Mercedes-Benz U.S. International, Inc. (MBUSI) ***and*** **Kirk Garner.** Case 10–CA–169466

May 5, 2017

ORDER DENYING MOTION

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The General Counsel's Motion for Summary Judgment is denied. The General Counsel has failed to establish that there are no genuine issues of material fact warranting a hearing and that he is entitled to judgment as a matter of law.[1]

Dated, Washington, D.C. May 5, 2017

Philip A. Miscimarra, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] The Respondent has raised as an affirmative defense that the General Counsel's allegations are untimely and/or barred by Sec. 10(b). We reject this argument because the Board has long held that "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enfd. in relevant part 571 F.3d 53 (D.C. Cir. 2009); accord *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000); *Trus Joist MacMillan*, 341 NLRB 369, 372 (2004); *Control Services, Inc.,* 305 NLRB 435, 435 fn. 2, 442 (1991).

We disagree with our dissenting colleague's assertion that it is appropriate to grant the General Counsel's motion for summary judgment. In previous decisions implicating similar rules, the Board has permitted employers to adduce evidence regarding asserted business justifications, and about whether the rules were communicated or applied in a manner that clearly conveyed an intent to permit protected activity. See *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 4–5 (2015); *Mercedes-Benz U.S. International, Inc. v. International Union, UAW*, 838 F.3d 1128, 1135–1140 (11th Cir. 2016), citing *Our Way, Inc.*, 268 NLRB 394, 395 fn. 6 (1983). Because the Respondent has raised similar arguments here, we give the Respondent the same opportunity to adduce evidence at a hearing. Thus, contrary to our colleague's assertion, we find that the Respondent's arguments *are* sufficient, at least for purposes of avoiding summary judgment. Of course, we express no view whether the Respondent's arguments are sufficient to prevail on the merits; we merely deny the General Counsel's motion.

MEMBER PEARCE, dissenting.

Unlike my colleagues, I would grant the General Counsel's motion for summary judgment.[1] Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See, e.g., *Security Walls, LLC*, 361 NLRB No. 29, slip op. at 1 (2014). Here, it is undisputed that the Respondent maintains a rule in its employee handbook prohibiting the use of cameras and video recording devices in its vehicle manufacturing plant without prior authorization. As the Respondent effectively concedes, the rule facially infringes on employees' Section 7 rights by restricting all recording, with no exception for protected concerted activity. See, e.g., *Whole Foods Market*, 363 NLRB No. 87, slip op. at 3–5 (2015) (finding similar rule unlawfully overbroad); *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 3–5 (2016) (same). The Board has consistently held that the mere maintenance of an overbroad rule such as the rule here tends to impermissibly chill employee expression. See *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000), enfd. 297 F.3d 468 (6th Cir. 2002); *Cintas Corp. v. NLRB*, 482 F.3d 463, 468 (D.C. Cir. 2007). Thus, the requisite elements of a Section 8(a)(1) violation have been clearly established.

In its opposition to the motion, the Respondent nonetheless argues that a hearing is required to show that employees did not understand the rule to restrict Section 7 activity and that the rule furthers legitimate business interests, including the protection of proprietary and confidential information, the maintenance of safety and production standards, and open communication. It contends that its open culture, developed through candid communication between employees and managers at daily meetings, informs employees that the Respondent will not interfere with the exercise of their Section 7 rights.

Even assuming the truth of the Respondent's claims,[2] they do not cure the unlawfulness inherent in the rule. The Respondent's asserted business interests are inadequate, because the rule—which broadly applies to *all* photographic and video recording—is not tailored to address only those concerns and to exclude Section 7

[1] On May 10, 2016, the General Counsel filed its Motion for Summary Judgment with the Board. On July 12, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 26, 2016, in response to the Notice to Show Cause, the Respondent filed an opposition to the General Counsel's Motion for Summary Judgment, to which the General Counsel subsequently filed a response.

[2] In ruling on a motion for summary judgment, the Board construes the pleadings in the light most favorable to the nonmoving party. See, e.g., *Alpha Associates*, 344 NLRB 782, 785 (2005); *Eldeco, Inc.*, 336 NLRB 899, 900 (2001).

activity.[3] See *T-Mobile*, supra, slip op. at 3–5; *Whole Foods Market*, supra, slip op. at 4. As for its purported culture of open communication, the Respondent argues only that it discussed unspecific business management issues with employees at the daily meetings. It does not assert that it instructed *any*—let alone *all*—employees that they could engage in protected recording in spite of the rule, as would be required to effectively clarify the rule's scope. See *Guardsmark, LLC*, 344 NLRB 809, 811 (2005), enfd. 475 F.3d 369, 374 (D.C. Cir. 2007); *Schwan's Home Service*, 364 NLRB No. 20, slip op. at 2 fn. 4 (2016). For these reasons, the Respondent has failed to show that there are genuine issues of material fact warranting a hearing. I would therefore find that the General Counsel is entitled to summary judgment.

The majority does not dispute the insufficiency of the Respondent's arguments. Rather, they deny summary judgment because in two recent cases involving allegedly similar rules and arguments, the Board conducted hearings and received evidence about the justification for those rules. This rationale fails, however. First, in neither of those cases did a party file a motion for summary judgment that might have obviated a hearing.[4] Second, and more importantly, the majority's position disregards the correct analysis—whether there are genuine issues of material fact in *this* case. Instead, it appears that they would improperly require a hearing whenever an employer raises a "context" argument, no matter how weak, even where it would not change the outcome under existing law. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (only disputes over facts that might affect the outcome will properly preclude summary judgment). Their approach also ignores the unnecessary costs and delays that will result from prolonging this litigation, which summary judgment is designed to avoid. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Dated, Washington, D.C. May 5, 2017

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

[3] Because the rule is not narrowly tailored, it is unnecessary to consider whether the Respondent's business interests are otherwise compelling. See *T-Mobile*, supra, slip op. at 4–5.

[4] Contrary to the majority's assertion, *Mercedes-Benz U.S. International, Inc. v. International Union, UAW*, 838 F.3d 1128, 1135–1140 (11th Cir. 2016), is also inapposite because it did not involve a rule similar to the Respondent's rule against recording. Rather, that case involved a rule against solicitation and distribution, which implicates a unique set of considerations. See *Peyton Packing Co., Inc.,* 49 NLRB 828, 843–844 (1943), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).