

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**INTERSTATE MANAGEMENT COMPANY,  
LLC AS AGENT FOR BRE NEWTON  
HOTELS PROPERTY OWNER, LLC D/B/A  
RESIDENCE INN BY MARRIOTT SANTA FE  
ALL-SUITES HOTEL**

**and**

**Case 28–CA–206663**

**RESIDENCE MARRIOTT COMMITTEE**

Judith Dávila, Esq.  
for the General Counsel.

Matthew T. Wakefield, Esq.  
Nicole K. Haynes, Esq.  
Ballard, Rosenberg, Golper & Savitt, LLP  
for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Albuquerque, New Mexico, on April 17–18, 2018, based upon charges filed by the Residence Marriott Committee, and a complaint and notice of hearing dated January 9, 2018 (Complaint). The Complaint alleges that Interstate Management Company, LLC, as an agent for the property owner BRE Newton Hotels, LLC d/b/a Residence Inn By Marriott Santa Fe All-Suites Hotel (Respondent or Interstate) violated Sections 8(a)(1) of the National Labor Relations Act (Act) and by threatening employees, interrogating employees, and maintaining certain overly-broad and discriminatory work rules. Respondent denies the allegations.

Based upon the entire record, including my observation of witness demeanor, and after considering the briefs filed by the General Counsel, and Respondent, I make the following findings of fact and conclusions of law.<sup>1</sup>

---

<sup>1</sup> Testimony contrary to my findings has been discredited. Witness demeanor was the primary consideration used in making credibility resolutions.

## I. JURISDICTION AND LABOR ORGANIZATION

Interstate admits that it is a limited liability company with an office and place of business in Santa Fe, New Mexico, where it operates a hotel providing both lodging and food services. It further admits that, in conducting its business operations, the company annually performs services valued in excess of \$50,000 in states other than the State of New Mexico, and that it derives annual gross revenues in excess of \$500,000. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

## II. FACTS

A. *Background*

Respondent operates approximately 400 hotels throughout the United States under various brand names including Marriott Residence Inn, Hilton Grand, Holiday Inn, Sheraton, and Crowne Plaza. As a third-party management company, Interstate operates the hotels, using its own employees, through management agreements with various individual property owners. Approximately 30,000 employees work for Respondent in the United States.<sup>2</sup> (Tr. 162–166)

In Santa Fe, New Mexico, Respondent operates a Marriott Residence Inn branded property (Santa Fe Marriott). The General Manager at this hotel is Kate Lettenberger (Lettenberger). Ana Rojo (Rojo) supervises the hotel housekeeping employees. (Tr. 21, 31, 88, 89, 118, 165)

B. *Employee Letter*

In early July 2017 three of Respondent’s Santa Fe Marriott housekeeping employees, Lluvia M. Ramirez-Orozo (Ramirez-Orozo), Marixenia Brandt (Brandt), and Maria Orona (Orona), visited Somos Un Pueblo Unido (Somos), a group described as a “social services” or “immigrant rights” organization.<sup>3</sup> Ultimately the three signed an agreement with Somos forming a workers’ committee. (Tr. 33–34, 119; GC. 6)

Upset with what they perceived to be various workplace injustices, on August 22, 2017, the three workers delivered a letter to Interstate stating that they had formed a workers’ committee. In the letter the employees complain about pressure from Lettenberger and work requirements which, they allege, have caused injuries and health problems. The employees further complain that they feel pressured to work while injured, they are victims of age discrimination, and hotel management ignores their problems. The letter, which is signed individually by Ramirez-Orozo, Brandt, and Orona, under the title “Committee Hotel Marriott,”

<sup>2</sup> Transcript citations are denoted by “Tr.” with the appropriate page number. Citations to the General Counsel and Respondent exhibits are denoted by “GC.” and “R.” respectively. Transcript and exhibit citations are intended as an aid, as factual findings are based upon the entire record as a whole. Respondent’s unopposed motion to correct the transcript is granted and the motion is made part of the record.

<sup>3</sup> See *Merchants Bld. Maint. LLC*, 358 NLRB 578, 582 (2012) (describing Somos as a “social service organization”); *Palacios-Valencia v. San Juan Cty. Bd. of Commissioners*, No. CV 14-01050 WJ/KBM, 2016 WL 10592146, at \*1 (D.N.M. Feb. 10, 2016) (describing Somos as an “immigrant rights organization”). Brandt testified that Somos it as a “corporation where we’re all together so that . . . we can all get help.” (Tr. 33)

ends by asking for a meeting to solve the issues addressed in the document. Ramirez-Orozo sent the letter to Respondent via certified mail, and also handed it to Rojo, who said she would give the letter to Lettenberger. (Tr. 91–92; GC. 4)

5                                   C.       *Yamini Shankar Visits the Santa Fe Marriott*

Yamini Shankar (Shankar), Respondent’s director of human resources, received a copy of the letter from Lettenberger. Shankar has worked for Interstate in a human resources capacity for over 10 years. (Tr. 138)

10                                   Shankar testified that she was concerned about the severity of the issues raised in the letter and decided to visit the Santa Fe Marriott personally to meet with the workers. Shankar informed Lettenberger about the visit, asking her to contact the housekeepers and determine a date for the meeting; it was decided the meeting would occur on August 30, 2017. Shankar flew to Santa Fe on August 30, and left the next day. She had never previously been to the Santa Fe Marriott. (Tr. 22, 139–141)

15                                   Certain aspects of the August 30 meeting are undisputed. The meeting started at around 3 p.m., with Ramirez-Orozo, Brandt, Orona, and Shankar meeting in a conference room on the second floor of the hotel. Shankar first met with the employees as a group, and then met with them individually. While they were waiting to meet with Shankar individually, the workers sat in another conference room across the hall. (Tr. 22, 37, 82, 92, 104–105, 141)

20                                   Because Shankar does not speak or understand Spanish, and the three employees have a limited knowledge of English, a translator named Isabelle Jennings (Jennings) was used during the meeting. Jennings, who lives in Santa Fe, owns her own translation service and has been an interpreter for over 30 years. Lettenberger hired Jennings, who testified that she works for Respondent as a translator at the Santa Fe Marriott “all the time.” Jennings translated during both the group and the individual meetings between Shankar and the employees. (Tr. 143–144, 182, 192)

30

*D.       Testimony Regarding the August 30 Meeting*

1.       Marixenia Brandt

35

Because of a surgery, Brandt had been on an extended leave of absence since April 2017; she came to the hotel on August 30 specifically to meet with Shankar. Brandt testified that, when she arrived at the second floor conference room for the 3 p.m. meeting, Shankar and Jennings were already there waiting. In the room everyone sat at a long conference table. During the meeting Shankar spoke in English, and the employees waited for Jennings to translate what was said into Spanish. (Tr. 37–40, 42, 49–51, 121–122; GC. 7–8)

40

The meeting started with Shankar saying that she was going to help them, and asking the employees why they sent the letter. The workers responded that they wanted to be heard and needed Respondent to pay attention when they had a problem. (Tr. 43, 55)

45

According to Brandt, the employees then took turns expressing their concerns and complaints. Among the things they told Shankar were that: managers were not honoring Brandt’s medical restrictions; the hotel needed to hire more people; Ramirez-Orozo should not be required to work the night shift alone; Lettenberger was pressuring them to complete their work quickly; employees were incurring workers’ compensation injuries because of the workload; they would not get a lunch break when it was busy; the laundry room was too hot in the summer and too cold in the winter; the housekeepers should not have to maintain the pool area, deliver guest checkout paperwork, or make coffee for breakfast; two employees should be scheduled to work in the laundry overnight because of the workload; employee lockers, which had been removed, should be reinstalled; they did not have sufficient supplies; and employees should be treated professionally and with respect (Tr. 55–78)

