

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

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

and

Case 10-CA-169466

KIRK GARNER, An Individual

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL

To the Honorable Donna N. Dawson, Administrative Law Judge

Joseph W. Webb
Counsel for the General Counsel
National Labor Relations Board, Region 10
Birmingham Resident Office
1130 22nd Street South
Ridge Park Place Suite 3400
Birmingham, Alabama 35205
(205) 518-7518
(205) 933-3017 (FAX)
joseph.webb@nlrb.gov

TABLE OF CONTENTS

I. Introduction and Procedural Statement.....4

II. Issues Presented5

III. Facts5

 A. Respondent’s Business Operations5

 B. Respondent’s Recording Rule.....6

 C. Application of Respondent’s Recording Rule.....6

 D. Michael Kirk Garner’s Attempts to Follow Respondent’s Recording Rule.....7

IV. Argument.....8

 A. Respondent’s Motion to Sever Should be Denied.....8

 B. Respondent’s Motion to Dismiss Should be Denied.....9

 C. Michael Kirk Garner’s Testimony Should be Credited.....13

 D. The Respondent’s Recording Rule Violates Section 8(a)(1) of the Act.....14

V. Conclusion.....18

Appendix I – Proposed Conclusions of Law.....20

Appendix II – Proposed Order.....21

Appendix III – Proposed Notice.....23

TABLE OF AUTHORITIES

Federal Cases

<i>Advanced Disposal Services E., Inc. v. NLRB</i> , 820 F.3d 592 (3d Cir. 2016)	13
<i>Albertson’s, Inc.</i> , 351 NLRB 254 (2007).....	15
<i>Caesars Entertainment</i> , 362 NLRB No. 190 (2015)	16
<i>Central Hardware Co. v. NLRB</i> , 407 U.S. 539 (1972).....	14
<i>Cintas Corp.</i> , 344 NLRB 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007).....	15
<i>Consumer Fin. Prot. Bureau v. Gordon</i> , 819 F.3d 1179 (9th Cir. 2016)	13
<i>Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision</i> , 139 F.3d 203 (D.C. Cir. 1998)	13
<i>FEC v. Legi-Tech</i> , 75 F.3d 704 (D.C. Cir. 1996)	13
<i>Flagstaff Medical Center</i> , 357 NLRB No. 65 (2011).....	17
<i>Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.</i> , 561 U.S. 477 (2010).....	10
<i>Hawaii Tribune-Herald</i> , 356 NLRB No. 63 (2011)	16
<i>Int’l Automated Machines</i> , 285 NLRB 1122 (1987)	14
<i>Lafayette Park Hotel</i> , 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).....	15
<i>-Mobile USA, Inc.</i> , 363 NLRB No. 171 (2016)	18
<i>Sullivan, Long & Hagerty</i> , 303 NLRB 1007 (1991).....	16
U.S. Const., Art. II, § 2, Cl. 2	9
<i>United States v. Chem. Found.</i> , 272 U.S. 1(1926).....	3
<i>Whole Foods Market, Inc.</i> , 363 NLRB No. 87 (2015)	16

Federal Statutes

29 U.S.C. § 154(a)	17, 20
29 U.S.C. § 154(a)	20
29 U.S.C. § 154, 49 Stat. 451 (1935).....	11
29 U.S.C. § 157.....	22
29 U.S.C. § 158(a)(1).....	23
29 U.S.C. § 160.....	17
29 U.S.C. §160.....	15
Act of June 29, 1906, ch. 3951, sec. 7, § 20, 34 Stat. 584, 595	11
Administrative Procedure Act, ch. 324, § 11, 60 Stat. 237, 244 (1946) (codified as amended at 5 U.S.C. § 3105).....	12

Federal Regulations

29 C.F.R. § 102.177	16
29 C.F.R. § 102.26	16
29 C.F.R. § 102.35	15
29 C.F.R. § 102.46.....	18
29 C.F.R. § 102.69	15
29 C.F.R. §§ 102.46.....	17

Other Authorities

<i>Administrative Procedure: Hearings Before a Subcomm. of the S. Comm. on the Judiciary</i> , 77th Cong. 250, 876, 1000 (1941).....	11
<i>Attorney General’s Manual on the Administrative Procedure Act</i> 83 (1947).....	12
H.R. Rep. No. 79-1980, at 8 (1946).....	11

Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 87 (2007)..... 14

I. INTRODUCTION AND PROCEDURAL STATEMENT

On April 11, 2016, the Regional Director of the NLRB's Region 10 issued a Complaint and Notice of Hearing based upon charges filed against Mercedes-Benz U.S. International (herein Respondent) by Kirk Garner, an individual (herein Garner). On May 10, 2016, Counsel for the General Counsel filed a Motion for Summary Judgment with the Board. The Board denied the Motion on May 5, 2017. On September 25, 2017, the Regional Director issued an Order consolidating this case with cases 10-CA-197031 and 10-CA-201799. On September 28, 2017, the Regional Director issued a Clarification of Order explaining that the complaints have not been consolidated and that the cases would be heard separately, at different locations on different dates. Respondent filed a Motion to Sever and Request for Expedited Hearing on September 29, 2017. Administrative Law Judge Donna N. Dawson (herein ALJ) denied Respondent's request for an expedited hearing that same date but did not decide the Motion to Sever. On October 2, 2017, Respondent filed a Motion to Dismiss the Complaint on the basis of a lack of subject matter jurisdiction.¹ A hearing was held before ALJ Dawson in Birmingham, Alabama on October 3 and 4, 2017. The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful policy in its employee handbook concerning cameras and video recording devices.

The General Counsel submits that the ALJ should credit the record evidence showing that Respondent violated Section 8(a)(1) of the Act, find the violations alleged in the Complaint, and order Respondent to remedy its unlawful conduct.

¹ See GC Ex. 1(cc). At the hearing, ALJ Dawson concluded that Respondent's Motion to Dismiss should be addressed by the parties in their briefs. (Tr. at 15-16).

II. ISSUES PRESENTED

- A. Should Respondent's Motion to Sever be denied?
- B. Should Respondent's Motion to Dismiss be denied?
- C. Did the Respondent violate Section 8(a)(1) of the Act by maintaining an overly broad rule regarding cameras and picture taking?

III. FACTS

A. Respondent's Business Operations

Respondent is a large, multi-national corporation engaged in manufacture for domestic and international sale. Respondent maintains a manufacturing facility in Vance, Alabama, in which several models of Mercedes-Benz automobiles are manufactured using an assembly line process. Respondent's facility is fenced in and includes an administrative office, a paint shop, a body shop, and two assembly shops – Assembly 1 and Assembly 2. (Tr. 39; 197-199). The facility also includes a visitor center. The facility operates close to twenty-four hours a day, seven days per week. (See Tr. 257-258).

Respondent's CEO is Jason Hoff. (Tr. 50). Respondent's rank-and-file employees are assigned to work groups, and each work group engages in work on a specific portion of the assembly line or may engage in certain "offline" tasks that are not directly associated with assembly line production. Rank-and-file employees work on three shifts – A, B, and C – and are directly supervised by "group leaders." (Tr. 42). Group leaders report to managers, who report to senior managers. (Tr. 214). Respondent also employs Human Resources representatives who are accessible to employees throughout the facility at all times of the day. (Tr. 215).

Respondent maintains performance statistics on its employees, which are posted on bulletin boards and television screens throughout Respondent's Plant, along with records of

employee attendance. (Tr. 221; 285-286). Respondent provides tours to the general public during which participants can see these boards and screens. (Tr. 294).

B. Respondent's Recording Rule

It is undisputed that, at all material times, the Respondent has maintained the following rule:

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

(GC Ex. 1(c) and 1(e)).

C. Application of Respondent's Recording Rule

Respondent's rule prevents employees from taking photographs without prior approval. However, some employees are provided cameras to take photographs in the facility as part of their job duties. (Tr. 42). The rule applies at all times, in and around the facility. (Tr. 267). The rule prohibits employees from using a recording device to document safety concerns and unfair labor practices. (Tr. 268). There is no evidence of any agreement or contract that requires Respondent to maintain this rule. (Tr. 260; R. Ex. 20).

Despite the existence and maintenance of this rule, the evidence established that employees regularly take photographs and post them on Facebook, with Respondent's knowledge. (See Tr. 51-64; GC Ex. 4-12). This includes Respondent's Human Resources Vice President, David Olive, who posted pictures of himself in the facility on his Facebook page. (Tr. 61; GC Ex. 11). Nine examples of such photographs were presented to Respondent during

hearing, only one of which was identified as containing confidential or proprietary information. (Tr. 271-272; GC Ex. 4-12).

