

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

MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL, INC.

And

CASE 08-CA-152192

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1982, AFL-CIO

**GENERAL COUNSEL'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

Counsel for the General Counsel (General Counsel) respectfully submits this Response to the Notice to Show Cause issued by the National Labor Relations Board (Board) on October 5, 2018. For the reasons explained below, the General Counsel requests that the Board not remand the rules at issue to the Administrative Law Judge by dismissing those that are lawful under *Boeing Co.*, 365 NLRB No. 154 (2017) and retain and decide the remaining rules as it is unnecessary to remand to the Administrative Law Judge to further develop the record to adjudicate the remaining rules under *Boeing*.

The rules at issue are the: “Non-Disclosure/Confidentiality Policy #2500” referring to “confidential business information, to include information regarding labor relations”; the portion of the “Confidentiality Policy #2500” requiring employees to maintain the confidentiality of “ALL documents... and personal information” (emphasis in the original); the Workplace Environment Policy #4500; (Complaint paragraphs 6(A)(i), (ii) and (iv)), the Camera, Cell, Digital Device Policy #3100; and the Incident Reporting Policy #1600. (Complaint paragraphs 6(A)(iii) and 7(A)(i-vi)). The General Counsel respectfully requests that none of the rules be remanded as the record is complete with regard to the confidentiality rules and the Board has

sufficient record evidence to retain those rules and make a determination pursuant to *Boeing*. With regard to the Camera, Cell, Digital Device Policy #3100; and the Incident Reporting Policy #1600, these rules are prima facie lawful under *Boeing* and the General Counsel respectfully requests that the Board dismiss these rules.

The International Longshoremen's Association, Local 1982, AFL-CIO's (the Union) charge alleges that the Midwest Terminals of Toledo International, Inc. (the Employer) violated Section 8(a)(1) of the Act, *inter alia*, by maintaining certain unlawful rules.¹ (Exh. A) A hearing was held on December 3 and 4, 2015, and January 20, 2016 in Fostoria, Ohio, before Administrative Law Judge Eric M. Fine. ALJ Fine rendered his decision on September 19, 2016 at JD-89-16 finding that the rules at issue were unlawful and that the Respondent violated Section 8(a)(1) and (5) by unilaterally promulgating and implementing these rules. (Exh. B)

On October 31, 2016, Respondent filed Exceptions, which Counsel for the Acting General Counsel Answered on December 5, 2016. (Exhs. C and D) Respondent filed a Response on December 19, 2016. (Exh. E)

While the Exceptions have been pending before the Board, the Board issued its decision in *Boeing* overruling the "reasonably construe" test in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004). The instant Notice to Show Cause issued on October 5, 2018.

I. The Board Should Retain the Non-Disclosure/Confidentiality Policy #2500; and Confidentiality Policy #2500

The General Counsel respectfully requests that the Board retain the confidentiality rules and find these work rules to be unlawful under *Boeing*. *Boeing* instructs that work rules prohibiting employees from sharing confidential information, where the definition includes

¹ The original charge was filed on May 14, 2015. The charge was amended on July 28, 2015. The charge also alleges, and the ALJ found that the unilateral promulgation and implementation of these rules violate Section 8(a)(1) and (5) of the Act. These unilateral change allegations are pending Exceptions.

employee information, employment conditions, and Section 7 activities, are Category 3 rules and are unlawful. The Respondent's policy states:

Employees who improperly use or disclose...confidential business information, *to include information regarding labor relations*, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, *all personnel information, and union related business are considered confidential business information and should be guarded as such.* (emphasis added).

The policy further states that employees must:

[M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company. (emphasis in original).

Respondent's confidentiality policy and its attendant policies prohibit the disclosure of employees' personnel information, labor relations information, and union related information, which are overbroad and unlawful definitions of confidential information. Moreover, Respondent had the opportunity at the hearing to develop the record to demonstrate any legitimate purpose to prohibit its employees from discussing or sharing such information and Respondent's arguments are unavailing. It is requested that the Board retain these rules and find these rules to be unlawful.

II. The Board Should Retain the Workplace Environment Policy #4500

The General Counsel respectfully requests that the Board also retain the Workplace Environment Policy #4500 which prohibits employees from "[v]iolating others' expectation of privacy" and the "[l]oitering or presence on the jobsite without authorization before or after

assigned shift is completed.” This policy, particularly when considering the prohibitions together, is an unlawful category 3 rule under *Boeing*. With regard to rules prohibiting “loitering,” the Board’s test set forth in *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976) continues to be applicable after *Boeing*. As *Tri-County Medical Center* requires a balancing of employees’ rights under Section 7 and an employer’s legitimate business justifications, it is in line with the Board’s reasoning in *Boeing*.² In *Tri-County Medical Center*, the Board stated, “except where justified by business concerns, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.” The Board further held that a no-access rule, concerning off-duty employees, will be found valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activities. Here, the policy restricts off-duty employees from the entire jobsite, clearly not limited to working areas. Accordingly, this rule should be found to be unlawful.