Brandt testified that, at some point, Shankar said she wanted to meet with them separately because in a group setting everyone could hear their individual, personal, and intimate issues. The employees said that they were a committee, and wanted to address their issues as a committee. Shankar then asked what the committee was, if it was legal, whether they had an attorney, and if so, who. The employees did not name their attorney, because they did not actually have one at the time. After this exchange the group meeting ended, the employees were separated, and the individual meetings started. (Tr. 44–45, 73–74, 79, 85)

According to Brandt, Shankar was calm during the group meeting. However, she testified that Jennings was “aggressive.” (Tr. 52) Ramirez-Orozo, who Brandt described as having a loud voice, was “revved up” asking questions. Brandt testified that Jennings got mad, became aggressive, and acted as if she wanted to punch someone. At some point during the group meeting Jennings said something about the police. However, Brandt was not paying attention and did not hear the details of the comment. She was also unsure of what Shankar was telling the interpreter at the time, explaining that “all we were receiving was what the interpreter was saying.” (Tr. 42–43, 52–54, 58, 72, 84, 85)

During her individual meeting with Shankar, Brandt complained that she hurt her shoulder due to the excessive workload, was told that Respondent would not help her as she did not have any rights, and that she wanted Interstate to pay for her surgery. Brandt also told Shankar that, when she was working alone, there was too much work to perform, that the maintenance employees were careless, and she further complained about the temperature in the laundry room. After Brandt finished her individual meeting, she did not leave the hotel, but waited in the conference room across the hall because she carpooled to the meeting with one of the other workers. Brandt estimated that her individual meeting with Shankar lasted for about 30 minutes. (Tr. 47, 75, 81–82, 85)

## 2. Lluvia M. Ramirez-Orozo

Ramirez-Orozo started working for Respondent in October 2016 as a housekeeper.<sup>4</sup> She testified that, at the beginning of the group meeting, she wanted to record the encounter using her cell phone. However, Jennings said that, according to Shankar, they were not allowed to record the meeting; Ramirez-Orozo turned off her phone. The meeting then started with Shankar

<sup>4</sup> At the time of the hearing, Ramirez-Orozo no longer worked at the hotel as she had been fired. (Tr. 97)

greeting employees by saying good afternoon, and that it was a good thing the police “aren’t here, right?” (Tr. 94, 107) Ramirez-Orozo, who testified at the hearing through a translator, said that she knows the word ‘police’ in English, she heard Shankar say the word in English, watched Shankar as she said it, and Jennings interpreted the word into Spanish.<sup>5</sup> Shankar then asked the workers about their concerns, and each person explained their particular issues; they also discussed items they wanted changed at the hotel. Then, Ramirez-Orozo told Shankar that the workers had formed a legal committee, and had an attorney help them. Shankar inquired about the committee, asking why the employees had formed a committee, for an explanation about the details of the committee, whether it was legal, who was their syndicate,<sup>6</sup> who represented the committee, and for the name of their attorney. Ramirez-Orozo testified that she replied saying the committee was a group of workers who joined together to defend themselves, and that it was legal. Ramirez-Orozo declined to give Shankar the name of their attorney. Shankar then said that they would meet individually, because she did not want everyone to hear about their coworkers’ intimate issues. (Tr. 95–96, 103, 107–110, 116)

Ramirez-Orozo estimated that the group meeting lasted between a half-hour to an hour. She described Shankar’s mood as serious and ironic at the same time, testifying that Shankar was trying to intimidate them. Ramirez-Orozo denied getting upset or using any profanity during the group meeting. She also denied that Jennings ever said anything about the workers needing to act professionally. According to Ramirez-Orozo, at the end of the group meeting Jennings said that she wanted to punch her. (Tr. 96, 103, 106–108)

Ramirez-Orozo was the second worker to meet individually with Shankar, and testified that Shankar asked why employees “had done this.” (Tr. 96) Ramirez-Orozo replied that Lettenberger did not respect her accident-related work restrictions. Shankar asked her to provide proof of both the accident and the work restrictions, and Ramirez-Orozo said she had paperwork as proof. Shankar, appearing angry, then called her a “liar.” (Tr. 97, 110) Ramirez-Orozo asked for permission to retrieve the paperwork from her car. When she returned with the documents, Ramirez-Orozo testified that Shankar, again appearing angry, said “do you know I can fire you this minute.” (Tr. 110) Ramirez-Orozo asked if the comment was a threat, and Shankar said no. Shankar then asked for the documents but Ramirez-Orozo told her to get them from her doctor. While she did not give the documents to Shankar, she did show the paperwork to her. Finally, Ramirez-Orozo asked for her shift to be changed, claiming that medical restrictions prohibited her from lifting more than 50 pounds, and that the heavy work is conducted in the afternoon; however, Shankar said that she could not change her shift. (Tr. 96–97, 104, 110–111)

### 3. Maria Orona

Orona, like Brandt, was also on a leave of absence in August 2017; she was recovering from a surgery due to a workplace injury. According to Orona, at the meeting, just after the introductions, Shankar said “the good thing is that the police is not here and I hope that we don’t

<sup>5</sup> The translation of Ramirez-Orozo’s trial testimony uses the word “cops” instead of “police.” (Tr. 94, 107)

<sup>6</sup> The Spanish word “sindicato” or syndicate can also be defined as a trade or labor union. See Concise Spanish-English/English-Spanish Dictionary 479 (Larousse 1993) (defining “sindicato” as “trade union, labor union”).

have to call them, correct.”<sup>7</sup> (Tr. 128) While Orona attributed the statement to Shankar, Orona testified that she did not understand what Shankar was saying in English, and that her trial testimony was based solely upon what Jennings told them as the translator. (Tr. 118, 123, 127–129)

5

The employees were then asked about their concerns, and for ideas on how they would like to see the hotel change for the better. According to Orona, as employees replied with their issues and ideas, Shankar took notes on a small notepad. Orona testified that, after employees discussed their concerns as a group, they were told they had to meet with Shankar separately; the employees replied that they could not speak separately because they were a committee. Specifically, Ramirez-Orozo said the workers had formed a committee and had an attorney that helped them. According to Orona, Shankar became upset, asked about the committee, the lawyer, and whether it was legal. Orona testified that she tried to speak up, but was told they were going to speak separately because their work issues were private. (Tr. 123–124, 133–134)

15

Orona was the last person to meet with Shankar individually. During her individual meeting, Shankar asked Orona why they had written the letter. Orona replied that it was because the company was not listening, that they needed things at work but Respondent did not pay any attention to them. When asked how she wanted things to change, Orona expressed concerns about Lettenberger as the general manager. She complained that Lettenberger was unable to communicate with employees, and gave Shankar various examples. (Tr. 124, 135–136)

20

#### 4. Isabelle Jennings

According to Jennings, the August 30 meeting started with some difficulty, as there was not much structure, and one of the employees was a little unruly, talking loudly, and cursing in Spanish. Jennings testified that she had to lay some ground rules, because an interpreter is also a moderator and cannot let a situation escalate. Regarding her ground rules, Jennings testified she told employees not to interrupt, and for everyone to wait their turn to speak. One of the employees wanted to record the meeting. Jennings asked Shankar if recordings were allowed, and Shankar said no. Jennings relayed this to the employees, and according to Jennings the person who wanted to record the meeting started swearing. Jennings told her to stop swearing or “you’re going out and that’s it.” (Tr. 186) The employee complied, and they continued with the meeting. (Tr. 183–186)

30

35

Jennings testified that she interpreted in the first person during the meeting and that Shankar was aware of everything that was occurring. Jennings would ask Shankar if she was interpreting certain things correctly, or whether what was being said made sense. Jennings testified that Shankar never raised her voice or became angry. Instead, she was very patient, and took notes. She denied that Shankar said anything about calling the police or threatened to fire anyone. (Tr. 186–188, 193)