Respondent also maintains a badge system for security. The badges worn by visitors and employees alike are set to prevent unauthorized individuals from entering areas containing confidential or proprietary information. (Tr. 199-200; 268).

Photographs are regularly taken inside the plant by Respondent's public relations team, and Respondent routinely gives groups of employees "general blanket" camera passes that allow employees to take photographs at special events involving local celebrities in the plant without prior authorization. (Tr. 242, 288-289). Respondent makes no effort to monitor social media for the appearance of photographs taken at its facility (Tr. 279).

D. Michael Kirk Garner's attempts to follow Respondent's Recording Rule

Garner first requested to use a camera on November 25, 2015. (Tr. 47). On that date, he told Respondent's Human Resources Representative, Roger Baird, that he wanted a camera pass to take pictures of "unfair labor practices and unsafe working conditions." (Tr. 48). Baird sent an e-mail to Respondent's management team regarding the request, noting that its purpose was to "document unsafe working conditions as well as unfair labor practices." GC. Ex. 13(a). Respondent, through Baird, denied Garner's request on November 30, 2015, stating that Respondent "does not give camera passes to document unsafe working conditions and unfair labor practices." (Tr. 50, 277; GC Ex. 13(b)).

On January 25, 2016, Garner made the same request to Respondent's CEO, Jason Hoff. (Tr. 50). Respondent, through Human Resources Manager David Olive, again denied Garner's request. (Tr. 80).

On February 2, 2016, Garner asked Baird whether there would be a penalty if he used a camera without a camera pass. (Tr. 81-82). Respondent, through Baird, informed Garner that such action would result in “corrective action up to dismissal.” (Tr. 83-84).

IV. ARGUMENT

A. The Respondent’s Motion to Sever Should be Denied

Respondent’s Motion to Sever should be denied, as the Regional Director’s Order Consolidating cases effectuates the purposes of the Act and avoids unnecessary costs and delays.

Section 102.33 of the Board’s Rules and Regulations provide that a Regional Director may consolidate cases in his or her Region when they deem it “necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay.” §102.33(c), Board Rules and Regulations.

Cases 10-CA-169466, 10-CA-197031, and 10-CA-201799 involve similar overly broad prohibitions on the use of recording devices by employees of Respondent or its affiliates and suppliers and were consolidated only to the extent that the same ALJ will hear and issue decision in them. As explained by the Regional Director’s clarification order, the complaints in these cases have not been consolidated.

Having the same ALJ considering the rules ensures a consistency of legal analysis that effectuates the purposes of the Act, and it prevents unnecessary costs and delay should the issues come before the Board on exceptions. Contrary to Respondent’s Motion, consolidation in this form is appropriate, and the Motion to Sever should be denied.

B. The Respondent's Motion to Dismiss Should Be Denied

On October 2, 2017, Respondent filed a motion to dismiss on the basis of subject matter jurisdiction because, Respondent argues, the administrative law judge was not constitutionally appointed. As explained below, Respondent's motion is without merit and should be denied.

The Appointments Clause of the U.S. Constitution states that "Officers of the United States" may be appointed as follows:

By and with the Advice and Consent of the Senate, [the President] shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, Cl. 2. Paraphrased, this requires "Officers" to be appointed (i) by the President with the advice and consent of the Senate (the only method by which *principal* officers may be appointed); (ii) by the President alone; (iii) by courts, or (iv) by "Heads of Departments."

Respondent contends that the administrative law judge assigned to this case (i) is a constitutional "inferior Officer" and (ii) was not properly appointed by a "Head of Department." Respondent errs, for even if the NLRB's administrative law judges are "inferior Officers," they are properly appointed by the Board—a "Head of Department."²

The Board Members, acting collectively, are a "Head of Department" to whom appointing authority may constitutionally be entrusted. *Free Enterprise Fund v. Public Co.*

² In *Radical Media, LLC* (Case No. 31-CA-174138), *WestRock Services, Inc.* (Case No. 10-CA-195617), and *Schnellecke Logistics Alabama, LLC* (Case No. 10-CA-199183), the General Counsel argued that the NLRB's administrative law judges were not covered by the Appointments Clause because they are employees and not "inferior Officers." The General Counsel no longer adheres to that position.