Furthermore, the requirement that employees not violate others’ “expectation of privacy” mirrors Respondent’s Confidentiality Policy #2500 addressed above as a category 3 rule prohibiting the disclosure of personal information. This predictably would have an adverse impact on employees’ Section 7 activities which clearly outweighs any justification offered by Respondent.

Barring employees from the workplace during non-work time and prohibiting employees from disclosing or observing employees that would violate “their expectation of privacy” would chill employees from engaging in activities protected by Section 7. Respondent was given the opportunity to present evidence to support any business justification during the hearing. The

² *Boeing*, 365 NLRB No. 154 at FN 32(December 14, 2017).

ALJ concluded that Respondent's proffered security justification covering its entire 110 acre was unpersuasive, particularly as all employees have Transportation Worker Identification Cards (TWIC) cards and have been subject to background checks upon hire. (Exh. B, pgs. 33-34, lines 50-05) The broad language contained in this policy, specifically "privacy" when considered in conjunction with Respondent's unlawful confidentiality rules and "loitering" when read to include the entire 110-acre facility, is not ambiguous. Rather, employees would read this policy to restrict them from engaging in any solicitation or distribution during non-work time in non-working areas, and from disclosing, observing or sharing anything about anyone that would be perceived to be a violation of an expectation of privacy. It is respectfully requested that the Board find this policy to be unlawful.

III. The Board Should Dismiss Not Remand the Non-Disclosure/Confidentiality Policy #2500 Referring to Photography and Recording; the Handbook's Camera, Cell, Digital Device Policy #3100; and the Incident Reporting Policy #1600

The rules, contained in the Employer's handbook, are as follows:

The Non-Disclosure/Confidentiality Policy #2500:

Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by...employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

The Camera, Cell, Digital Device Policy #3100:

In the Policy Overview, that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information."

Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when

performing any function for or on behalf of the company –is restricted. This policy applies to all full-time and part-time employees and visitors.” (emphasis in original)

Under Cellular Telephone Use, that “[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence.”

Under Camera Use, that “[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee.”

Under Camera Use, that “[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee.”

Under Camera Use, that “[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device.”

Under Camera Use, that “[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.”

Under Camera Use, that “[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual’s expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken.”

The Incident Reporting Policy #1600:

“Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs...shall be marked as follows: “PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION.”

“No incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO.”

The Driver Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

The Visitor Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

Counsel for the General Counsel respectively requests that the Board dismiss these work rule allegations as under *Boeing*, the rules are category 1 rules and are prima facie lawful. Remanding these rule allegations to the ALJ would expend unnecessary time and resources as these rules considered pursuant to *Boeing* would not prohibit or interfere with the employees’ exercise of their rights under Section 7 of the Act and/or the potential adverse impact on protected rights is outweighed by the apparent business justifications associated with the rules. The General Counsel requests that the Board dismiss paragraphs 6(A)(iii) and 7(A)(i-vi) of the Complaint.

IV. Conclusion

For the reasons stated above, the General Counsel respectfully requests the Board to retain, not remand, the Non-Disclosure/Confidentiality Policy #2500” referring to “confidential business information, to include information regarding labor relations”; the portion of the “Confidentiality Policy #2500” requiring employees to maintain the confidentiality of “ALL documents... and personal information” (emphasis in the original); and the Workplace

Environment Policy #4500 (Complaint paragraphs 6(A)(i), (ii) and (iv)). The General Counsel further requests that the remaining work rules at issue be dismissed.

Dated at Cleveland, Ohio this 2nd day of November 2018.

