defined as a rule that does not expressly restrict Section 7 activity, was not adopted in response to NLRA-protected activity, and has not been applied to restrict NLRA-protected activity—should be declared unlawful only if the legitimate justifications an employer may have for maintaining the rule are outweighed by its potential adverse impact on Section 7 activity. Applying this standard, I believe the Board should find that the two rules described above are lawful.

A. The Board's Lutheran Heritage "Reasonably Construe" Test Should Be Overruled by the Board or Repudiated by the Courts

As addressed at greater length in my partial dissenting opinion in William Beaumont,[5] I believe that the Lutheran Heritage "reasonably construe" test should be overruled by the Board or repudiated by the courts. The "reasonably construe" standard defies common sense and is contrary to the Act in numerous respects. It entails a single-minded consideration of NLRA-protected rights—even though the risk of intruding on NLRA rights might

[1] Affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir 1987), cert. denied 487 U.S. 1205 (1988).

[2] Having found that Stout was unlawfully discharged for engaging in protected concerted activity, I find it unnecessary to reach or pass on the majority's finding that Stout's discharge was also unlawful under *Continental Group, Inc.*, 357 NLRB 409 (2011). Finding the discharge unlawful on two grounds instead of one would not materially affect the remedy.

[3] As I explained in *Hoodview Vending*, the notion that conversations about certain subjects are "inherently" concerted cannot be reconciled with *Meyers II*, which requires that a conversation have an object of group action in order to qualify as concerted activity. *Meyers II* distinguishes between conversations that look toward group action, which are concerted, and mere griping, which is not. To deem a conversation "inherently" concerted based solely on its subject matter erases this distinction and thus contravenes *Meyers II*. In addition, the courts of appeals have uniformly rejected the theory of "inherently" concerted activity, see *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991), and *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209 (D.C. Cir. 1996), and the Court of Appeals for the District of Columbia Circuit has criticized the theory as "nonsensical," "limitless," and having "no good support in the law," *Aroostook County*, 81 F.3d at 214. See *Hoodview Vending*, 362 NLRB No. 81, slip op. at 5–6 (Member Miscimarra, dissenting).

[4] See *NLRB v. Great Dane Trailers, Inc*., 388 U.S. 26, 33–34 (1967) (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"). In performing the balancing discussed in the text, I believe the Board must also take into account other considerations, which may include, depending on the case, reasonable distinctions between types of rules and justifications, evidence regarding the particular industry or work setting, specific events that may bear on the disputed rule, and the possibility that the rule may be lawfully maintained even though application of the rule against NLRA-protected conduct may be unlawful. See *William Beaumont*, supra, slip op. at 15, 18-20 (Member Miscimarra, concurring in part and dissenting in part).

[5] *William Beaumont*, supra, slip op. at 8–10, 11–18 (Member Miscimarra, concurring in part and dissenting in part).

be "comparatively slight"[6]—without taking into account the many legitimate justifications associated with particular policies, rules and handbook provisions, which may be associated with important justifications such as preventing unlawful harassment, reducing the risk of workplace violence, or avoiding potentially fatal accidents. As I explained in *William Beaumont*:

- *Lutheran Heritage* is contrary to Supreme Court precedent establishing that, whenever work requirements are alleged to violate the NLRA, the Board *must* give substantial consideration to the justifications associated with the rule, rather than only considering a rule's potential adverse effect on NLRA rights.[7]
- *Lutheran Heritage* is contradicted by the NLRB's own cases establishing that numerous work requirements and restrictions are lawful—for example, no-solicitation and no-distribution rules, off-duty employee access rules, "just cause" provisions and attendance requirements—notwithstanding the fact that each would fail the *Lutheran Heritage* "reasonably construe" test.[8]
- The Board has engaged in a balancing of competing interests—in the above cases and others spanning more than six decades—*without* disregarding the justifications associated with particular rules and requirements.[9]
- Under *Lutheran Heritage*, the Board has invalidated many facially neutral work rules merely because they are ambiguous. However, the Board's requirement of linguistic precision when applying *Lutheran Heritage* is contrary to the permissive treatment that Congress, the Board and the courts have afforded to "just cause" provisions, benefit plans, and other employment-related requirements throughout the Act's history.[10] Moreover, given that many ambiguities are inherent in the NLRA itself, it is unreasonable to find that reasonable work requirements violate the NLRA merely because employers cannot discharge the impossible task of anticipating and carving out every possible overlap with some potential NLRA-protected activity.
- The *Lutheran Heritage* "reasonably construe" test stems from several false premises that are contrary to the NLRA, the most important of which is a misguided belief that unless employers formulate written policies, rules and handbooks that can never be construed in a manner that conflicts with some type of hypothetical NLRA protection, employees are best served by not having employment policies, rules and handbooks at all. In this respect, *Lutheran Heritage* requires perfection that literally has become the enemy of the good.[11]
- The *Lutheran Heritage* "reasonably construe" test improperly limits the Board's discretion, contrary to the Board's responsibility to apply the "general provisions of the Act to the complexities of industrial life."[12] It does not permit the Board to afford greater protection to those Section 7 activities that are central to the Act (as compared to other types of activity that may lie at the periphery of the Act or rarely if ever occur), to make reasonable distinctions among different types of justifications underlying particular rules, to differentiate between different industries or work settings, or to take into account discrete events that, if considered, may

[6] *NLRB v. Great Dane Trailers*, supra, 388 U.S. at 33–34.

[7] See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945) (describing the need to balance the "undisputed right of self-organization assured to employees" and "the equally undisputed right of employers to maintain discipline in their establishments," rights that "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee," because the "[o]pportunity to organize and proper discipline are both essential elements in a balanced society"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (referring to the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing . . . the intended consequences upon employee rights against the business ends to be served by the employer's conduct"); *Great Dane*, 388 U.S. at 3-–34 (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). Cf. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 680–681 (1981) ("[T]he Act is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved."). See generally *William Beaumont*, supra, slip op. at 11–12 (Member Miscimarra, concurring in part and dissenting in part).

[8] See *William Beaumont*, supra, slip op. at 12 (Member Miscimarra, concurring in part and dissenting in part).

[9] Id., slip op. at 12–13, 20–21 (Member Miscimarra, concurring in part and dissenting in part).