In addition, on November 29, 2017, the Solicitor General filed a brief in *Lucia v. SEC*, No. 17-130 (U.S. petition for cert. filed July 26, 2017), stating that the government is now of the view that the SEC's administrative law judges are inferior officers and agreeing with the petitioner in that case that certiorari be granted. If the Supreme Court grants the petition in *Lucia*, a decision is likely by June 2018—the expected close of this Term.

Acctg. Oversight Bd., 561 U.S. 477, 512-13 (2010) (explaining that for multimember independent agencies, the “Head of Department” with constitutional appointing authority is the members of the agency acting collectively). And indeed, the NLRA does exactly that—it grants the Board authority to appoint subordinate officials, including “examiners,” the precursor to today’s administrative law judges. Section 4(a) of the NLRA provides that the Board “shall appoint . . . such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.” 29 U.S.C. § 154(a).

Consistent with its statutory authority to appoint “examiners,” now administrative law judges, the NLRB appoints its administrative law judges in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. § 3105. Applicants for vacancies undergo a screening process which ultimately results in the submission of a list of the most qualified candidates to the Board’s Division of Judges. The Board’s Chief Administrative Law Judge then recommends a candidate for hire to the Board, and if the Board votes to approve the recommendation, the judge will be appointed. The judge will not assume his or her duties until after the Board’s vote.

Respondent’s sole argument to the contrary is that the NLRB “is not a Department named by Congress and is instead an executive agency.” (GC Ex. 1(cc) at 9). For this novel proposition, Respondent relies on 5 U.S.C. § 101, which does not enumerate the NLRB as an “Executive Department,” and 29 U.S.C. § 153, which refers to the NLRB as “an agency of the United States.” However, *the SEC* is not enumerated in 5 U.S.C. § 101, yet Respondent concedes—as it must—that the Supreme Court found the SEC to be a “Department” in *Free Enterprise Fund*. In that case, the Court rejected the very same argument advanced here by Respondent, 561 U.S. at 510-11, and instead defined “Department” as “a freestanding component of the Executive

Branch, not subordinate to or contained within any other such component.” 561 U.S. at 511. The NLRB, like the SEC, meets this definition. *See* 29 U.S.C. § 153(a) (establishing the NLRB as an independent “agency of the United States”). Respondent’s argument is thus plainly foreclosed by controlling precedent.³

Respondent’s argument also fails for three additional, related reasons:

- First, as a grammatical matter, to describe some departments as “Executive departments” necessarily implies that there are other, *non-Executive* “departments,” including military departments like the Department of the Army, 5 U.S.C. § 102; government corporations like the Federal Deposit Insurance Corporation, 5 U.S.C. § 103; and independent agencies like the NLRB, 5 U.S.C. § 104. At least where the heads of these departments are themselves principal officers, appointing authority may be vested in them.
- Second, Congress’s definition of a particular term for purposes of Title 5 of the U.S. Code does not purport to, and could not possibly, control the definition of a similar term in the United States Constitution.⁴
- Finally, the broad grant of appointing authority contained in Section 4(a) of the NLRA has already been quoted above. If Congress had for some reason wanted to *deny* the NLRB the power to appoint inferior Officers, it would be passing strange for it to do so

³ Respondent’s citation of *Silver v. United States Postal Service*, 951 F.2d 1033, 1038 (9th Cir. 1991), is unpersuasive. In that case, the Ninth Circuit relied in part on the Postal Service’s history as a Cabinet department to find that the post-reorganization Postal Service remained a “Department” for Appointments Clause purposes. But the court never suggested that prior Cabinet-level status was *necessary* to find that an agency is a constitutional “Department.” In any event, the SEC has never been a Cabinet department, yet was found to be a constitutional Department in *Free Enterprise Fund*, 561 U.S. at 513; thus, even if *Silver* at one time supported Respondent’s position, it would no longer be good law today.