Respectfully submitted,

/s/ Noah Fowle
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically and served by electronic mail on the following parties, this 2nd day of November, 2018:

MIDWEST TERMINALS OF TOLEDO INC.
3518 SAINT LAWRENCE DR
TOLEDO, OH 43605-1079
(electronic service to legal representatives only)

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Respectfully submitted,

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UNITED STATES OF AMERICA
 NATIONAL LABOR RELATIONS BOARD
AMENDED CHARGE AGAINST EMPLOYER

INSTRUCTIONS:

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
08-CA-152192	July 28, 2015

File an original of this charge with NLRB Regional Director in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer MIDWEST TERMINALS OF TOLEDO INTERNATIONAL INC.		b. Tel. No. (419)698-8171
d. Address (street, city, state ZIP code) 3518 Saint Lawrence Dr, Toledo, OH 43605-1079		c. Cell No.
e. Employer Representative Terry Leach		f. Fax No. (419)697-2715
		g. e-Mail
		h. Dispute Location (City and State) Toledo, OH
i. Type of Establishment (factory, nursing home, hotel) Dock Warehouse	j. Principal Product or Service Stevedore	k. Number of workers at dispute location 48

RECEIVED
 JUL 28 2015
 NLRB
 REGIONAL

1. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

At all relevant times, the Employer has maintained in its Policy Handbook the following unlawful work rules: Nondisclosure/Confidentiality Policy #2500, Confidentiality Agreement Policy #2550, Camera, Cell, Digital Device Policy #3100, and Workplace Environment Policy #4500. The Employer has maintained in its Safety Handbook the following unlawful work rules: Incident Reporting Policy #1600, Driver Safety Requirement, and Visitor Safety Requirement.

On about March 1, 2015, the Employer unilaterally changed its Policy Handbook for the 2015-2016 shipping season. The Employer failed to give notice to the union to bargain and unilaterally implemented the following policies: Nondisclosure/Confidentiality Policy #2500 and its Camera, Cell, Digital Device Policy #3100.

On about March 1, 2015, the Employer unilaterally implemented in its Safety Handbook policies titled Driver Safety Requirement and Visitor Safety Requirement. The Employer did not give the union notice to bargain.

On about March 1, 2015, the Employer unilaterally implemented a 2015-2016 ILA Standard Operating Procedures policy, without notifying or bargaining with the union.

By the acts set forth in the paragraphs above and by other acts and conduct, the Employer, by its officers, agents, and representatives, has interfered with, restrained and coerced and is interfering with, restraining, and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1982

4a. Address (street and number, city, state, and ZIP code) 2300 Ashland Ave Ste 225, Toledo, OH 43620-1280		4b. Tel. No. (419)280-4012
		4c. Cell No.
		4d. Fax No. (419)754-2678
		4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)		
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.		Tel. No. (419)280-4012
By: <i>Otis Brown</i> (signature of representative or person making charge)	Otis Brown, President Print Name and Title	Office, if any, Cell No.
Address: 2300 Ashland Ave Ste 225, Toledo, OH 43620-1280	Date: <i>28 July 15</i>	Fax No. (419)754-2678
		e-Mail

**WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
 PRIVACY ACT STATEMENT**

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIDWEST TERMINALS OF TOLEDO
INTERNATIONAL, INC.

and

Case 08-CA-152192

LOCAL 1982, INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO,

Gina Fraternali, ESQ., and Noah Fowle, ESQ.,
for the General Counsel.

Ronald L. Mason ESQ., and Aaron T. Tulencik, ESQ.,
of Dublin, Ohio for the Respondent.

Otis Brown, President of Local 1982
of Toledo, Ohio for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eric M. Fine, Administrative Law Judge. This case was tried in Bowling Green, Ohio on December 3 and 4, 2015, and completed in Fostoria, Ohio on January 20, 2016. Local 1982, International Longshoremen's Association, AFL-CIO (the Union or Local 1982) filed the charge on May 14, 2015, and the first amended charge on July 28, 2015 against Midwest Terminals of Toledo International, Inc. (Respondent).¹ The General Counsel issued the complaint on August 28, alleging Respondent violated Section 8(a)(5) and (1) of the Act by since March 1: unilaterally changing certain specified items it Policy Handbook; unilaterally promulgating and implementing certain specified policies in its 2015-2016 Safety Handbook; and unilaterally promulgating and implementing a 2015-2016 ILA Standard Operating Procedures policy. The complaint also alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining certain specified policies and/or work rules in its 2015-2016 Policy Handbook and in its 2015-2016 Safety Handbook which interfere with, restrain and coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

On the entire record, including my observation of witnesses' demeanor, and after considering the briefs filed by the General Counsel and Respondent, I make the following:²

¹ All dates are 2015 unless otherwise indicated.

² In making the findings, I have considered demeanor of the witnesses, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951).