[10] Id., slip op. at 8, 13–14 & fns. 29-31 (Member Miscimarra, concurring in part and dissenting in part).

[11] Id., slip op. at 8, 13-15 (Member Miscimarra, concurring in part and dissenting in part).

[12] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; see also *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266–267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

demonstrate that the justifications for certain work requirements outweigh their potential impact on some type of NLRA-protected activity.[13]

- If a particular work rule exists for important reasons that require the Board to conclude that "the rule on its face is *not* unlawful,"[14] *Lutheran Heritage* fails to recognize that the Board may find that the employer has violated Section 8(a)(1) by *applying* the rule to restrict NLRA-protected activity.[15] Here as well, *Lutheran Heritage* prevents the Board from discharging its duty to apply the "general provisions of the Act to the complexities of industrial life."[16]
- The *Lutheran Heritage* "reasonably construe" test has been exceptionally difficult to apply, many Board decisions have disregarded important qualifications set forth in *Lutheran Heritage* itself,[17] and *Lutheran Heritage* has consistently produced arbitrary results.[18]

As I stated in *William Beaumont*, our experience with the *Lutheran Heritage* "reasonably construe" standard "has revealed its substantial limitations, as well as its departure from the type of balancing required by Supreme Court precedent and the Board's own decisions."[19] For the above reasons, *Lutheran Heritage* should be overruled by the Board, and if the Board fails to do so, it should be repudiated by the courts.

B. The Rules Prohibiting "Insubordination and Other Disrespectful Conduct" and "Boisterous and Other Disruptive Conduct" Should Be Deemed Lawful

Turning first to the prohibition against "[i]nsubordination and other disrespectful conduct," this rule cannot be regarded as an 8(a)(1) violation under the balancing test set forth in *William Beaumont*. The risk of this rule affecting the exercise of Section 7 rights is comparatively slight, since the rule is clearly aimed at unprotected conduct; and the legitimate justifications for the rule are substantial. Requiring that directives be obeyed and disrespectful conduct avoided is essential for preserving supervisory authority and maintaining order, discipline, and production.

I would reach the same result under the *Lutheran Heritage* "reasonably construe" standard. Applying that standard, the judge and my colleagues agree that employers may lawfully prohibit "insubordination," but they believe employees would reasonably construe "other disrespectful conduct" to include Section 7 activity. I respectfully disagree. In context, I believe employees would reasonably construe the phrase "other disrespectful conduct" to refer to misconduct of the same kind or nature as "insubordination," and employees would not interpret the rule as a prohibition against Section 7 activity. See *Casino San Pablo*, 361 NLRB No. 148, slip op. at 10–11 (2014) (Member Johnson, dissenting in part); see also *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003) (finding that "'other disrespectful conduct' . . . is clearly conduct of a piece with 'insubordination'" and character-

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[13] See *William Beaumont*, supra, slip op. at 9, 15 (Member Miscimarra, concurring in part and dissenting in part).

[14] *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (emphasis added).

[15] In *Aroostook County Regional Ophthalmology Center*, supra, the Court of Appeals for the D.C. Circuit stated:

> In the absence of any evidence that [the employer] is imposing an unreasonably broad interpretation of the rule upon employees, the Board's determination to the contrary is unjustified. If an occasion arises where [the employer] is attempting to use the rule as the basis for imposing questionable restrictions upon employees' communications, the employees may seek review of the Company's actions at that time. However, the rule on its face is not unlawful.

Id.; see also *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 10, 28 (D.C. Cir. 2001) (stating that the Board cannot find a facially neutral policy unlawful based upon "fanciful" speculation, and the Board must "consider the context in which the rule was applied and its actual impact on employees"). See *William Beaumont*, supra, slip op. at 19–20 & fn. 60 (Member Miscimarra, concurring in part and dissenting in part).

[16] *NLRB v. Erie Resistor Corp.*, 373 U.S. at 236; *NLRB v. J. Weingarten, Inc.*, 420 U.S. at 266–267. See generally *William Beaumont*, supra, slip op. at 12 (Member Miscimarra, concurring in part and dissenting in part).

[17] See *William Beaumont*, supra, slip op. at 13–14 fn. 29; id., slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[18] Compare *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d at 27 (finding it *lawful* to maintain rule prohibiting "abusive or threatening language to anyone on company premises") and *Lutheran Heritage*, 343 NLRB at 646–647 (finding it *lawful* to maintain rule prohibiting "abusive or profane language") with *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding it *unlawful* to maintain rule prohibiting "loud, abusive or foul language"). Also, compare *Palms Hotel & Casino*, 344 NLRB 1363, 1363 (2005) (finding it *lawful* to maintain rule prohibiting "conduct which is . . . injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees) with *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (finding it *unlawful* to maintain rule prohibiting "false, vicious, profane or malicious statements"), enfd. 203 F.3d 52 (D.C. Cir. 1999). See generally *William Beaumont*, supra, slip op. at 15–18 (Member Miscimarra, concurring in part and dissenting in part). In part, the arbitrary results associated with application of the *Lutheran Heritage* "reasonably construe" standard have resulted from many Board decisions that have disregarded important qualifications set forth in *Lutheran Heritage* itself. See *William Beaumont*, supra, slip op. at 18 fn. 55 (Member Miscimarra, concurring in part and dissenting in part).

[19] *William Beaumont*, supra, slip op. at 18 (Member Miscimarra, concurring in part and dissenting in part).

izing the Board's contrary conclusion as "implausible").[20]

The rule prohibiting "boisterous and other disruptive conduct" presents a closer issue. Section 7 activity need not be "boisterous" or "disruptive," but it sometimes is. Therefore, the existence of a rule banning "boisterous and other disruptive conduct" has the potential to adversely affect NLRA-protected activity. On the other hand, this type of rule clearly applies most directly to the enhancement of workplace productivity and safety—which are both substantial interests, particularly in a manufacturing facility such as the Respondent's. Thus, similar to a prohibition of roughhousing, this rule would discourage conduct that could result in injury to the employee engaging in "boisterous" or "disruptive" behavior and/or an injury to others.