40

That being said, Jennings could remember little else from the August 30 meeting. She could not remember the names of the employees who attended, or even Shankar’s name. At

---

<sup>7</sup> Orona’s testimony about this incident was consistent with the affidavit she gave during the underlying investigation. (Tr. 123, 129, 131–132)

trial, she had to visually identify Shankar, who was sitting in the courtroom, as the official who attended the August 30 meeting. Jennings could not remember whether the employees first met together as a group, did not remember the topics or issues the employees discussed, and did not remember if anyone from the hotel briefed her before the meeting started. On cross-examination  
 5 Jennings admitted that she really did not remember the interpretation at all and generally does not remember any of her interpretations.<sup>8</sup> Jennings denied ever making a fist, and stated that the meeting was not physically contentious. She described the translation as a Ping-Pong game, going back and forth between herself, Shankar, and the employees. (Tr. 183–188, 190–194)

10 5. Yamini Shankar

Shankar testified that the primary purpose of the meeting was to gather information about the concerns raised in the employee letter. The August 30 meeting was Shankar’s first visit to the hotel, and when she arrived at the facility at 3 p.m. Jennings was already in the conference  
 15 room while the employees were across the hall waiting. She introduced herself to the employees and asked whether they wanted to meet individually or as a group; Ramirez-Orozo replied that they wanted to meet collectively.<sup>9</sup> According to Shankar, she then invited them into the conference room across the hall and introduced them to Jennings. (Tr. 141–142)

20 After the introductions, Shankar testified that she set forth some ground rules about being professional, and reiterated the company’s open door, no harassment, and no retaliation policies. She also reminding the workers that “whatever we discussed, it’s better that we retain it here; again it will be shared only on a need-to-know basis” by Respondent. (Tr. 142–143) Shankar denied saying anything about the police during the meeting, and denied hearing the interpreter  
 25 discuss the police. Shankar, who does not speak or understand Spanish, testified that it appeared to her as if Ramirez-Orozo was initially trying to take over the meeting, and that Jennings was trying to calm her down on more than one occasion. (Tr. 143–144)

30 After reviewing the company’s various policies, Shankar explained that she was present to discuss the concerns the employees raised in their letter. According to Shankar, as she was going through the various issues, Ramirez-Orozo interrupted saying repeatedly that the employees were a committee. Shankar asked her to explain, and Ramirez-Orozo replied that they had formed a committee and had an attorney representing them. Shankar asked for the name of the attorney, or a contact, but Ramirez-Orozo said she would not disclose that  
 35 information. Shankar testified that she wanted this information to provide to Respondent’s counsel in the event the company needed to follow-up. (Tr. 144–145)

Shankar then asked the employees to take turns discussing their complaints. Ramirez-Orozo went first, and then the other employees followed. However, according to Shankar,  
 40 Ramirez-Orozo continuously interrupted the other employees while they were speaking. After everyone finished discussing their concerns, Shankar testified that she gave them the opportunity to meet with her individually if they wanted, to discuss personal, medical, or disciplinary issues. According to Shankar, the workers “were very amenable” to meeting individually, and said they wanted to do so. (Tr. 144–148)

<sup>8</sup> On direct examination Jennings had testified that she remembered “some” of the interpretation. (Tr. 182)

<sup>9</sup> Shankar testified that this part of the conversation occurred in English, without the interpreter. (Tr. 142)

*E. Respondent’s Business Code of Conduct*

Respondent’s maintains a Business Code of Conduct (Code of Conduct) that applies to all Interstate employees throughout the United States. Employees get a physical copy of the Code of Conduct, in both English and Spanish, when they are hired. An electronic version is also available on the company’s intranet site. Respondent’s vice president of compliance, Joy Johnson (Johnson), helped draft the Code of Conduct, and testified that the purpose of the document is to provide employees with guidance on how to deal with certain situations in an ethical manner. (Tr. 163, 177–179)

The Code of Conduct is divided into 17 sections based on subject matter; it ends with instructions telling employees to contact an attorney in the legal department if they have any questions or concerns. (GC. 3, p.6; Tr. 163–164) Paragraph 5(b) of the Complaint alleges that portions of the Code of Conduct in Section 6 (Information Protection) and Section 16 (Government Investigations) violate Section 8(a)(1) of the Act. (GC. 1(g); GC. 3)

1. Provision on Information Security

Section 6 of the Code of Conduct contains rules regarding the confidentiality of personal information, and reads as follows:

**Section 6:<sup>10</sup> Information Protection**

One of the Company’s most valuable assets is information and the information systems we use to process and store that data. Keeping confidential our Company’s non-public information is important to the success of our Company. Confidential information includes, but is not limited to:

- personal information, which is defined broadly to include any information that can be associated with or traced to any individual, such as an individual’s name, address, telephone number, e-mail address, bank and credit card information, social security number, etc. The personal information covered by this Code could pertain to a customer, potential customer, associate, former associate, owner or joint venture partner;
- information system user IDs, passwords, voice mail, and dial-up access numbers;
- proprietary information that provides our Company with an advantage over our competitors (e.g., email, financial systems, business intelligence site, development plans, revenue management techniques, etc.).

Every associate is responsible for utilizing the Company’s information solely for authorized business purposes. In addition, every associate is responsible for

---

<sup>10</sup> The Complaint mistakenly identifies this as Section 5 of Respondent’s Business Code of Conduct.

protecting the Company’s confidential information and information systems from unauthorized internal and external access.

5 The General Counsel alleges that the portion of this policy which deems as confidential  
 “personal information, which is defined broadly to include any information that can be  
 associated with or traced to any individual, such as an individual’s name, address, telephone  
 number, [and] email address” pertaining to an “associate, [or] former associate” violates Section  
 8(a)(1) of the Act. Johnson testified that this portion of the Code of Conduct is necessary due to  
 10 obligations under various state and/or federal laws involving data privacy. According to  
 Johnson, because Respondent collects information on employees as part of its business  
 operations, there is an expectation that the information is secure, as per various data privacy  
 laws. Thus, Johnson testified data privacy laws and personal security are the primary reasons  
 that Section 6 is included in the Code of Conduct. (Tr. 167–171)

15 Regarding the specific information Respondent considers confidential, according to  
 Johnson this includes protected information in the company’s database regarding employees  
 including their name, address, email, social security number, I-9 form, tax and bank account  
 information, along with health care information and the identity of dependents. The company  
 refers to this information as personally identifiable information, or “PII.” Respondent considers  
 20 any one piece of information that, when tied to a person’s name, can specifically identify the  
 individual, as being PII. Thus, according to Johnson, an individual workers name, by itself, is  
 not confidential. However, if the name is tied to some other piece of information which could  
 specifically identify the individual—like an address, phone number, or email, then it would be  
 considered confidential PII. (Tr. 166–169)

25 According to Johnson, the policy does not prohibit an employee from giving out his or  
 her own name, address, telephone number, etc. Instead, the purpose of the policy is to prohibit a  
 company representative who has access to confidential information taken from company records  
 or databases from distributing this information. Johnson testified that she is not aware of anyone  
 30 being disciplined for violating this policy. (Tr. 171–172)

## 2. Provision on Government Investigations

35 The Code of Conduct contains a provision prohibiting employees from answering  
 requests from the police, Internal Revenue Service, or other regulatory authorities without first  
 obtaining clearance from Respondent’s legal department. The General Counsel alleges that this  
 provision violates Section 8(a)(1) of the Act. The full policy reads as follows:

### **Section 16: Government Investigations**

40 We promote cooperation with law enforcement agencies and government  
 agencies. However, rights of third parties, associates, customers, suppliers, and  
 others may be affected. In most cases, the Company requires an official written  
 request or a subpoena describing the requested information or documents and will  
 45 ensure that the information requested is limited to information legitimately  
 required for the agency’s or party’s purpose. Therefore, requests from the police,

Internal Revenue Service and other regulatory authorities must not be answered without first obtaining clearance from our Legal Department.