FINDINGS OF FACT

I. JURISDICTION

5 Respondent, a corporation, provides stevedoring services at its facility on St. Lawrence
Drive in Toledo, Ohio (Respondent's facility) to shipping companies that are engaged in
interstate and foreign commerce. From these activities, Respondent derives annual gross
revenues in excess of \$500,000. Respondent admits and I find it is an employer engaged in
10 commerce under Section 2(2), (6), and (7) of the Act and the Union is a labor organization
under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

15

1. Prior NLRB Litigation

In *Teamsters Local 20 (Midwest Terminals of Toledo International, Inc.)*, 359 NLRB 983
20 (2013), the Board resolved a work jurisdiction dispute between Local 1982 and Teamsters Local
20 pertaining to Respondent. There, the Respondent took the position that the work in dispute
should be assigned to the Teamsters. The Board in essence divided the contested work
between the two competing unions based on the way it had been historically been performed by
the employees represented by each union. The Board did not alter the collective-bargaining
unit description of either unit. I raise this point because Respondent through counsel at the
25 hearing argued that this decision somehow altered Local 1982's bargaining unit to something
different than that alleged in the current complaint, and therefore Respondent refused to admit
the alleged unit. There was to be an explanation of this argument in Respondent's post-hearing
brief which never surfaced in the brief. Given the testimony of Local 1982 officials Brown and
Hubbard, as well as the testimony of Respondent Human Resources Manager Christopher
30 Blakely that the unit description in the parties' most recent collective-bargaining agreement is
accurate, I find the unit alleged in the complaint is accurate and appropriate as acknowledged
by officials of both Local 1982 and the Respondent.

The Board issued a decision in *Midwest Terminals of Toledo International*, 362 NLRB
35 No. 57 (2015). In its decision, the Board affirmed the judge's finding that Respondent violated
Section 8(a)(3) and (1) of the Act by failing to assign work to Otis Brown in June, July, and
August 2008, and by refusing to assign him light duty work from November 28 to December 2,
2008. It was also found that on April 24, 2009, by then Vice President of Operations Tim Jones
violated Section 8(a)(1) of the Act by telling an employee Respondent would not hire other
40 employees because they had filed grievances and unfair labor practice charges. It was found
that by memo issued by Blakely on August 19, 2011, that Blakely violated Section 8(a)(1) of the
Act by threatening an employee with discipline including termination because the employee had
filed grievances. The Board found that on September 28, 2012, Director of Operations Terry
Leach violated Section 8(a)(1) of the Act by informing an employee he lost overtime because of
45 the Union. The Board found that on November 12, 2012, Respondent by Leach violated
Section 8(a)(1) of the Act by threatening to remove a union steward from the job, or discharge
him, and grabbing the employee. The Board also found that Respondent violated Section
8(a)(5) and (1) of the Act when it ceased dues checkoff on January 1, 2013.

5 The decision in *Midwest Terminals*, cited directly above, gave a history of trusteeship of
Local 1982 beginning in 2010, and stated thereafter in August 2012, Otis Brown was elected
president of Local 1982. One of the allegations in this *Midwest Terminals* decision was whether
Respondent violated Section 8(a)(5) and (1) of the Act by refusing to implement an agreed upon
collect-bargaining agreement with Local 1982, the agreement upon which allegedly took place
on December 8, 2011. There, as affirmed by the Board, the judge dismissed this allegation
finding there was no meeting of the minds as to a CBA between Respondent and Local 1982
because Local 1982 sought to grieve a health and welfare provision in the new alleged local
agreement as a violation of the ILA master agreement at the same time it purportedly agreed to
10 the provision in the Local agreement. It was noted at footnote 17 in the judge's decision that on
December 9, union official Joseph presented Blakely with a flash drive containing a draft CBA
and "the employee handbook." This aspect of the Board's decision is mentioned because the
bargaining history pertaining to employee handbooks is an issue in the current case.

15 On January 21, 2016, Judge Paul Bogas in case JD-04-16, issued the first of two
decisions involving Respondent. In this decision, the judge found that in August 2013,
Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing established past
practice regarding the transfer of aluminum at the facility in a manner that deprived Local 1982
unit members of loading working they had theretofore performed. It was found that since
20 November 2013, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally
reassigning calcium unloading work historically performed by Local 1982 unit members to
others outside the unit. It was found that Respondent violated Section 8(a)(5) and (1) of the Act
by unilaterally ceasing informal crane training for unit employees after June 23, 2013. It was
found that Blakely violated Section 8(a)(1) of the Act by telling Prentis Hubbard, the union vice-
25 president and steward, on August 12, 2013, that Blakely had not been able to work on
Hubbard's workmen's compensation claim because Blakely was too busy working on
grievances and unfair labor practice charges filed by Hubbard. It was found that Respondent
discriminated against Hubbard on August 11, 2013, in violation of Section 8(a)(4), 8(a)(3), and
8(a)(1) of the Act by denying him pay for the hours he would have worked on that date if he had
30 not left work due to a work related injury; and that Respondent also violated Section 8(a)(5) of
the Act by denying Hubbard that pay. It was found that Respondent through Leach violated
Section 8(a)(4), 8(a)(3) and 8(a)(1) of the Act when it discharged Brown on October 1, 2013. It
was noted that Brown was elected Local 1982 president when it emerged from trusteeship in
July 2012, and that he continued to hold that position. That during that time, Brown served as
35 the Union's chief contract negotiator, chairman of the safety committee, and that he served as
representative of the Union at an unfair labor practice trial in June and August 2013.