On balance, especially because the Board at present is merely considering maintenance of the rule (i.e., there is no allegation that it expressly prohibits NLRA-protected activity, or was adopted in response to such activity, or has been applied against such activity), I would find the legitimate interests advanced by the rule outweigh the potential adverse impact of the rule on Section 7 activity. In this regard, I note that the Board previously has found similar language lawful. See *Tradesmen International*, 338 NLRB 460, 460–461 (2002) (finding lawful rule that prohibited "disloyal, disruptive, competitive, or damaging" conduct). Moreover, I believe a different situation would likely be presented if we were evaluating the Respondent's *application* of the rule to restrict Section 7 activity, but that is not the case here. See fn. 15 supra.

Accordingly, as set forth above, I respectfully dissent in part from, and I also concur in part with, the majority's decision.

Dated, Washington, D.C. November 8, 2016

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule in our employee handbook that prohibits insubordination or other disrespectful conduct.

WE WILL NOT maintain a rule in our employee handbook that prohibits boisterous or disruptive activity in the workplace.

WE WILL NOT enforce or apply handbook rules in a manner that restricts employees' Section 7 activity, including by asserting the rules as a basis for discharging an employee for engaging in protected concerted activity.

WE WILL NOT tell employees that they or other employees are discharged because they engaged in protected concerted activity.

WE WILL NOT discharge you because you engage in protected concerted activity with other employees.

WE WILL NOT discharge you pursuant to an unlawful handbook rule prohibiting insubordination or other disrespectful conduct.

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

WE WILL, within 14 days from the date of this Order, rescind or revise the rule in our employee handbook that prohibits insubordination or other disrespectful conduct.

WE WILL, within 14 days from the date of this Order, rescind or revise the rule in our employee handbook that prohibits boisterous or disruptive activity in the workplace.

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

WE WILL, within 14 days of the date of this Order, offer James Stout full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent

[20] The rule at issue in *Community Hospitals of Central California* prohibited "[i]nsubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a service integrator, service coordinator, or other individual."

position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make James Stout whole for any loss of earnings and other benefits resulting from his unlawful discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate James Stout for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of James Stout, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

COMPONENT BAR PRODUCTS, INC.

The Board's decision can be found at www.nlrb.gov/case/14–CA–145064 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rochelle K. Balentine, Esq., for the General Counsel.
Terry L. Potter, Esq. (Husch Blackwell, LLP), of St. Louis, Missouri, for the Respondent.

DECISION

STATEMENT OF THE CASE

CHARLES J. MUHL, Administrative Law Judge. This case arises out of a phone conversation between two employees, during which Charging Party James Stout told his coworker Shawn Burgess that a supervisor was upset with Burgess and Burgess might not have a job. The General Counsel's complaint principally alleges that the phone conversation constituted protected, concerted activity and Component Bar Products, Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act), by discharging Stout because of that activity. The Respondent denies that the conversation was protected, and asserts it discharged Stout because he exceeded his authority by telling Burgess he was fired.

I conducted a trial on the complaint on June 4, 2015, in St. Louis, Missouri. I have considered the briefs filed by the parties on July 9, 2015. I conclude that, pursuant to longstanding Board precedent, Stout's warning to Burgess that his job was at risk constitutes protected, concerted activity. I also find that the Respondent justified its discharge of Stout, in part, on his protected conduct violating an unlawful disrespectful conduct rule the Respondent maintained in its employee handbook. Finally, I hold that the Respondent terminated Stout solely due to his protected conduct. Accordingly, Stout's discharge violated Section 8(a)(1).

On the entire record, including my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the manufacture and sale of precision machined products for the automotive and other industries from a facility in O'Fallon, Missouri. In conducting its business operations, the Respondent annually sells and ships from that facility goods valued in excess of $50,000 directly to points outside the State of Missouri. As a result, and at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer to the complaint.

II. ALLEGED UNFAIR LABOR PRACTICES

At the Respondent's manufacturing facility, James Stout began working as a quality technician, or roving parts inspector, in July 2014. He was responsible for moving from machine to machine and verifying the quality of parts being made by machine operators. The Respondent's supervisors include Chief Operating Officer Darrel Keesling; Plant Manager Charles Grant Yeakey; Assistant Production Manager Steven Burke; Night Supervisor Mike Pingle; and Human Resources Manager Elizabeth Richards.

A. The Respondent's "Personal Conduct & Disciplinary Action" Policy

From March 13, 2014, through June 3, 2015, the Respondent maintained a personal conduct and disciplinary action policy in its associate handbook. The policy listed rules of conduct, infractions of which subjected employees to discipline, up to and including termination for a single offense. The examples included:

- Insubordination or other disrespectful conduct
- Unauthorized disclosure of business "secrets" or confidential information
- Boisterous or disruptive activity in the workplace
- Violation of company policies

On August 1, 2014, Stout signed an acknowledgement form indicating he had received a copy of the handbook and that it

was his responsibility to read and abide by the policies therein.[1]

On June 3, 2015, the day before the hearing in this case, the Respondent posted a revised version of its handbook in the employee break room at its O'Fallon facility.[2] (R. Exh. 6.) The Respondent deleted the boisterous activity and violation of company policies rules. It also changed the insubordination rule to read: "[b]eing insubordinate, threatening, intimidating, disrespectful, or assaulting a manager/supervisor, co-worker, customer or vendor will result in discipline." Finally, the Respondent added the following to the end of the policy: "None of these rules or any provision of the handbook is intended to interfere with employee's (sic) rights under the National Labor Relations Act."

B. The Respondent's Discharge of James Stout

1. Stout's phone call to operator Shawn Burgess on January 20

One of Stout's coworkers at the Respondent's facility was operator Shawn Burgess, who was nicknamed "turbo" and "the kid." At the beginning of January, Burgess gave the Respondent his 2-week notice after deciding to move to Michigan. However, Burgess changed his mind and asked Plant Manager Yeakey if he could revoke his resignation. Yeakey agreed and Burgess was assigned to the night shift starting January 19.

On that date, Stout was working his regular, combined day and night shift. Burgess did not show up for work. Stout asked Pingle, the night supervisor, if Burgess came in. Pingle told Stout no and that he had not heard from Burgess.