5 According to Johnson, this policy provides employees with guidance on cooperating with government investigations and ensures that the information provided is appropriate. Johnson testified that it does not apply to employees who make a claim against the company, or who cooperate on their own in providing information to the government. (Tr. 173)

10 Johnson gave examples of various situations in an attempt to show why Respondent maintains this policy. According to Johnson, it is common for local police, the FBI, or law enforcement, to visit a property and request information on a guest or employee by simply showing a badge, saying they are conducting an investigation, and need access to information. Johnson also testified that, in California there are conflicts between state and federal law regarding the type of information an employer can provide the Department of Homeland  
15 Security Immigration and Customs Enforcement Agency. Finally, Johnson also gave as an example a Department of Labor audit where a manager provided the agency with responsive information, instead of contacting superiors, which resulted in a fine. Johnson claimed that, had the manager gone through proper channels, Respondent would have been able to provide other timekeeping information to the government and avoided a fine. (Tr. 174–176)

20 According to Johnson, these situations are “very intimidating” to employees; thus Respondent’s policy alleviates pressure from workers by giving them a standard response: we want to cooperate but need to contact the legal department and will then cooperate as guided. Respondent asserts that Section 16 allows the company to have a consistent and appropriate  
25 response to the various regulatory agencies contacting the hotel and requesting information. Johnson testified that she is not aware of anyone being disciplined for violating Section 16 of the Code of Conduct. (Tr. 174–177)

30 *F. Respondent’s Employee Handbook and the General Counsel’s Motion to Amend.*

The Complaint alleged that a provision in Respondent’s employee handbook prohibiting associates from “recording conversations or actions of guests or associates without  
35 authorization,” along with a separate clause deeming as confidential “policies, procedures, [and] manuals,” violated Section 8(a)(1) of the Act. However, at the opening of the hearing, the General Counsel withdrew these allegations. (Tr. 9)

40 After the hearing ended, contemporaneously with the filing of its post hearing brief, the General Counsel filed a Motion to Amend the Complaint (Motion to Amend). In the Motion to Amend, the General Counsel seeks to add two additional 8(a)(1) allegations, claiming that the evidence presented at trial supports a finding that, on about August 30, 2017, at Respondent’s facility, Shankar: (1) prohibited employees from recording a meeting in which they discussed concerted complaints about their terms and conditions of employment with Respondent; and (2) prohibited employees from discussing with others a meeting in which they discussed concerted complaints about their working conditions.  
45

Pursuant to an Order to Show Cause, Respondent filed a supplemental brief arguing that the General Counsel’s Motion to Amend should be denied as untimely, and because the allegations were not fully litigated. Respondent further argued that, if the Motion to Amend was granted, the additional allegations should be dismissed on the merits.

5

1. Prohibiting the recording of the August 30 meeting

Respondent had served a trial subpoena upon Ramirez-Orozo, and during cross-examination asked whether she possessed any documents responsive to the subpoena. One of the subpoena requests sought any recordings of the August 30 meeting. After some confusion, I specifically asked Ramirez-Orozo whether she made a recording of the meeting. In reply to my question, Ramirez-Orozo testified that she was going to record the meeting, but Shankar said she could not do so, so she turned her phone off and did not record the meeting. This testimony occurred during the General Counsel’s case-in-chief. (Tr. 102–103)

15

Jennings testified about this same incident on the second day of hearing, after the government had rested. Specifically, Jennings testified that, as she was setting her ground rules, one of the employees wanted to record the meeting. Jennings asked Shankar if recording was allowed, and Shankar said no. Jennings then relayed this information to the employees. (Tr. 185–186)

20

After Jennings testified, I asked Shankar whether this incident occurred. Shankar testified that Ramirez-Orozo did, in fact, ask to record the meeting, and that Shankar said that she could not do so. As a follow-up to this question, Respondent’s counsel asked Shankar why she did not want the meeting recorded. Shankar testified that, Respondent typically does not allow meetings to be recorded, and the company’s policy does not allow recordings without authorization. But, according to Shankar, the primary reason was that she was there to gather information from the associates, and her speculation that “once you put a recorder into play, it probably does not make associates feel very comfortable to open up.” (Tr. 195) However, Shankar never asked any of the workers whether they did, or did not, want the meeting to be recorded. (Tr. 195–196)

25

30

2. Prohibiting employees from discussing the meeting

As for the allegation that Shankar prohibited employees from talking about the August 30 meeting, the testimony relied upon by the General Counsel comes directly from Respondent’s examination of Shankar, which occurred after the government had rested its case-in-chief. Specifically, Respondent’s counsel asked Shankar what occurred when she first went into the conference room with the interpreter and the three employees. Shankar testified that, after laying some ground rules, she went over some of the company’s policies, and “with regards to confidentiality, I did remind them that whatever we discussed, it’s better that we retain it here; again, it will be shared only on a need-to-know basis on the Employer’s side.” (Tr. 142–143)

35

40

45

## III. ANALYSIS

A. *The General Counsel’s Motion to Amend*

5 Pursuant to Section 102.17 of the Board’s Rules and Regulations, a judge has wide discretion to grant or deny motions to amend complaints. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015) enfd. sub. nom. *R&S Waste Services, LLC v. NLRB*, 651 F. App’x 34, 35–36 (2d Cir. 2016). “In determining whether that discretion has been properly exercised, the Board evaluates (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated.” *Id.*

15 Here, I find that the facts do not support granting the General Counsel’s motion. First, at the opening of the hearing, the General Counsel withdrew the complaint allegation that Respondent’s rule prohibiting employees from recording conversations with coworkers violated Section 8(a)(1) of the Act. Thus, after the allegation was withdrawn, it was reasonable for Respondent to presume that, going forward, there were no alleged unfair labor practices with respect to the prohibition, and presented its evidence at trial accordingly. Had it known of the allegation in the Motion to Amend before presenting its evidence, Respondent argues that it would have more fully developed the record. *Resp’t. Supp. Br.*, at 7. While the General Counsel argues the matter was fully litigated, pointing to the fact that Respondent’s counsel asked Shankar to provide the company’s justification for not allowing the recording, it may not be simply “assumed that Respondent counsel’s handling of Respondent’s case would have been unchanged had he been aware of the potential new allegations.” *Consolidated Printers*, 305 NLRB 1061, 1064 (1992). Thus, I do not necessarily believe that the matter was fully litigated. It is possible that, had Respondent known of the allegation before the hearing closed, Shankar, or Johnson, could have more fully developed the record regarding Respondent’s no-recording policy, and the application of that policy to the facts presented involving the August 30 meeting.

30 Also, the General Counsel first learned of the facts supporting this allegation from Ramirez-Orozo’s testimony, during the government’s case-in-chief. And, Ramirez-Orozo’s testimony about the incident was confirmed by both Jennings and Shankar before the trial was adjourned. However, there is no explanation as to why the government waited until the filing of its post hearing brief, over a month after the hearing closed, to move to amend the complaint. Thus the issues of delay, and lack of notice, also militate against granting the motion.