40 On April 19, 2016, Judge Bogas issued a second decision in case JD-33-16 involving
Respondent and Local 1982. In the decision, it was found that Respondent violated Section
8(a)(5) and (1) of the Act in April 2014, by departing from the placement criteria set forth in the
CBA in terms of selection of employees to be placed on the skilled list, which impacts on the
selection of employees for work assignments; and Respondent was also found to have violated
the same sections of the Act by changing its practice in April 2014 by its failure to seek prior
input from the Union or providing the Union advanced notice of its filling of vacancies on the
45 skilled list. Respondent was also found to have violated Section 8(a)(3) and (1) of the Act by its
failure to place employee F. Victorian on the skilled list in April 2014.

2. The Current Case

5 Terry Leach is employed by Respondent as director of operations, a position he has held since 2007. Leach testified that he reports to the Respondent President Alex Johnson who works at Respondent's corporate office. Leach testified Local 1982 represents the longshoremens working at Respondent's facility. Leach testified that for the Local 1982 represented employees there is a skilled group who come in every day consisting of 9 employees. Then there are 20 or more employees who come to work depending on the number of vessels in port.

10 Christopher Blakely, whose title is human resource manager, reports to Leach. Blakely has held this position with Respondent since May 2010. Blakely testified Respondent took over the facility in October 2004, and Local 1982 was the collective bargaining representative for certain employees at that time. Blakely testified Respondent is a marine cargo dock. He testified there is a street running through the middle of the facility called St. Lawrence Drive, and on the water side of the facility is a stevedoring operation where cargo comes in by vessel, and is unloaded. He explained that cargo can also go out. Blakely testified that on the dry side of the facility employees represented by the Teamsters load and unload product from rail and truck. Blakely testified, based on prior his prior employment, he is a lifetime member of the National Education Association, Ohio Education Association, Northwest Ohio Education Association. Blakely testified he was a union officer at Maumee City Schools for 25 years, president elect, and president. He testified, as union president in the school system he served as the chief negotiator for three 3 year contracts.

25 a. Contract Negotiations and the Union's Handbook proposals

30 Leach testified he participates in collective bargaining negotiations with the Union and he has been doing so since at least 2010. Leach testified representing Respondent in negotiations also are Blakely and counsel Tulencik and Mason. At the time of the trial, the most recent collective-bargaining complete agreement (CBA) between the parties had effective dates of January 1, 2006 to December 31, 2010. There was a representation at the hearing that the parties were continuing to abide by the expired CBA, although Local 1982 President Otis Brown testified Respondent was refusing to allow cases to go to arbitration under that agreement. Leach testified that between 2010 and 2012, union trustees were negotiating on behalf of Local 1982 for a new CBA. Leach estimated there were about eight or nine negotiation sessions with the trustees. He testified proposals were made during those meetings and to his recollection he attended every negotiation session with the trustees.

40 Andre Joseph testified he works for the Atlantic Coast District of the International Longshoremens's Association as one of the vice presidents of the Great Lakes Area and he is held that position since December 2007. Joseph testified he became involved in contract negotiations with Respondent on behalf of Local 1982 because Local 1982 was put in trusteeship around 2010. Joseph was appointed as a co-trustee in September 2011. Joseph testified he participated in the negotiations on behalf of Local 1982 beginning in September 2011, when he learned negotiations had not started for a new CBA. Joseph named John Baker, Jr., as another appointed trustee for Local 1982. Joseph testified that when he began negotiations with Respondent the parties were following the terms of the expired 2006 to 2010 local contract. Joseph testified that Joseph, Baker, and union steward Miguel Rizo, Sr., were on

the Union's negotiating committee. Joseph testified Leach and Blakely were on the Respondent's negotiating committee.