On January 20, Burgess again did not show up for work. Stout asked Yeakey what was going on with the kid. Yeakey responded what kid? When Stout said turbo, Yeakey responded "He doesn't work here anymore." (Tr. 26, 80.)

Worried about Burgess after what Yeakey said, Stout decided to call Burgess to suggest Burgess call in and try to save his job. While working, Stout used his cell phone and called Burgess at about 12:15 p.m. that day. Stout asked Burgess what was going on with him. Burgess responded that he had been sick. Stout responded, "I don't think you have a job and [Yeakey's] upset with you." (Tr. 28.) Burgess then asked Stout what was going on and why Yeakey was upset with him. Without waiting for Stout's response, Burgess began hollering that he had to call someone and hung up on Stout. The entire conversation lasted about 2 minutes.[3]

Burgess then called the Respondent and left a voice message saying twice that he did not appreciate an employee calling him and telling him he was fired. Five minutes later, Burgess called and spoke to Yeakey. Burgess repeated to Yeakey that he was upset Stout had called him and told him he was fired. He told Yeakey that it was management's job, not an employee's, to make that kind of call.

2. The Respondent's meetings with Stout

At 12:30 p.m. that same day, Yeakey and Burke met with Stout. Yeakey asked Stout if he had called Burgess and Stout said yes. Burke then asked Stout what he was doing calling Burgess when he was not on break time. Stout told them he made the call because, after Yeakey told Stout that Burgess did not work there, Stout was worried about Burgess and wanted to let him know what was going on. Stout also told Yeakey and Burke that he knew Burgess had not called in and that he needed to do so to save his job. Stout reiterated that he just told Burgess he did not think Burgess had a job and Yeakey was upset with him, and that was all he could say before Burgess hung up on him. Yeakey told Stout he did not know what he was going to do.[4]

Thereafter, Keesling, Richards, Yeakey, and Burke met to discuss the situation. They talked about the fact that the incident "was causing a big to-do in the day's activity." (Tr. 93.) This included Yeakey and Burke being pulled off the production floor for these meetings. (Tr. 69, 74.) It also included a couple of additional employees being informed about what had occurred, due to security concerns related to a possibility that an angry Burgess would show up at the workplace. (Tr. 68, 74.) Richards testified:

> Everybody was just all up in arms. There was a lot of talk that [Stout] had called [Burgess] and upset him, and there were a lot of conversations with employees trying to find out what had gone on. Everybody was trying to settle it down and trying to figure out what happened.

Ultimately, they determined that Stout would be discharged for "misconduct," because he had involved himself in another employee's personnel activities. (Tr. 93.)

Only 2 hours after Stout's meeting with Burke and Yeakey, Stout met with Keesling, Richards, Yeakey, and Burke. Keesling said it had come to his attention that Stout called Burgess and told him he was fired. Keesling then told Stout it was not his place and none of his business to call anybody and tell them they are fired. Keesling also stated that Burgess had called in and interrupted business. Keesling told Stout both he and Burgess were fired.

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[1] At the hearing, I granted counsel for the General Counsel's oral motion to amend the complaint to include allegations that the Respondent's maintenance of the boisterous activity rule, as well as its statement in the handbook that "use of profanity is undesirable in all settings," both violated Sec. 8(a)(1). (Tr. 95–97.) In her posthearing brief, counsel moved to withdraw the allegation regarding the profanity rule, and I approve that withdrawal. I also grant counsel for the General Counsel's motion to correct pages 19 and 20 of the transcript to insert a "yes" response at line 23 of p. 19 that was inadvertently omitted.

[2] All dates hereinafter are in 2015, unless otherwise specified.

[3] Both Stout and Burgess testified credibly at the hearing concerning what was said during their phone conversation. (Tr. 28, 52–53.) Their accounts were consistent and contained no meaningful conflicts, even if the exact words each recalled were not identical. Because Stout's testimony regarding the conversation is corroborated by his contemporaneous submission to the Missouri Division of Employment Security (R. Exh. 1), I specifically credit that testimony as the actual words said during the January 20 phone conversation between Stout and Burgess.

[4] I credit Stout's testimony regarding what was said in this meeting. (Tr. 28–29.) Initially in his testimony, Yeakey attempted to deny that Stout told him he was trying to get Burgess to call Yeakey to save his job. When confronted by counsel for the General Counsel with prior, sworn testimony he gave during a hearing on Stout's application for unemployment benefits, Yeakey then changed course and conceded that Stout told him this. (Tr. 81–82.)

3. The Respondent's subsequent assertions regarding Stout's discharge

On or about January 26, Stout called Keesling and asked why he had been discharged. Keesling told Stout that it was misconduct calling another employee and telling them that they were fired.

On January 27, Richards submitted a written explanation on behalf of the Respondent to the Missouri Division of Employment Security (MDES), which was handling Stout's application for unemployment benefits. (GC Exh. 4.) The explanation stated:

> Mr. Stout was terminated on January 20, 2015 for "misconduct in the work place."
>
> Mr. Stout took improper action that was not his affair, called a co-worker and told the co-worker he was fired. Per our Associate Handbook: a.) Insubordination or other disrespectful conduct is grounds for termination, b.) unauthorized disclosure of business secrets or confidential information and c.) violation of company policies are grounds for dismissal.
>
> Mr. Stout signed a document on 8/1/2014 stating he had read the "Associate Handbook" and would abide to the company's rules and regulations.

In early February, Burgess went to pick up his belongings and spoke to Yeakey. Burgess again said he was upset that Stout, another employee, had called to tell him he did not have a job anymore and the call should have come from management. Yeakey responded, "yeah, that pissed me off too. I fired him for it." (Tr. 54.)

3. The Respondent's alleged cell phone use policy

On March 17 during the hearing on Stout's application for unemployment benefits, the Respondent, through Richards, stated for the first time that Stout was discharged, in part, for using his cell phone while working. (Tr. 71–73.)

At the hearing in this case, witness testimony conflicted as to whether the Respondent had a policy which banned employee cell phone use on the job. Both Stout and Burgess testified that the Respondent had no such policy and in fact, tolerated such use. Stout stated that supervisors and employees often used their phones during work to do things like order lunch, listen to music, and text—all without repercussion. (Tr. 31–32, 35.) He also described how he believed it was inappropriate for production employees to talk on their phones during work time, but that the Respondent had no company policy which prohibited that conduct. (Tr. 32, 37.) Burgess stated that, when Burke once observed him texting on his cell phone, Burke told him that he was "not really going to bitch" about Burgess being on his phone, as long as Burgess was not making a habit of it and doing his job. (Tr. 57.)