⁴ Likewise, the U.S. Government Manual, a mere informational handbook, does not purport to define the meaning of terms of the Constitution such as “Head of Department.”

through the definition of “Department” in an unrelated title of the U.S. Code, rather than by simply limiting the NLRB’s appointing authority within the section of the NLRA dealing with appointments (as it did when it prohibited the NLRB from appointing “individuals for the purpose of conciliation or mediation, or for economic analysis”). It is well settled that “[w]here Congress creates specific exceptions to a broadly applicable provision, the ‘proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.’” *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 395 (5th Cir. 2008) (quoting *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

As a last-ditch expedient, Respondent then turns to dicta from *Freytag*, 501 U.S. at 884-86, cautioning against an interpretation of “Heads of Department” that would create an “excessively diffuse” Appointments Clause power. (GC Ex. 1(cc) at 11). This argument from constitutional purpose again runs headlong into *Free Enterprise Fund*, wherein the Court noted these concerns, yet unambiguously adopted the “freestanding component” definition of “Department” described just above. 561 U.S. at 513. The NLRB’s place in the constitutional firmament is clear—the Board, comprised of indisputably principal officers appointed by the President with the advice and consent of the Senate, may in turn appoint inferior officers.

Accordingly, as in *Free Enterprise Fund*, the administrative law judge who heard this case was validly appointed even assuming that NLRB administrative law judges are “inferior Officers.”⁵ For the foregoing reasons, Respondent’s Motion to Dismiss should be denied.

⁵ Although the issue is not yet presented, Counsel for the General Counsel expressly reserves the right to argue that the Board can cure any Appointments Clause defects in this case by assuming arguendo that there is merit in Respondent’s argument, and then proceeding to decide whether to ratify the administrative law judge’s rulings, findings, and conclusions, or to substitute its own. Ratification by duly constituted officials is an accepted means for curing the

C. Michael Kirk Garner's Testimony Should Be Credited

Michael Kirk Garner testified that he requested a camera pass in November 2015 and January 2016 in order to record “unfair labor practices and unsafe working conditions.” (Tr. 48). This request is corroborated by Respondent's e-mails. GC Ex. 13(a) – (b). Respondent denied his request both times. (Tr. 50, 80). In February 2016, Respondent informed Garner that if he used a camera without permission he would be disciplined and that discipline could be anything up to dismissal. (Tr. 83-84).

Garner's November 2015 request was made to Respondent's Human Resources Representative Roger Baird. (Tr. 48). The January 2016 request was made to Respondent's CEO Jason Hoff. (Tr. 50). Respondent informed Garner that he would be disciplined if he used a camera without permission through Human Resources Representative Baird.

Under longstanding Board law, when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual questions on which the witness is likely to have knowledge. *Int'l Automated Machines*, 285 NLRB 1122 (1987), *enfd.* 861 F.2d 720 (6th Cir. 1988). Garner testified that he made requests to use a camera and had discussions regarding the use of cameras with Baird, Olive, and Hoff. Respondent did not offer any evidence to rebut Garner's testimony and did not call Baird, Olive, or Hoff as witnesses during the hearing. Therefore, the Judge should draw an adverse inference that Baird, Olive, and Hoff would have had testimony that would have been adverse to the Respondent. The Judge should credit Garner's testimony.

harm of an ultra vires decision. *See generally Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016); *Advanced Disposal Services E., Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016); *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998); *FEC v. Legi-Tech*, 75 F.3d 704 (D.C. Cir. 1996).

D. The Respondent's Recording Rule Violates Section 8(a)(1) of the Act

Section 7 provides that employees have “the right to “self-organization” and the right “...to engage in . . . concerted activities for the purpose of ... mutual aid or protection.” 29 U.S.C. § 157. These words have been interpreted to protect employees’ right to communicate with each other regarding their workplace terms and conditions of employment. *Parexel International, LLC*, 356 NLRB 516, 518 (2011), citing *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), *enfd.* in part 81 F.3d 209 (D.C. Cir. 1996) (discussions regarding wages, the core of Section 7 rights, are the grist on which concerted activity feeds). Thus, the guarantee of Section 7 rights includes not only the right of employees to discuss organization, but also the right to discuss wages, hours, and terms and conditions of employment. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542 (1972).

Under Section 8(a)(1) of the Act, it is an unfair labor practice “for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” 29 U.S.C. § 158(a)(1). Thus, if a work rule would reasonably tend to chill employees in the exercise of their Section 7 rights, it will violate Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). A violation may occur merely by the maintenance of such a rule—even in the absence of enforcement. *Lafayette Park Hotel, supra*; see also, *Cintas Corp.*, 344 NLRB 943 (2005), *enfd.* 482 F.3d 463 (D.C. Cir. 2007). This principle follows from the Act’s goal of preventing employees from being chilled in the exercise of their Section 7 rights without regard to the intent of the employer, instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it. See e.g., *Lafayette Park Hotel*, 326 NLRB at 828.