5 Joseph estimated that he attended over 10 bargaining sessions during the trusteeship. He testified the Union provided proposals to Respondent including a proposed employee handbook policy for which Joseph did the drafting. He testified he provided both Leach and Blakely copies of the proposed handbook drafts as they went along. Joseph testified most of the handbook was language contained in the expired CBA which Joseph removed and placed into a handbook. Joseph testified it was his view placing this language in a handbook would allow more flexibility for change whereas if the language remained in the CBA it would have to be voted on by the Union's membership for approval to open the CBA in order to change the wording. He testified the handbook would have been a signed document between the parties, but it would still be flexible enough to address any changes in law for certification, training, hours and types of jobs.

15 Joseph identified a document entitled "ILA Local 1982 Employee Handbook." It states it was compiled on December 1, 2011. Joseph testified the document was provided to Leach and Blakely. It contains listings of color codes for Union and Employer inserts. It includes sections entitled: Referral and Seniority List, Skilled Employees, Regular Employees, Casual Employees, Employment Procedures, Seniority, Attendance, Pay Period/Payday, Medical Insurance, Pension Benefit, Drug and Alcohol, and Standard Operating Procedures. Joseph identified a second draft of the proposed Employee Handbook compiled on December 8, 2011 containing the same or similar headings. He testified he thought this was the last draft both parties agreed to, and then it was prepared for the next meeting. Joseph testified he did not have the sign in sheets for December 8 or 9 meetings, but if Leach was there the document would have been provided to him. Joseph testified the proposal was provided to Blakely. Joseph testified he provided the proposals in person at the bargaining table.

30 Joseph testified his last day as a trustee was either in late July or August 2012. When asked if at the end of the trusteeship if the parties had reached a new collective bargaining agreement between Respondent and Local 1982, Joseph testified he thought the Union's position was they had a complete tentative agreement on both the employee handbook and a new CBA. Joseph testified he attended an NLRB trial as to whether Respondent had reached a contract with the Union as of December 9, 2011. Joseph testified he stated in a pre-hearing affidavit dated April 3, 2012, that the parties had reached agreement on all items on December 9, 2011 for a new CBA except for the issue in CBA paragraph 17 because it was the Union's position that this provision in the tentative local agreement conflicted with the national agreement. Joseph testified that his reference to paragraph 17, in his affidavit should have been a reference to paragraph 18 in the local agreement. As set forth above, the Board in *Teamsters Local 20 (Midwest Terminals of Toledo International, Inc.)*, 359 NLRB 983 (2013), found the parties did not reach agreement on a new CBA in 2011, because as found by the judge there was no meeting of the minds pertaining to article 18, and therefore no meeting of the minds on a complete contract.

45 Blakely testified he participated in contract negotiations on behalf of Respondent. Concerning negotiations in the fall of 2011, Blakely testified Joseph had an employee handbook that Blakely thought came from Burns Harbor. Blakely testified Joseph, who was a trustee at the time, had his main base is Burns Harbor, a port opposite Chicago, and Joseph had a handbook showing what they did at that port. Blakely testified that to his recollection the document mirrored a lot of things in the parties' expired contract. When asked if it had work

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5 rules in it, Blakely testified "I don't think it had work rules. It had definitions, and it had parts of the contract." Blakely testified to his recollection concerning the document, "was that it went through a lot of the things like the hiring practice and that, and then there were things like job descriptions -- a lot of it came from the master agreement -- job descriptions of like what is a power operator, what is a forklift operator. So there was that, and then there was a lot of duplication of things that were in this contract."

10 Blakely identified the sign in sheet for the October 6, 2011 negotiation session between the parties. He testified that present were Blakely, Leach for Respondent and for the Union were then acting steward Miguel Rizo, Sr., and trustees Baker, and Joseph. The sign in sheet contains attached typewritten notes from the session. Blakely testified the notes were taken by his daughter who was Respondent's note taker during the Fall of 2011 negotiation sessions. Blakely testified that in the notes Blakely is referred to as C; T for Leach, and A for Joseph. Blakely testified the notes are an accurate reflection of what was stated at the meeting.
15 Beginning the first page of the typewritten notes it states that Joseph stated:

A: wouldn't be such a big contract if we set a work rules were at 35 pages that has work rules in it

C: work rules progressive discipline policies more naturally would be an addendum,

20 A: handbook signed by both parties

T: both parts have handbooks³

25 The minutes reflect that Joseph stated, "call out procedures, can be put in handbook" There was further discussion of an employee handbook incorporated in the minutes. Blakely testified that there were multiple versions of an employee handbook proposal. He testified, "Joseph's practice was when he presented his contract, what they were looking for, he typically, I'm not going to say every time, would provide a copy of -- of his handbook."