I credit this testimony of Stout and Burgess, which I found frank and believable. Moreover, Richards, the Respondent's own human resources manager, implicitly corroborated the testimony. Richards testified that, during Stout's unemployment benefits hearing, she stated only that the Respondent "discourage[s] all use of cell phones during work hours." (Tr. 72, 76.) This statement strongly suggests that no formal policy or ban existed. Moreover, the Respondent presented no evidence of a written cell phone use policy or records demonstrating employees had been disciplined for improper cell phone use in the past. Although the personal conduct policy prohibits "unauthorized use of telephones, mail system, or other company owned equipment," the reference to "other company owned equipment" establishes that the ban applies only to company telephones, not employees' personal cell phones.

I do not credit Yeakey's testimony, which Stout denied, that employees had to seek permission from a supervisor to make a call during work, as well as that Stout was aware of this requirement and had sought permission multiple times in the past. (Tr. 35, 84–85.) Yeakey was openly hostile towards Stout on the witness stand. He also testified evasively and inconsistently concerning his conversations with Stout and the reason for his discharge. (Tr. 79–83, 87–88.)

For all these reasons, I conclude that the Respondent does not maintain or enforce any policy prohibiting employee cell phone use while working.

Analysis

I. THE SUFFICIENCY OF THE GENERAL COUNSEL'S COMPLAINT ALLEGATIONS

In its brief, the Respondent asserts, without citation to any Board law, that the General Counsel's complaint should be dismissed, because it does not set forth facts sufficient to show that Stout was discharged for engaging in "inherently concerted" activity.[5] (R. Br., pp. 1–2, 9–10.) See *Hoodview Vending Co*., 362 NLRB No. 81 (2015). The Respondent also takes issue with the General Counsel not identifying legal theories in the complaint, as well as adding, but not pleading, the "inherently concerted" theory after the issuance of the complaint and prior to the hearing.

Section 102.15 of the Board's Rules and Regulations requires the General Counsel to include in a complaint:

> (a) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (b) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Complaint paragraph 6(B) alleges that the Respondent discharged Stout on January 20, 2015, because he "engaged in concerted activities with other employees for the purposes of mutual aid and protection by actions and conduct *including talking to another employee about terms and conditions of employment*, and to discourage employees from engaging in these or other protected concerted activities." (emphasis added) (GC

[5] The Respondent incorrectly states in its brief that it moved to dismiss the complaint at the hearing on this same basis. Rather, after counsel for the General Counsel's case-in-chief, the Respondent argued that dismissal of the complaint was warranted, because the evidence presented was insufficient to establish that Stout engaged in protected, concerted activity and, in any event, Burgess had disavowed Stout's actions. (Tr. 90–91.) I denied that motion.

Exh. 1(e).) This allegation contains a clear and concise description of the claimed unfair labor practice with respect to the discharge and meets the requirements of Section 102.15.

Furthermore, the General Counsel was not required, in the complaint or in any other discussion, to advise the Respondent of the specific legal theories that would be advanced to establish Stout's conduct was protected, concerted activity. *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 2 fn. 6 (2015); see also *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993). Nevertheless, prior to the hearing, counsel for the General Counsel told the Respondent's counsel that she intended to argue Stout's discharge was unlawful pursuant to both *Hoodview Vending*, supra, and *The Continental Group*, 357 NLRB 409 (2011). The facts addressing both theories largely are the same and the Respondent had the opportunity to present evidence and fully litigate both theories at the hearing. The Respondent has identified no prejudice to the presentation of its defense.

Finally, the Respondent argues that the complaint allegations are insufficient under the Federal Rules of Civil Procedure (FRCP) and the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), setting forth pleading requirements under the federal rules. However, it long has been recognized that Board proceedings are governed by the Administrative Procedures Act and the Board's Rules and Regulations, not the FRCP. *Armstrong Cork Co.*, 112 NLRB 1420, 1420–1421 (1955). Sections 101.10 and 102.39 of the Board's Rules contain the only references to the FRCP and dictate that federal rules of evidence should control in NLRB proceedings, so far as practicable.

Therefore, I conclude the General Counsel's complaint complies with Section 102.15 of the Board's Rules and deny the Respondent's motion to dismiss the complaint.

II. THE RESPONDENT'S HANDBOOK RULES

The General Counsel's amended complaint alleges that the Respondent's maintenance of rules prohibiting "insubordination and other disrespectful conduct" (disrespectful conduct rule) and "boisterous or disruptive activity in the workplace" (boisterous activity rule) both violate Section 8(a)(1), because employees reasonably could construe these bans to include protected, Section 7 activity.

An employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where the rule is likely to have a chilling effect on Section 7 rights, the maintenance of the rule is an unfair labor practice, even absent evidence of enforcement. In determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, particular phrases must not be read in isolation, and improper interference with employee rights must not be presumed. The first area of inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, the rule is unlawful only upon the showing of one of the following: (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.

As to the Respondent's disrespectful conduct rule, the Board recently found facially unlawful a nearly identical rule which prohibited "insubordination or other disrespectful conduct (including failure to cooperate fully with security, supervisors, and managers)." *Casino San Pablo*, 361 NLRB No. 148 (2014). The Board noted that, although rules solely prohibiting "insubordination" are lawful, the inclusion of "other disrespectful conduct" encompassed Section 7 activity that supervisors may perceive as an affront to their authority. This includes concerted complaints about supervisors or working conditions. The rule here is no different. Perhaps recognizing this, the Respondent makes no argument in its brief as to why this rule is lawful. Thus, the maintenance of the disrespectful conduct rule violates Section 8(a)(1).

With respect to the boisterous activity rule, the Board again had recent occasion to consider a similar rule regarding workplace disruptions. In *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 1, 6 (2014), the Board concluded that a rule prohibiting employees from "causing, creating, or participating in a disruption of any kind during working hours on Company property" was unlawful. The Board noted that the rule there covered employees' protected right to engage in a work stoppage, activity that unquestionably disrupts the workplace. The broad ban on boisterous activity here likewise includes that and other Section 7 conduct.