Board law is well settled that even if a rule does not explicitly restrict activity protected by Section 7, the rule still violates Section 8(a)(1) if “employees would reasonably construe [its] language to prohibit Section 7 activity.” *Lutheran Heritage*, 343 NLRB at 646. In applying this standard, the Board “give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation.” *Albertson’s, Inc.*, 351 NLRB 254, 259 (2007). Any ambiguity in a rule is construed against the employer promulgating it. *Lafayette Park Hotel*, 326 NLRB at 828.

Respondent’s rule concerning cameras and video recording devices prohibits employees from photographing or videotaping other employees without the consent of Respondent. The rule is unreasonably restrictive in the current technological climate, which is saturated with cell phones, electronic devices, recorded events and images, and social media. The workplace environment is no different. Today, it is nearly impossible to consider that photos and videos would not be part of employees' union and protected concerted activities. From global politics to the mundane, events are instantly shared via the internet, Facebook, Instagram, Twitter, and other forms of social media. Increasingly, employees are turning to social media to communicate and share information about Section 7 activities through photos and videos. Cf. *Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (Board found that an employee was engaged in protected activity by recording at the jobsite to supply information in federal investigation).

The Board has recognized that employees have a Section 7 right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. See *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 1 (2011); see also *Caesars Entertainment*, 362 NLRB No. 190, slip op. at 4-5 (2015) (photographing or videoing is protected activity under Section 7). Without any further narrowing

or clarification, the instant rule is unlawful because an employee would reasonably interpret it to include a broad prohibition on photographing or videotaping employees engaged in the exercise of their Section 7 rights. See *Lutheran Heritage*, 343 NLRB at 646.

In *Whole Foods Market, Inc.*, 363 NLRB No. 87 (2015), the Board considered the following two rules:

It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device (including but not limited to a cellular telephone, PDA, digital recording device, digital camera, etc.) unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent. Violation of this policy will result in corrective action, up to and including discharge.

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

Id. at 1. Whole Foods argued that this policy applied regardless of protected concerted activity.

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

Photograph and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Rio All-Suite Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015). ... The rules at issue here unqualifiedly prohibit all workplace recording. ... The Respondent's witness testified that the rules apply "regardless of the activity that the employee is engaged in, whether protected concerted activity or not." Thus, the Respondent has effectively admitted that the rules cover all recording, even that which is part of the *res gestae* of protected concerted activity. In light of the broad and unqualified language of the rules and the Respondent's admission as to their scope, we find that employees would reasonably read the rules as prohibiting recording activity that would be protected by Section 7. ... Accordingly, we find that the rules would reasonably chill employees in the exercise of their Section 7 rights.

Whole Foods, 363 NLRB No. 87 at 3-4. As in *Whole Foods*, Respondent's recording policy is broad and unqualified and requires managerial consent, and Respondent admits, via Baird's explicit denial of Garner's request, that the rule applies regardless of whether the activity is protected. Therefore, applying the Board's analysis, Respondent's policy has a chilling effect on Section 7 right. See *Id.*

Respondent is likely to argue, citing *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), that, even if the rule does have a chilling effect on Section 7 rights, the employee interest is outweighed by legitimate and substantial business interest. Specifically, it is anticipated that Respondent will argue that its interests in (i) protecting against deliberate and inadvertent disclosure of proprietary information, (ii) protecting Team Member's privacy and (iii) furthering the company's interests in maintaining open communications at the facility outweigh the implicated Section 7 rights.

As stated by the Board in *Whole Foods*, "...an intention to promote open communication and dialogue does not cure the rule of its overbreadth." *Whole Foods*, 363 NLRB No. 87 at 4. Therefore Respondent's interest in "maintaining open communications" does not outweigh the employee interest. See *Id.*

The Board did uphold a prohibition on the use of recording equipment in *Flagstaff Medical Center*. The Board upheld the prohibition because it found the employer's concerns about protecting patient information outweighed the affected employee interest. *Flagstaff Medical Center*, 357 NLRB No. 65 at 6. However, the Board came to this conclusion because federal statute 42 U.S.C. §1320-6 prohibits disclosure of such information. *Id.*

In distinguishing *Flagstaff*, the Board in *Whole Foods* pointed out that the employer was under a statutory obligation to protect sensitive patient information and that employees would

understand that the rule in *Flagstaff* was designed to abide by the statutory requirements of HIPAA. *Whole Foods*, 363 NLRB No. 87 at 4. Like the Employer in *Whole Foods*, Respondent is under no statutory obligation comparable to that in *Flagstaff*.