40 Similarly, regarding the allegation that Respondent prohibited employees from discussing the August 30 meeting, the General Counsel does not explain its delay in moving to amend the complaint. And, although it is difficult to imagine what business justification Respondent could have proffered for Shankar’s telling employees that “whatever we discussed, it’s better that we retain it here,” our system of justice requires that a party accused of wrongdoing, at the very least, be given an opportunity to present a defense against the allegation. Because Respondent was never given such an opportunity, I deny the General Counsel’s motion.<sup>11</sup>

---

<sup>11</sup> In *The Boeing Co.*, 362 NLRB No. 195, slip. op at 3 (2015) the Board found a notice given to employees during an investigative interview that “recommended” they refrain from discussing the matter was a violation of a Section 8(a)(1) of the Act, as “[e]mployees have a Section 7 right to discuss employer investigations with their coworkers.”

B. *Alleged 8(a)(1) Violations Involving the August 30, 2017 Meeting*

Paragraph 5(c) of the complaint alleges that, during the August 30, 2017 meeting Shankar violated Section 8(a)(1) of the Act by: interrogating employees; threatening employees with discharge and unspecified reprisals; and threatening employees with calling the police.

1. Interrogating employees

To support the allegation that Respondent unlawfully interrogated employees, the General Counsel points to Shankar’s questioning the employees about the committee. Specifically, the General Counsel asserts that:

Rather than focusing on the subject matter of the letter, Shankar questioned the employees about their Committee, asking what syndicate represented them and whether their committee was legal. . . . Given the tone set by Shankar . . . making a remark about the police, her title, the location of the room, and the insistence on some formality to the committee . . . Shankar intimidated and interrogated the employees about their union and protected concerted activities. *GC. Br.*, at 22

Regarding what transpired, I find that the credited evidence shows that while discussing the letter during the group meeting, at some point Shankar told the workers they would need to meet with her individually to discuss their personal issues.<sup>12</sup> The employees protested saying that they did not want to meet separately, they were a committee, and wanted to address their issues as a committee.<sup>13</sup> During this discussion, Ramirez-Orozo said that the workers had an attorney help them form the committee. Shankar asked them to explain exactly what the committee was, whether it was legal, and for the name of their attorney.<sup>14</sup> In response, Ramirez-Orozo said that the committee was a group of workers who joined together to defend themselves, and declined to name their attorney.

Citing *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964), the General Counsel asserts that Shankar’s questions constitute an unlawful interrogation. In deciding whether an interrogation occurred, the Board looks at a number of factors, based on the “totality of the circumstances.” *Rossmore House*, 269 NLRB at 1178.

---

However, in finding a violation, the Board noted that the employer “has not demonstrated the existence of a legitimate and substantial business justification for this rule.” *Id.*, slip op. at 4. Here, Respondent was never given an opportunity to present evidence on whether such a justification existed.

<sup>12</sup> I do not credit Shankar’s testimony that the workers were “very amendable” to meeting individually. Instead, I credit the employees’ testimony that they wanted to meet as a committee, but were told they had to meet with Shankar separately.

<sup>13</sup> I do not credit Ramirez-Orozo’s testimony that, during the group meeting, Shankar asked why employees formed the committee, and “who is your syndicate [union].” (Tr. 95, 107) I note that neither Orona nor Brandt mentioned these statements from Shankar.

<sup>14</sup> Shankar admitted asking employees for the name of their attorney. And, all three employees testified that Shankar asked whether the committee was legal. Shankar did not testify as to whether she did, or did not, ask if the committee was “legal.”

These factors include: (1) the background, i.e. whether there is a history of employer hostility and/or discrimination against employee protected conduct; (2) the nature of the information sought, e.g. whether the interrogator appeared to be seeking information on which to base taking action against an employee; (3) the identity of the questioner – and their place in the management hierarchy; (4) the place and method of the interrogation, e.g. whether there was an atmosphere of unnatural formality, or if the employee was called from work into the bosses’ office; and (5) the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000) (citing *Bourne v. NLRB*, 332 F.2d at 48). These and other factors are not applied mechanically.<sup>15</sup> Id. “Instead, [t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the ‘totality of the circumstances.’” Id. (citing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998). In the end, the “task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.” *Westwood Health Care Ctr.*, 330 NLRB at 940.

Applying these factors here, I find that Shankar’s questions did not amount to an unlawful interrogation. While Shankar is Respondent’s highest level human resources official, it was the employees who asked for a meeting with someone from the hotel to discuss their complaints and concerns about Lettenberger. And, because the employee letter was also sent to Respondent’s corporate office in Virginia, it is sensible that someone of Shankar’s position would respond. The meeting occurred at a conference room in the hotel, which is not an unwarranted location given that both Orona and Brandt were on a leave of absence. And, the questioning occurred during a back and forth discussion about complaints the employees expressed in their letter. Shankar asked employees to explain the committee, whether it was legal, and for the name of their attorney. The response from the employees was truthful; Ramirez-Orozo told Shankar that the committee was legal, and was a group of workers who joined together to defend themselves. While they did not give the name of their attorney, Brandt testified that it was because they did not actually have one.

The core of the allegation involves the information Shankar sought to illicit from the workers. I do not find that, in these circumstances, Shankar’s request for the name of the committee’s attorney was coercive, as it came in direct response to Ramirez-Orozo’s statement that employees formed a committee and had a lawyer; Shankar did not press the issue further after the workers refused to give her a name. Thus, I find the circumstances here are different from those in *Deep Distributors of Greater NY d/b/a The Imperial Sales, Inc.*, where the Board found an unlawful interrogation. 365 NLRB No. 95, slip op. at 18 (2017) (interrogation where general manager asked employee whether he knew anything about the lawyer who filed an FLSA lawsuit against the company, and continued questioning the employee about the lawsuit, noting the employee was listed as a plaintiff).

---

<sup>15</sup> The Board also looks at other factors such as whether a legitimate purpose for the questioning existed or was conveyed, whether employees were given assurances against reprisals, and if there were contemporaneous threats. See, e.g., *Fiber Glass Sysrems*, 298 NLRB 504, 505 (1990); *Amerace Corp., ESNA Div.*, 225 NLRB 1093, 1101 (1976).

I believe that Shankar’s asking employees to explain exactly what the committee was, and whether it was legal, is more troubling. Shankar, who worked in human resources for over 10 years surely understood the meaning of the employees’ letter, their statement about forming a workers committee, and knew that they were not doing anything illegal.<sup>16</sup> Instead, I believe Shankar’s comments were a flippant response to the employees’ insistence that they wanted to meet as a group, as opposed to individually, because they were a committee. That being said, cheekiness is not a factor in determining whether an unlawful interrogation occurred. And, while Shankar asked whether the committee was legal, she did not specifically tell the workers that what they were doing was unlawful, or otherwise tell them to stop. Cf., *Storall Mfg. Co.*, 275 NLRB 220, 230–231 (1985), *enfd.* 786 F.2d 1169 (8th Cir. 1986) (Table) (violation of Section 8(a)(1) to tell employees that it was illegal for them to be passing out union cards on the company’s property). Thus, under the totality of the circumstances, I do not believe that Shankar’s comments amounted to an unlawful interrogation, and recommend that the allegation be dismissed.

## 2. Threatening employees with discharge and unspecified reprisals

Both of these allegations derive from Ramirez-Orozo’s testimony about what occurred during her individual meeting with Shankar, and the discussion about the paperwork involving her work-related accident. According to Ramirez-Orozo, Shankar asked for proof of her work-related accident. Ramirez-Orozo asked for a minute, saying she had the paperwork, and testified that Shankar, appearing angry, and called her a liar. Ramirez-Orozo then went to her car and came back with a stack of papers. She testified that, when she returned with the paperwork Shankar, again appearing angry, said “do you know I can fire you this minute.” (Tr. 110) Ramirez-Orozo asked whether the comment was a threat, and Shankar said no. Then, when Shankar asked for the documents, Ramirez-Orozo testified that she told her to get them from her doctor. Shankar denied ever threatening fire anyone, or telling any of the employees that she thought they were lying. (Tr. 148)

Regarding this incident, while I have credited various parts of Ramirez-Orozo’s testimony, particularly when it was corroborated by the other employees, it was clear at trial that she was sometimes prone to exaggeration, and was also angry at Respondent for having been fired. Her testimony that Shankar abruptly called her a liar and threatened to fire her simply does not ring true.<sup>17</sup> Accordingly, I credit Shankar’s testimony that she never made these statements. Accordingly, I recommend these allegations be dismissed.