Despite subsequently deleting this prohibition in its handbook revision, the Respondent argues that the rule is lawful pursuant to the Board's decisions in *Tradesmen International*, 338 NLRB 460, 460–461 (2002) (rule prohibiting "disloyal, disruptive, competitive, or damaging conduct") and *Lafayette Park Hotel*, supra, 326 NLRB at 825–826 (rule prohibiting "[b]eing uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the [company's] goals or objectives"). I find these cases and the rules therein distinguishable. The *Tradesmen* rule also contained specific examples of prohibited conduct, including illegal acts in restraint of trade and employment with another organization while employed at the company. The rule here contains no such examples or other limitations. The *Lafayette Park* rule is targeted to conduct contradicting the employer's goals or objectives, limiting language that is not a part of the broader rule here.

Therefore, I likewise conclude the maintenance of the boisterous activity rule violates Section 8(a)(1).

I also find that the Respondent did not effectively repudiate its unlawful maintenance of these handbook rules. A proper repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. *Boch Honda*, 362 NLRB No. 83, slip op. at 1 fn. 3 (2015); *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978). The repudiation also must be adequately published to the employees involved, while giving them assurances that, in the future, the employer will not interfere with the exercise of their Section 7 rights. In this case, the Respondent did nothing more than post its revised handbook in the employee

break room, more than 4 months after Stout was discharged and 2 months after the complaint issued in this case. It provided no notification to employees of the prior, unlawful handbook provisions it maintained. The Respondent's actions are insufficient to meet the *Passavant Memorial* repudiation requirements.

III. THE RESPONDENT'S DISCHARGE OF JAMES STOUT

The General Counsel advances two, separate legal theories in support of the complaint's allegation that the Respondent's discharge of Stout violated Section 8(a)(1). The first is that the Respondent discharged Stout pursuant to its unlawful disrespectful conduct rule for activity that either was protected and concerted, or otherwise implicates the concerns underlying Section 7 of the Act. See *The Continental Group*, supra; *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). Second, the General Counsel argues that Stout's phone call to Burgess constituted inherently concerted, and protected, activity and the Respondent unlawfully discharged Stout solely for that phone call. *Hoodview Vending Co.*, supra, 362 NLRB No. 81, slip op. at 1 fn. 1.

A. Stout's Phone Conversation with Burgess Constituted Protected, Concerted Activity

Under either of the General Counsel's theories, the case hinges on whether Stout's phone call to Burgess was protected by the Act.

Section 7 of the Act protects employee conduct that is both "concerted" and engaged in for "mutual aid and protection." More specifically, the Board repeatedly has held that an employee's warning to another employee that the latter's job is at risk constitutes protected, concerted activity. *Food Services of America, Inc.*, 360 NLRB No. 123, slip op. at 2–4 (2014); *Tracer Protection Services*, 328 NLRB 734, 740–741 (1999); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987). In *Food Services*, employee Rubio told her coworker Aparicio that Aparicio might be discharged, because their supervisor had criticized Aparicio's job performance and berated Rubio for recommending Aparicio for employment. In *Jhirmack*, employee Allison advised her coworker Ramsey about complaints that other employees made to management about Ramsey's job performance. A common thread in both cases was that Rubio and Allison were motivated to speak to their coworkers by a desire to encourage them to take corrective action to retain their employment. The Board concluded the employees were engaged in protected, concerted activity when warning their coworkers they might lose their jobs.

In light of this precedent, Stout's conversation with Burgess undoubtedly constitutes protected, concerted activity. Stout told Burgess that Yeakey was upset with him and that Burgess might not have a job. Stout did so out of a concern that Burgess would be discharged and needed to call in to save his job, a motivation he contemporaneously explained to Yeakey and Burke in their meeting on January 20. The conversation between the two was inherently concerted, because it dealt with Burgess' job security. It also satisfied Section 7's requirement of "mutual aid and protection," because Stout was attempting to protect Burgess' employment.

Relying on *Alleluia Cushion Co., Inc.*, 221 NLRB 999, 1000 (1975), the Respondent argues that Stout's conduct was not concerted, because Burgess disavowed Stout's actions. However, *Alleluia* is no longer valid precedent, as the Board overruled it and adopted its current definition of concerted activity in *Meyers Industries*, 268 NLRB 493, 496 (1984) (*Meyers I*), and *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*). Whether or not Burgess disavowed Stout's representations is irrelevant to the legal issues presented here.

To the extent the Respondent's argument suggests Stout's action was not concerted because Burgess responded angrily to Stout telling him he might not have a job, the Board rejected that argument in both *Food Services* and *Jhirmack*. The fact that an employee's statements annoy or disturb a coworker does not render the conversation unprotected. *Ryder Transportations Services*, 341 NLRB 761, 761 (2004).

The Respondent also argues that the Board's "inherently concerted" activity doctrine cannot rationally coexist with the definition of concerted activity adopted in *Meyers I* and *Meyers II*, and urges me to follow the rejection of this doctrine by the U.S. Courts of Appeals for both the D.C. and Fourth Circuits. See *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 214 (D.C. Cir. 1996); *Trayco of South Carolina, Inc. v. NLRB*, 927 F.2d 597 (4th Cir. 1991) (unpublished disposition). I decline to do so. A judge's duty is to apply established Board precedent which the U.S. Supreme Court has not reversed. *Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 2 fn. 6 (2014). In *Hoodview Vending*, supra, a Board majority recently reaffirmed that discussions about job security are inherently concerted and specifically rejected the Respondent's argument.

As a result, I conclude that Stout's conversation with Burgess on January 20 constituted protected, concerted activity.

B. The Respondent's Discharge of Stout Violates Section 8(a)(1) Pursuant to the Board's "Double Eagle" Rule

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 411–414; *Double Eagle Hotel & Casino*, supra. Here, the Respondent justified its discharge of Stout, in part, on his phone call to Burgess violating the unlawful disrespectful conduct rule. (GC Exh. 3.) As described above, Stout's conduct during that phone conversation was protected, concerted activity. Even if it was not, Stout's conduct otherwise implicates the concerns underlying Section 7, given that he made the call to Burgess in an effort to assist Burgess in retaining his job. Thus, the General Counsel has met the *Double Eagle* requirements.