30 Blakely testified he received a document entitled, "ILA Local 1982 Employee Handbook" from the Union with the statement on the cover page that it was "Compiled December 1, 2011" during negotiations. When asked if it had work rules in it, Blakely testified, "The document has a duplication of things that are in the contract explained in different language. It has -- at the back it has definitions of terms. It has things about medical insurance. It has things about sexual harassment and that." When it was pointed out that the document had a section entitled, "Rules and Regulations Accident Policy," Blakely testified, "yeah, it's got like a progressive discipline policy and what to do if there is an injury. It's got the master agreement drug and alcohol plan, but that was in the master agreement. It's copied verbatim here. Then it has a lot of things that are in the master agreement in terms of definitions of terms, like what the duties are for an end loader operator and, you know, somebody that runs a conveyor and so forth and so on. So, you know, it's a handbook that they wanted to give to the employees, and Mr. Andre Joseph, this is what they do in Burns Harbor." When asked if he would consider any of these things work rules, Blakely testified, "Well, the actual contract, the last two pages of the contract has the work rules which are negotiated between the union and the employer, I mean, there is no doubt, but those go back into the 1990s, and those are actually called work rules." Blakely testified the proposed handbook did not have the work rules from the contract. Leach testified that his
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³ The General Counsel offered G.C. Exh. L into evidence on January 20, 2016. At the time, Respondent's counsel stated there was no objection to its admission. However, the undersigned inadvertently failed to state it was admitted. I am correcting that oversight in this decision by admitting G.C. Exh. L into evidence.

general role in negotiations was understanding the dock operations and what needs to take place. Leach testified that it was not his function to present proposals, rather that was Blakely's function. When asked if during the negotiations Joseph presented the employer with employee handbook proposals, Leach testified that, "I don't recall."

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Joseph testified that, subsequent to the trusteeship, Otis Brown became the president of Local 1982. Joseph testified Prentis Hubbard was vice president and he is currently also filling in the position of secretary-treasurer. Joseph testified he has been involved in the negotiations for a new agreement with Respondent from 2012 to the present. Joseph testified from 2012 to the present the Union has not requested bargaining over the handbooks. Joseph testified in explanation, "We haven't even gotten to our proposals." He testified the Union from 2012 to the present has not proposed any change in the employee handbooks stating, "We haven't had the opportunity yet." Joseph testified that during that time the Union made a proposal which was primarily the 2010 local agreement. He testified "And when we first got their proposal, it was a bunch of deletions, and it came from whatever, 30-some pages down to 12 maybe. I'm talking about in January – in February of 2012 or 2013. Joseph testified, "They had like three or four meetings, I believe three with the employer and the local officers, and then I was called in to ask -- to assist them in their new endeavor of the contract, and that's what we started doing. But we -- we haven't gotten -- except for the one meeting where we gave copies of what we'd like to see, everything has been the employer telling us what they want deleted. I mean, it's gutting the contract as we know it today."

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Brown testified he became president of Local 1982 on August 7, 2012. Brown testified that since that time he has been, and is still involved in negotiations as president of the local. Brown testified he has been representing the union in all contract negotiations. Brown testified that, during this time, the Union has never in negotiations asked to bargain about changes Respondent has made annually to the handbooks. Brown estimated that he has attended over 24 negotiation sessions. Brown testified "We started negotiating, I believe, in October of 2012, and we're ongoing even as of right now. We're still in negotiations." He testified, "We haven't really gotten anywhere yet in almost three years." Brown testified that since 2012 when he took office to the time of his testimony the Union had not proposed a policy handbook. Brown explained that, although they had been in negotiations for 3 years, they were having a difficult time reaching a contract. Brown testified there was an understanding to negotiate different parts of the contract in stages. Brown testified they agreed to postpone negotiations on economics to a later time, and then at some point in time after completing negotiations on economics they would get to negotiations on handbook policies, work rules, and safety rules which the Union wanted to take out of the contract and place in a handbook. Brown testified the Union cannot present Respondent with a handbook proposal right now. Brown testified, "we haven't been able to settle upon the first part of our negotiations. These things are done in part, and I was hoping that we could get this done, but it's been very difficult. So, again, to give them physically an entire document, no, but we have negotiated in part."