## 3. Threatening employees with calling the police.

I credit the testimony of the employees that, at the August 30 meeting, Jennings told them in Spanish that it was a good thing the police were not present, and she hoped that they did not

<sup>16</sup> I find Respondent’s argument that it would be reasonable for Shankar to ask about the committee, and its legality, to avoid a possible 8(a)(2) violation as without merit. *Resp’t Br.*, at 23–24. Shankar did not testify as to why she asked employees to further explain the committee or its legality. Thus, Respondent’s argument is no more than a post-hoc attempt to justify Shankar’s comments, that has no basis in the trial evidence.

<sup>17</sup> According to Shankar’s notes of the meeting, it was Ramirez-Orozo who asked “are you firing me,” several times in reply to Shankar’s explanation as to why the company could not accommodate her request to change shifts. And Shankar explained that she was not being fired. (GC. 6, p. 5)

need to be called.<sup>18</sup> That being said, I also credit Shankar’s testimony that she personally did not say anything about the police.<sup>19</sup> Accordingly, the credited evidence shows that, sometime during the beginning of the group meeting, Ramirez-Orozo became loud, was “revved up” asking questions, and trying to dominate the meeting. Jennings, trying to stop Ramirez-Orozo, said to the employees that it was a good thing the police were not at the meeting, and she hoped that she did not need to call them.

The Board has found that threats to call the police, in response to employees’ protected activity, violate Section 8(a)(1) of the Act. *Healthbridge Mgmt., LLC*, 365 NLRB No. 37, slip op. at 4 (2017); *Roadway Package Systems, Inc.*, 302 NLRB 961 (1991); *All American Gourmet*, 292 NLRB 1111 fn. 2 (1989). And, a translator’s statements can violate the Section 8(a)(1), with the respondent being held responsible for the violation, where the translator is an “important and partisan conduit” between the employer “and its Spanish-speaking employees” and thereby is the employer’s agent for communicating with its employees. *Ella Industries*, 295 NLRB 976, 976 fn. 2 (1989). Here, however, the fatal flaw to the unfair labor practice allegation is that the General Counsel does not allege that Jennings was Respondent’s agent. The Complaint does not contain this allegation, nor does the government make this argument in its post hearing brief. Accordingly, because Jennings is not alleged to be Respondent’s agent, and the statement about the police was made by Jennings, and not by Shankar, I recommend that this allegation be dismissed.

### C. Respondent’s Business Code of Conduct

#### 1. Legal Framework

In *The Boeing Company*, 365 NLRB No. 154 (2017) the Board established a new standard to determine whether facially neutral policies or rules violate Section 8(a)(1) of the Act.<sup>20</sup> Since 2004 the Board had used a test that a work rule or policy not explicitly restricting Section 7 activity would be deemed unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004). In overruling *Lutheran Heritage*, the *Boeing Co.* Board stated that, when evaluating a facially neutral provision “the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *The Boeing Co.*, 365 NLRB No. 154, slip. op. at 3. As a result of this balancing, the Board established three categories of employment rules, policies, and handbook provisions:

<sup>18</sup> I do not credit Ramirez-Orozo’s testimony, which none of the other employees corroborated, that she heard Shankar say the word “police” in English, and that she watched Shankar as she said it.

<sup>19</sup> As for Shankar’s testimony that she did not hear the interpreter discuss the police, Shankar admitted that she does not speak or understand Spanish. Thus, by her own admission, she could not have understood what Jennings was telling employees and I do not credit this part of her testimony.

<sup>20</sup> The Board defined the term “facially neutral” as describing “policies, rules and handbook provisions that do not expressly restrict Sec. 7 activity, were not adopted in response to NLRA-protected activity, and have not been applied to restrict NLRA-protected activity.” *The Boeing Co.*, 365 NLRB No. 154, slip. op. at 1, fn. 4.

• Category 1, which includes rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

• Category 2, which includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• Category 3, which includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id. slip. op. at 3, 15.<sup>21</sup> These categories are not part of the test itself, but represent a classification of results from the application of the test. Id.

Therefore, to determine the lawfulness of the two work rules here, I must evaluate whether the rules, when “reasonably interpreted,” would potentially interfere with the exercise of Section 7 rights, and if so, (i) the nature and extent of the rule’s potential impact on Section 7 rights, and (ii) the legitimate business justification associated with the rule. Id. slip. op. at 14.

## 2. Respondent’s rule on government investigations

Here, a reasonable interpretation of the government investigations rule requires employees to first obtain clearance from Respondent’s legal department before answering requests from the police or regulatory authorities. The General Counsel argues that the term “regulatory authorities” includes the NLRB and other government regulatory/law enforcement agencies, and therefore the rule infringes upon employee Section 7 rights as it requires employees to get pre-clearance from the legal department before cooperating with any such entity.<sup>22</sup> *GC. Br.*, at 19–20. Respondent argues that there is no infringement on employee

<sup>21</sup> Even before *The Boeing Co.*, when analyzing the legality of a work rule, policy, or handbook provision, the Board has required the balancing of employee Section 7 rights with the company’s asserted “legitimate and substantial business justifications.” *Caesar’s Palace*, 336 NLRB 271, 272 (2001); *International Business Machine Corp.*, 265 NLRB 638 (1982) (Company policy prohibiting employees from distributing wage data that was compiled by the company and classified as confidential was lawful, as the employer had a substantial and legitimate business interest supporting the policy which outweighed employees’ interests in making use of data compiled by the company). This was true even after *Lutheran Heritage*. See *First Transit, Inc.*, 360 NLRB 619, 619–620, 628 (2014) (Board affirms ALJ’s finding that employer’s handbook rule on references is lawful, as the company “articulated a legitimate and substantial business justification for the rule that outweighs any speculative infringement of employee rights.”); *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip. op. at 2, fn. 4, (2016) (confidentiality provision in arbitration agreement a violation as the employer “failed to show a legitimate and substantial business justification that outweighs the employees’ Sec. 7 rights.”).

<sup>22</sup> In her testimony about the need for this rule Johnson used as an example a Department of Labor official seeking information as part of an audit. (Tr. 174–176) Therefore it is clear from both the plain reading of the rule, and Respondent’s interpretation, that the term “regulatory authorities” encompasses Federal regulatory agencies such as the Department of Labor and the NLRB. In its brief Respondent does not argue otherwise.

Section 7 rights, as the rule is limited to “official written requests” and “subpoenas” and that Interstate “is merely seeking to prevent employees from providing an official response on behalf of Respondent.” *Resp’t. Br.*, at 37.