Nonetheless, an employer can avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. *The Continental Group*, supra, at 413. The employer bears the burden of asserting this affirmative defense and

establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the overbroad rule. *Flex Frac Logistics, LLC*, 360 NLRB No. 120, slip op. at 2 fn. 5 (2014).

The Respondent contends that Stout's phone call caused a "vast disruption" to its operations on January 20 sufficient to satisfy *Double Eagle*. I do not agree. The record fails to establish that Stout's conduct actually interfered with his own or other employees' work. Stout made the phone call to Burgess while working. However, the call lasted only a couple of minutes, if that, a negligible amount of time. As to other employees' work, Burgess was not working when Stout called him. Since Stout was a roving inspector, his call could not have interfered with other employees' work at the time it was made, because he was not employed on the manufacturing line.

The record also fails to establish that the Respondent's operations were disrupted in any significant manner by Stout's conduct. The Respondent had 70 to 75 employees working on January 20, and the only two employees who were taken off the floor as a result of the incident were Yeakey and Burke. As supervisors, dealing with situations such as the one on January 20 logically would be part of their job duties. Moreover, the total amount of time from when Stout called Burgess and the Respondent discharged Stout was approximately 2 hours and 15 minutes, a very short period. The Respondent presented no evidence of any other effects that this incident had on January 20, in particular on its actual production. Instead, its supervisors offered only vague, nonspecific testimony about Stout causing a "big to-do" and people being "up in arms." I find that testimony unconvincing.

Although the standard announced by the Board in *Continental Group* does not address what level of interference an employer must show to justify discipline issued pursuant to an unlawful rule, I hold that any interference which occurred here was de minimus and insufficient to enable the Respondent to satisfy its *Double Eagle* burden.

Even if this disruption was deemed substantial enough, Burgess—not Stout—caused the disruption. Burgess misinterpreted what Stout told him during their phone call and then immediately made two calls to Yeakey where he "raised hell a little bit." (Tr. 53–54.) The Respondent attempts to assign causation for the disruption to Stout, by arguing that none of Burgess' conduct would have occurred if Stout did not call Burgess and warn him he might not have a job. By that logic, Yeakey caused the disruption. Yeakey initiated the entire sequence of events by telling Stout on January 20, in response to a benign question, that Burgess "doesn't work here anymore." He told Stout that before informing Burgess he had been discharged. Stout would have had no opportunity to advise Burgess he might not have a job, if Yeakey had not told him exactly that. Yet Stout was discharged and Yeakey remains employed in a supervisory capacity for the Respondent.

Finally, the record fails to establish that Stout's interference with production was the actual reason for the discipline. The Respondent did not contemporaneously cite this as a basis for Stout's discharge. At the last January 20 meeting with Stout, Keesling stated that Burgess, not Stout, had interrupted business. Neither Keesling nor Yeakey mentioned disruption of operations when explaining why Stout was discharged during their respective conversations with Stout on January 26 and with Yeakey in early February. The Respondent also did not include disruption of operations as a basis for the discharge in its written submissions to the MDES and the General Counsel during the investigation of the underlying charge in this case. (GC Exhs. 3, 4.)

For all these reasons, I conclude that the Respondent's discharge of Stout violated Section 8(a)(1), pursuant to the Board's *Double Eagle* rule.

C. The Respondent's Discharge of Stout Also Violates Section 8(a)(1), Because Stout Was Terminated Solely for his Protected, Concerted Activity

Where the conduct for which an employer claims to have discharged an employee is protected, concerted activity, the discharge violates Section 8(a)(1) and no analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980), is necessary. *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994); *Mast-Advertising & Publishing*, 304 NLRB 819 (1991). Although not specifically arguing that a Wright Line analysis is appropriate, the Respondent suggests in its brief that Stout was discharged, in part, due to the alleged disruption to its operations, as well as to Stout using his cell phone while working, on January 20.

I have concluded that the Respondent did not rely on a disruption of operations when deciding to terminate Stout, as well as that it did not maintain or enforce any policy banning employee cell phone use while working. The latter finding necessitates the conclusion that Stout's use of his personal cell phone to call Burgess while working played no role in his discharge. Nonetheless, that conclusion is further supported by the Respondent's failure to contemporaneously cite Stout's cell phone use as a reason for his discharge. The only supervisor who raised this issue was Burke in the initial, investigatory meeting. Thereafter, Stout's cell phone use was not mentioned in any oral or written communication from the Respondent until the March 17 hearing on Stout's application for unemployment benefits, nearly 2 months after his discharge.

Therefore, I find that the Respondent discharged Stout solely due to the content of his phone conversation with Burgess. Because that phone conversation was protected, the Respondent's discharge of Stout independently violates Section 8(a)(1), irrespective of any *Double Eagle* violation.[6]

[6] The finding that Stout's discharge was unlawful would hold, even pursuant to a *Wright Line* analysis. The General Counsel established that Stout's protected conduct was a motivating factor for his discharge. However, the Respondent did not present any evidence to demonstrate it would have discharged Stout due to his use of a cell phone while working or because he caused a disruption. The record contains no testimony or documents indicating the Respondent discharged employees in the past for this conduct. In addition, the Respondent asserted these justifications long after Stout's discharge. Such shifting explanations are indicative of an unlawful motive under *Wright Line*.

IV. THE REMAINING COMPLAINT ALLEGATIONS

The General Counsel's complaint also alleges that three statements by the Respondent's supervisors to employees were coercive and independently violated Section 8(a)(1). The alleged violations are: (1) Keesling's statement to Stout in the January 20 meeting that it was not his place and none of his business to call anybody and tell them they are fired; (2) Keesling's statement to Stout on or about January 26 that it was misconduct to call another employee and tell them they were fired; and (3) Yeakey's statement to Burgess in early February that Stout was fired for making the call to Burgess and telling Burgess he did not have a job anymore.