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

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

T-Mobile USA, Inc., 363 NLRB No. 171, slip op. at 4 (2016). In this case, it is undisputed that the rule is not tailored in any way to protect Section 7 activity. In fact, the evidence is that the rule is specifically tailored to prohibit Section 7 activity, while Respondent ignores its own rule in regards to some photographs taken in the facility. See GC Ex. 4-13.

The precedent set by the Board's rulings in *Whole Foods* and *T-Mobile* establishes that Respondent's policy has a chilling effect on Section 7 rights and that the interests claimed by Respondent are outweighed by the affected employee interest. See *Whole Foods*, 363 NLRB No. 87 at 3-4; see also *T-Mobile USA, Inc.*, 363 NLRB No. 171 at 4. Thus, Respondent's recording rule violates Section 8(a)(1) of the Act. See *Whole Foods* at 4; see also *T-Mobile USA, Inc.* at 4.

V. CONCLUSION

For the foregoing reasons, Counsel for the General Counsel respectfully urges that the Administrative Law Judge deny Respondent's Motion to Sever, deny Respondent's Motion to Dismiss, find that Respondent violated the Act as alleged in the complaint, order Respondent to cease its unlawful conduct, and direct that Respondent remedy the harm that it caused to employees as requested in the complaint.

Respectfully Submitted,

/s Joseph W. Webb
Joseph W. Webb
Counsel for the General Counsel
National Labor Relations Board, Region 10

Dated this 1st day of December 2017

APPENDIX I – PROPOSED CONCLUSIONS OF LAW

1. Respondent, Mercedes-Benz U.S. International, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by maintaining a camera and video recording rule that is overly broad, requires managerial consent, and applies regardless whether the activity is protected under the Act.
3. The aforementioned unlawful conduct engaged in by the Respondent constitutes unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

APPENDIX II – PROPOSED ORDER

Respondent, Mercedes-Benz U.S. International, Inc., its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Maintaining the “Cameras and Picture Taking” policy in the 2016 Edition VIII Team Member Handbook prohibiting all unauthorized cameras and video recording devices.

(b) 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 the Board’s Order, rescind the “Cameras and Picture Taking Policy” in all of its forms.

(b) Within 14 days from the date of the Board’s Order, furnish all employees with inserts for the 2016 Edition VIII Team Member Handbook that (1) advise that the above rule has been rescinded or (2) publish and distribute revised Team Member Handbooks that do not include the above rule.

(c) Within 14 days after service by the Region, post at its facility in Vance, Alabama, copies of the attached Notice to Employees.⁶ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

⁶ 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.”

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 February 11, 2016.

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

APPENDIX III – (Proposed) NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain the “Cameras and Picture Taking Policy” in our 2016 Edition VIII Team Member Handbook prohibiting all unauthorized cameras and video recording devices.

WE WILL rescind the language in our 2016 Edition VIII Team Member Handbook regarding the “Cameras and Picture Taking Policy.”

WE WILL furnish all employees at our Vance, Alabama, facility with inserts for the current Team Member Handbook that advise that the unlawful provision above has been rescinded, or **WE WILL** distribute a revised Team Member Handbook that does not contain the unlawful provision.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief of Counsel for the General Counsel by electronic transmission on this date to:

Marcel L. DeBruge, Esq.
Burr & Foreman, LLP
420 N 20th St
3400 Wachovia Tower
Birmingham, AL 35203-5210
E-mail: debruge@gmail.com

Michael L. Lucas, Esq.
Burr & Foreman, LLP
420 N 20th St
3400 Wachovia Tower
Birmingham, AL 35203-5201
E-mail: mlucas@burr.com

Matthew Scully, Esq.
Burr & Foreman, LLP
420 N 20th St
3400 Wachovia Tower
Birmingham, AL 35203-5201
E-mail: mscully@burr.com

Michael Kirk Garner, An Individual
PO Box 122
Duncanville, AL 35456-0122
E-mail: kgarner724@aol.com

/s Joseph W. Webb
Joseph W. Webb, Counsel for the General Counsel