5 I disagree with Respondent’s assertion and agree with the General Counsel. Nowhere  
 does the Code of Conduct say that the rule is limited to only “official written requests” or  
 “subpoenas,” or that Respondent is seeking to prevent employees from giving an official  
 response on behalf of the company. Moreover, there is no evidence that employees have ever  
 been told of this purported limitation. *Laidlaw Transit, Inc.*, 315 NLRB 79, 83 (1994) (any  
 10 clarification or narrowed interpretation of an overly broad rule must be effectively  
 communicated to an employer’s work force “before the Board will conclude that the impact of  
 facially illegal rules has been eliminated.”). Because the Code of Conduct is given to each  
 employee when they are hired, it is reasonable to conclude they would believe that its provisions  
 generally govern their interaction with government agencies, including Board investigators.<sup>23</sup>  
 15 And, pursuant to the plain reading of the rule, employees would conclude that requests from a  
 Board agent to provide an affidavit or other evidence during an investigation “must not be  
 answered without first obtaining clearance” from Respondent’s legal department. Accordingly, I  
 find that the rule—as written—impacts the Section 7 right of employees to provide evidence to  
 the Board, or to cooperate in Board investigations.<sup>24</sup>

20 I further find that the impact on Section 7 rights is severe. In practice, Respondent’s rule  
 would require employees to identify themselves to Interstate as having been contacted by a  
 Board agent—or other government/law enforcement agency—and receive clearance before  
 providing evidence; this puts employees at risk of intimidation and coercion. As noted by the  
 25 Supreme Court, “Congress has made it clear that it wishes all persons with information about”  
 alleged unfair labor practices “to be completely free from coercion against reporting them to the  
 Board.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Thus, in *NLRB v.*  
*Robbins Tire & Rubber Co.*, 437 U.S. 214, 239–242 (1978) the Supreme Court recognized the  
 “special danger” of witness intimidation, including intimidating employees and others to change  
 30 their testimony—or not testify at all—if “employers, or in some cases, unions” were allowed pre-  
 hearing discovery in NLRB proceedings.<sup>25</sup> *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239–242  
 (1978). The Court noted that the “danger of witness intimidation is particularly acute with  
 respect to current employees . . . over whom the employer by virtue of the employment  
 relationship, may exercise intense leverage.” *Id.* Here, Respondent’s rule puts employees at risk  
 35 of intimidation, and could make them “reluctant to give statements to NLRB investigators at all.”

<sup>23</sup> Respondent’s claim that this rule is properly clarified for employees by the fact that it has posted, in English and Spanish, an NLRB employee rights poster is not supported by Board precedent. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978). Moreover, Respondent’s Code of Conduct is given to all Interstate employees throughout the United States. There was no evidence presented at trial that the NLRB Employee Rights poster is posted at any locations outside of Santa Fe. (Tr. 125–128)

<sup>24</sup> It similarly impacts upon the Section 7 right of employees to concertedly participate in investigations by other regulatory or law enforcement agencies. *T & W Fashions*, 291 NLRB 137, 137 fn. 2 (1988) (employees’ concerted participation in U.S. Department of Labor investigative meetings protected); *Squier Distributing Co.*, 276 NLRB 1195, 1195 fn. 1 (1985), *enfd.* 801 F.2d 238, 241 (6th Cir. 1986) (Section 7 protects employees’ concerted cooperation with sheriff regarding suspicions that manager was embezzling company funds).

<sup>25</sup> The Board does not require the disclosure of witness names to a party prior to an unfair labor practice hearing. See *Pacific 9 Transportation, Inc.*, 21–CA–116403, 2015 WL 3643583 (2015) (unpublished order) citing *Mid-West Paper Products Co.*, 223 NLRB 1367, 1376 (1976).

Id. at 240. (noting that because the “vast majority” of NLRB cases are resolved short of hearing, without the need to disclose witness statements, employees giving statements to Board investigators can have some assurance that in most instances their statement will not be made public). Cf. *United States v. Julius Doochin Enterprises, Inc.*, 370 F. Supp. 942, 943 (M.D. Tenn. 1973) (Court noting that the “informer’s privilege,” which privileges the government from disclosing the identity of individuals providing information concerning violations of the law has been given “great weight” in Fair Labor Standards Act cases “by virtue of the fact that enforcement is so dependent upon the cooperation of, and information from, employees, and there is therefore, a concomitant need for protecting those employees from potential retribution from employers.”)

Although *Robbins Tire & Rubber* dealt with the issue of providing actual witness statements to an opposing party before trial, the potential for coercion and intimidation similarly applies to situations such as here, where employees are required to identify themselves to their employer as having been contacted by a Board investigator, and then receive pre-clearance from the company before providing evidence to the Board during an investigation. Indeed, the danger of potential intimidation, including trying to shape a witnesses’ testimony or convince them not to cooperate, is even more acute before the employee has actually provided a witness statement than after.

Given the severe infringement upon employee Section 7 rights, I find that Respondent’s purported justification associated with the rule does not outweigh the adverse impact upon employee rights.<sup>26</sup> If, as Respondent asserts in its post hearing brief, the rule is “merely seeking to prevent employees from providing an official response on behalf of Respondent,” there would be no need to prohibit all employees from answering requests from Board investigators, or other regulatory/law enforcement authorities, without obtaining pre-clearance from the legal department. Instead, “[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company’s presumed interest.”<sup>27</sup> *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007). See also, *Mercury Marine-Div. of Brunswick Corp.*, 282 NLRB 794, 795 (1987) (the Board has held that any rule requiring employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee’s free time and in non-work areas is unlawful); *Trump Marina Assocs., LLC v. NLRB*, 435 F. App’x 1, 2 (D.C. Cir. 2011) (employee handbook rule prohibiting employees from releasing statements to the media without prior permission a violation). Accordingly, I find that, by maintaining a rule in its Code of Conduct requiring employees to get clearance from the company before answering requests from the police, Internal Revenue Service, or other regulatory authorities, Respondent has violated Section 8(a)(1) of the Act.

### 3. Respondent’s rule on information protection

The rule on Information Protection in Section 6 of Respondent’s Code of Conduct defines confidential information as including the “personal information” of an employee, or

<sup>26</sup> As for Johnson’s testimony that she does not know of anyone ever being disciplined under this rule, the mere maintenance of a rule that can chill employee Section 7 rights and amount to an unfair labor practice, even without evidence of enforcement. *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–468 (D.C. Cir. 2007)

<sup>27</sup> The same is true regarding the various scenarios about which Johnson testified to justify the rule.

former employee. It then defines personal information “broadly to include any information that can be associated with or traced to an individual, such as an individual’s name, address, telephone number, [and] email address.” The General Counsel argues that this portion of the rule violates Section 8(a)(1) of the Act, as it interferes with the right of employees to share the names and contact information of coworkers with other employees, labor unions, government agencies, or other third parties—such as Somos—in furtherance of union or concerted activities. *GC. Br.*, at 18.

Respondent asserts that the purpose of the policy is: (1) to protect the personally identifiable information (PII) that it collects from guests, employees, vendors, and other third parties as required by various state and federal privacy laws; and (2) to protect the personal safety of Respondent’s employees. *Resp’t. Br.*, at 26. Thus, Respondent argues the rule cannot be read to prohibit employee Section 7 activity. In support of its defense, Respondent cites to the various hypotheticals Johnson gave in her testimony about the prohibited use of personal information “such as accessing PII in Respondent’s database and sharing it with unauthorized persons, sharing PII with one of Respondent’s competitors, or jeopardizing an employee’s safety by sharing PII with a third party.” *Id.* Finally, relying on the terms “our Company” in the rule, Respondent argues that the rule only prohibits the release of company non-public information stored in Respondent’s databases. *Id.* at 27

I believe that Section 6, when reasonably interpreted in context with the other rules in the Code of Conduct, interferes with the exercise of employee Section 7 rights. The Board has long held that employees can lawfully use information that comes to their attention in the normal course of their work activity and association with colleagues, including the names and contact information of their coworkers, for self-organizing purposes. Thus, in *Ridgley Manufacturing*, 207 NLRB 193, 196–197 (1973) the Board held that an employee was engaged in protected, concerted activity by memorizing the names of coworkers from timecards for the purpose of contacting them about unionizing. And in *Gray Flooring*, 212 NLRB 668 (1974), the Board found that an employer unlawfully fired a worker for copying the names and telephone numbers of coworkers from information that was openly available in a supervisor’s office in order to give to the union. The *Gray Flooring* Board noted that employees regularly went to the office for both social and work related reasons, and employees were allowed to get various papers and information from the office, without supervision or asking for permission. *Id.* 668–671. Because the information was not “in any meaningful sense, ‘private records,’” the employee was free to use that information to help the union in organizing. *Id.*

Here, the rule on information protection deems as confidential employee names, addresses, telephone numbers and email addresses; there is no exception for information employees learn during the normal course of their work and association with coworkers, which they are entitled to use for activities protected under Section 7 of the Act. *Albertsons, Inc.*, 351 NLRB 254, 259 (2007) (confidentiality rule cannot prevent employee from providing list of employee names to union organizers). As such, the rule interferes with employee Section 7 rights.