Employer statements that link an employee's discharge to the employee's protected, concerted activity independently violate Section 8(a)(1), even when the discharge itself is found unlawful. A violation occurs when the employee who is discharged is told that his or her protected activity was the reason for the discharge. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1 fn. 2 (2014) (telling employees that Facebook activity, which was protected, was the reason for their discharges); *Benesight, Inc.*, 337 NLRB 282, 283–284 (2001) (telling employee that she had been insubordinate and was terminated, due to her prior participation in a protected work stoppage). A violation likewise occurs when an employer tells employees that another employee has been discharged for activity that is protected by the Act. *Extreme Building Services Corp.*, 349 NLRB 914, 914 fn. 3 (2007) (telling employees that another employee was discharged, because the employee was a member of the union).

In all three statements involved here, the Respondent's supervisors told either Stout or Burgess that Stout had been discharged due to the content of his phone conversation with Burgess. Because that phone conversation was protected, concerted activity, the statements linking Stout's discharge to that activity also independently violate the Act.

Finally, the General Counsel's complaint alleges that the Respondent applied two of its handbook rules to restrict the exercise of Section 7 rights, and the rules are unlawful pursuant to the third prong of the *Lutheran Heritage* standard. In its submission to the MDES, the Respondent cited violations of its handbook rules prohibiting insubordination and other disrespectful conduct and unauthorized disclosure of business secrets or confidential information as bases for its discharge of Stout. However, the conduct alleged to have violated these rules is protected, concerted activity. Thus, the Respondent used these rules to restrict Stout's Section 7 activity and that application renders both rules unlawful under the third prong of *Lutheran Heritage*. *The Sheraton Anchorage*, 362 NLRB No. 123 (2015), incorporating by reference *The Sheraton Anchorage*, 359 NLRB 574, 575–576 (2013); *Good Samaritan Medical Center*, 361 NLRB No. 145, slip op. at 4 (2014).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(1) by:

(a) Since March 13, 2014, promulgating and maintaining overly broad handbook rules prohibiting employees from engaging in insubordination or other disrespectful conduct and in boisterous or disruptive activity in the workplace.

(b) On January 20, 2015, applying handbook rules that prohibit insubordination and other disrespectful conduct and unauthorized disclosure of business secrets and confidential information to restrict employees' Section 7 activity.

(c) On January 20, 2015, discharging James Stout due to his protected, concerted activity.

(d) On January 20 and 26, 2015, telling an employee he was discharged due to his protected, concerted activity.

(e) In early February 2015, telling an employee that another employee was discharged due to the latter's protected, concerted activity.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I shall order the Respondent to offer James Stout full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent must compensate Stout for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). I also shall order the Respondent to remove from its files any references to the unlawful discharge of Stout and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.[7]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

[7] The General Counsel's complaint sought a requirement, as part of the remedy, that Stout be reimbursed for search-for-work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Under extant Board law, those expenses are considered an offset to interim earnings. In this case and others, the General Counsel is seeking a change in Board law. Such a change must come from the Board, not an administrative law judge. The Board has yet to resolve this issue. See *East Market Restaurant, Inc.*, 362 NLRB No. 143, slip op. at 5 fn. 5 (2015). Accordingly, I decline to include the requested remedy in my recommended order.

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

ORDER

The Respondent, Component Bar Products, Inc., O'Fallon, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rule that prohibits employees from engaging in insubordination or other disrespectful conduct or in boisterous or disruptive activity in the workplace.

(b) Applying handbook rules that prohibit insubordination and other disrespectful conduct and unauthorized disclosure of business secrets and confidential information to restrict employees' Section 7 activity, including by discharging them for engaging in such activity.

(c) Telling employees that they or other employees are discharged because they spoke about terms and conditions of employment with other employees.

(d) Discharging employees for engaging in protected, concerted activity.

(e) Discharging employees because they violated an overly broad rule prohibiting insubordination or other disrespectful conduct.

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

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

(a) Rescind the rules from its Personal Conduct and Disciplinary Action policy prohibiting: insubordination or other disrespectful conduct; boisterous or disruptive activity in the workplace; and unauthorized disclosure of business secrets and confidential information.

(b) Send to all employees inserts for the current employee handbook that (1) advise employees that the unlawful rules prohibiting insubordination or other disrespectful conduct, boisterous or disruptive activity in the workplace, and unauthorized disclosure of business secrets and confidential information, have been rescinded; or (2) provide the language of lawful rules; or (3) publish and distribute revised handbooks that do not contain the unlawful rules or provide the language of lawful rules.

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

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

(f) Compensate James Stout for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(g) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of James Stout, and, within 3 days thereafter, notify him in writing that this had been done and that his unlawful discharge will not be used against him in any way.

(h) Within 14 days after service by the Region, post at its facility in O'Fallon, Missouri, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 13, 2014.

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

Dated, Washington, D.C., August 7, 2015.

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.

YOU HAVE THE RIGHT to warn another employee that his or her employment is at risk, and to discuss other terms and conditions of employment with other employees, and WE WILL NOT do anything to interfere with your exercise of those rights.

WE WILL NOT discharge you because you engage in protected, concerted activities with other employees.

WE WILL NOT maintain overly broad rules in our handbook that subject employees to discipline for engaging in insubordination or other disrespectful conduct and/or for boisterous or

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

disruptive activity in the workplace.

WE WILL NOT discharge you because you violated an overly broad rule prohibiting employees from engaging in insubordination or other disrespectful conduct, by exercising the rights described above.

WE WILL NOT use rules prohibiting insubordination or other disrespectful conduct and/or unauthorized disclosure of business secrets or confidential information to restrict the exercise of the rights described above, including by discharging you for exercising those rights.

WE WILL NOT tell you or other employees that you are being discharged, because you warned another employee that his or her employment was at risk or talked with other employees about employee wages, hours, or other working conditions.

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

WE WILL, within 14 days from the date of this Order, rescind the rules in our employee handbook that subject employees to discipline for insubordination or other disrespectful conduct; boisterous or disruptive activity in the workplace; and unauthorized disclosure of business secrets and confidential information.

WE WILL, within 14 days from the date of this Order, offer James Stout full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges he previously enjoyed.

WE WILL pay James Stout for the wages and other benefits he lost because we unlawfully discharged him.

WE WILL compensate James Stout for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files all references to the discharge of James Stout and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

COMPONENT BAR PRODUCTS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14–CA–145064 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.