As for Respondent’s claim that the rule is aimed at protecting personally identifiable information (PII)—neither the acronym “PII” nor the phrase “personally identifiable

information” appears anywhere in the rule—or in the Code of Conduct for that matter. The same is generally true regarding Respondent’s claim that the rule is necessary for the protection of employee safety. There is no explanation in the rule saying that confidential information does not prohibit employee Section 7 activity, but is instead meant for the protection of employee safety in situations such as those testified to by Johnson, such as potential domestic violence, etc. Finally, while the rule does use the term “our Company,” Respondent reads the sentence out of context. In no way is the rule explicitly limited to company non-public information contained in Respondent’s databases. Accordingly, I find that the rule—as written—impacts employee Section 7 rights to share information amongst themselves, and with third parties, including labor organizations and worker advocacy groups.

I also find that the impact on employee Section 7 rights is significant. As noted by the Court of Appeals for the District of Columbia Circuit, the type of information deemed confidential here—employee names and contact information—is the type of information “that employees must be permitted to gather and share among themselves and with union organizers in exercising their Section 7 rights.” *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 548 (D.C. Cir. 2016).

Thus the question here is whether the rule’s adverse impact on employee rights is outweighed by Respondent’s legitimate justifications; I find that it is not. As with the government investigations rule, Respondent can accomplish all of its presumed justifications with a more narrowly tailored rule that does not interfere with employee protected activity, including the right to share the names and contact information of their coworkers with a union. *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007). Because a more narrowly drafted rule would meet Respondent’s purported interests of protecting PII, and employee safety, I find that its business justifications have not outweighed the significant infringement on employee Section 7 rights. *Id.* Therefore, I find that Respondent has violated Section 8(a)(1) of the Act by maintaining a rule in its Code of Conduct that deems as confidential the names, addresses, telephone numbers, and email addresses of current and former employees.

### 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 violated Section 8(a)(1) of the Act by maintaining an overly broad and discriminatory rule in its Business Code of Conduct requiring employees to keep confidential the names, addresses, telephone numbers, and email addresses of their coworkers or former coworkers.
3. The Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad and discriminatory rule in its Business Code of Conduct requiring employees to receive clearance before answering requests from the police, Internal Revenue Service, or other regulatory authorities.
4. The Respondent did not violate the Act as further alleged in the complaint.

## REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. The Respondent shall be required to post the attached notice, in both English and Spanish, in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Also, immediate rescission of the offending rules is the standard affirmative remedy for the maintenance of unlawful work rules, as it guarantees workers can engage in protected activity without the fear of being subjected to the unlawful rules. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 159 (2014) (citing *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007)). Accordingly, Respondent shall supply employees with inserts for its Business Code of Conduct stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will cover the unlawfully broad rules, until it republishes the Business Code of Conduct either without the unlawful provisions or with lawfully-worded rules. *Id.* Any copies of the Business Code of Conduct that are printed with the unlawful rules must include the inserts before being distributed to employees. *Id.*

Finally, the General Counsel also seeks a nationwide notice posting as a remedy. A nationwide notice posting is appropriate where the employer’s unlawful rules are maintained on a company wide basis. See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB at 160. “[O]nly a company-wide remedy extending as far as the company-wide violation can remedy the damage.” *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007). Here, the evidence shows that Respondent maintains its Business Code of Conduct nationwide. Therefore, I find that a nationwide remedy is appropriate.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>28</sup>

## ORDER

Respondent Interstate Management Company, LLC, as agent for BRE Newton Hotels Property Owner, LLC, d/b/a Residence Inn by Marriott Santa Fe All-Suites Hotel, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

- (a) Maintaining rules, including a provision in its Business Code of Conduct, requiring employees to keep confidential the names, addresses, telephone numbers, and email addresses of their coworkers or former coworkers.

<sup>28</sup> 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.

- (b) Maintaining rules, including a provision in its Business Code of Conduct, requiring employees to receive clearance from the company before answering requests from the police, Internal Revenue Service, or other regulatory authority.
- 5 (c) In any like or related manner, interfering with restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
- 10 (a) Rescind the rules requiring employees to keep confidential the names, addresses, telephone numbers, and email addresses of their coworkers or former coworkers.
- (b) Rescind the rules requiring employees to receive clearance from the company before answering requests from the police, Internal Revenue Service, or other regulatory authority.
- 15 (c) Furnish employees with inserts for the current Business Code of Conduct that (1) advise them that the unlawful rules have been rescinded or (2) provide a lawfully worded rules on adhesive backing that will cover the unlawful rules; or publish and distribute to employees a revised policy that (1) does not contain the unlawful rules or (2) provides lawfully worded rules. To the extent that these rules, or any characterizations or summaries of the same, are also found on the Respondent’s intranet portal, revise that content so that it (1) does not contain the unlawful rules, or (2) provide lawfully worded rules.
- 20 (d) Within 14 days after service by the Region, post (in both English and Spanish) at all of its facilities nationwide, including its Santa Fe, New Mexico facility, copies of the attached notice marked “Appendix.”<sup>29</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, 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 any of 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 the closed facilities any time since March 22, 2017.
- 25  
30  
35  
40

---

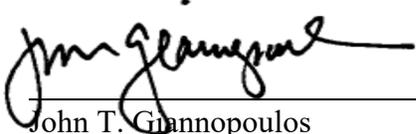
<sup>29</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(e) Within 21 days after service by the Region, file with the Regional Director for Region 28 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 with this order.

- 5           3. IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. September 11, 2018

10

  
\_\_\_\_\_  
John T. Giannopoulos  
Administrative Law Judge

15

**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 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** maintain work rules, including rules in our Business Code of Conduct, requiring employees to keep confidential the names, addresses, telephone numbers, and email addresses of their coworkers or former coworkers.

**WE WILL NOT** maintain work rules, including rules in our Business Code of Conduct, requiring that employees receive clearance before answering requests from the police, Internal Revenue Service, or other regulatory authority.

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

**WE WILL** rescind the portions of our Business Code of Conduct requiring employees to keep confidential the names, addresses, telephone numbers, and email addresses of their coworkers or former coworkers.

**WE WILL** rescind the portions of our Business Code of Conduct requiring employees to receive clearance before answering requests from the police, Internal Revenue Service, or other regulatory authority.

**WE WILL** furnish you with inserts for the Business Code of Conduct that (1) advise you that the unlawful rules have been rescinded, or (2) provide lawfully-worded rules on adhesive backing that will cover the unlawful rules; or **WE WILL** publish and distribute to all current employees nationwide a revised Business Code of Conduct that (1) do not contain the unlawful rules, or (2) provide lawfully-worded rules.

Interstate Management Company, LLC, as agent for BRE  
Newton Hotels Property Owner, LLC, d/b/a Residence  
Inn by Marriott Santa Fe All-Suites Hotel, Inc.  
\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1400; Phoenix, AZ 85004-3099  
(602) 640-2160; Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/28-CA-206663](http://www.nlr.gov/case/28-CA-206663) 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.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755.