b. Respondent's Mandatory Annual March meetings

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Brown worked for Respondent from October 2000 or 2001 until October 1, 2013, when Brown was discharged. The Board issued a decision in *Midwest Terminals of Toledo International*, 362 NLRB No. 57 (2015). In its decision, the Board affirmed the judge's finding that Respondent violated Section 8(a)(3) and (1) of the Act by failing to assign work to Brown in June, July, and August 2008, and by refusing to assign him light duty work from November 28 to December 2, 2008. In a subsequent judge's decision issued on January 21, 2016, It was found

that Respondent through Leach violated Section 8(a)(4), 8(a)(3) and 8(a)(1) of the Act when it discharged Brown on October 1, 2013. It was noted that Brown was elected Local 1982 president when it emerged from trusteeship in August 2012, and that he continued to hold that position. That during that time, Brown served as the Union's chief contract negotiator, chairman of the safety committee, and he served as representative of the Union at an unfair labor practice trial in June and August 2013.

Brown testified, during the current trial, that Hubbard is the vice president of the Union. Brown testified Fred Victorian, Jr., now deceased, was a steward in March 2014. Hubbard testified he has worked for Respondent since April 2006. At the time of his testimony, Hubbard was vice president of the Union, the dock steward and the financial secretary. Hubbard testified he is a member of the safety committee. Hubbard testified that prior to the trusteeship he held no union office. Hubbard testified he joined the union negotiating committee in October 2012. Hubbard testified that since October 2012 through the time of the hearing he has attended numerous negotiation sessions, as well as Local 1982 President Brown. In the aforementioned judge's decision issued on January 21, 2016, the judge found that Blakely violated Section 8(a)(1) of the Act by telling Hubbard, on August 12, 2013, that Blakely had not been able to work on Hubbard's workmen's compensation claim because Blakely was too busy working on grievances and unfair labor practice charges filed by Hubbard. It was found that Respondent discriminated against Hubbard on August 11, 2013, in violation of Section 8(a)(4), 8(a)(3), and 8(a)(1) of the Act by denying him pay for the hours he would have worked on that date if he had not left work due to a work related injury; and that Respondent also violated Section 8(a)(5) of the Act by denying Hubbard that pay. Both Brown and Hubbard testified that Juan Rizo is a member of the Union, but that he has never been elected or appointed to union office. They testified Juan Rizo has never been authorized to represent the Union.⁴

Brown testified Respondent conducts a mandatory annual safety meeting for employees in March of each year. Hubbard testified employees are required to attend the safety meeting prior to being allowed to work for the upcoming shipping season. He testified Respondent holds makeup meetings for employees who miss the meeting. Hubbard testified he was not able to attend the mandatory 2014 meeting, but he did attend a makeup meeting. Blakely similarly testified that Respondent conducts preseason training. He testified Respondent participates in a drug-free safety program run through the Bureau of Workmen's Compensation. Blakely testified once the employee completes the training they have to go for a preseason drug test. Blakely testified, that during the preseason training, Respondent also reviews what is happening in the coming season, and Respondent hands out and reviews policy handbooks.

Blakely identified a letter dated February 11, 2011, labeled "Mandatory Drug Safety Workplace Training." The letter stated the annual mandatory Drug Safety Workplace training was set for February 25, 2011. Blakely testified the letter is sent out to employees informing them of the annual mandatory meeting. A subsequent letter issued to employees notifying them that the training was rescheduled to March 18, 2011. Blakely identified the sign in sheets for the March 18, 2011 meeting, which stated "By signing this sheet you acknowledge receipt of MWTTI Policy Packet (MWTTI Drug Policy, Cell Phone Policy, Equipment Policies, Violence in the Workplace Policy, Shape-Up Hiring, Grievance turn in). He testified these policies were distributed at the March 18 meeting. Blakely testified the company did not bargain with the

⁴ Juan Rizo is referred to in this decision by his full name, because there was another individual named Rizo mentioned in the transcript.

Union over the policies listed at the bottom of the page on the sign in sheets. Blakely testified that no one from the Union requested to bargain over those rules.

5 Blakely identified a letter to employees dated March 2, 2012, announcing the annual
"Mandatory Drug-Free Safety Program Training" was to be held on March 16, 2012. Blakely
identified the sign in sheets for attendance at the March 16 meeting which state, "By signing this
sheet, you acknowledge receipt of MWTTI Policy Handbook, MWTTI Safety Handbook and
10 paperwork for the pre-season drug screen to be completed on or before March 23, 2012."
Blakely testified the Policy Handbook and the Safety Handbook were distributed to employees
at the meeting. He testified, "We were in the hallway, and then people signed in, and then, you
know, I handed them documents, and they went into the auditorium." Blakely testified he did
not bargain with the Union over the Policy Handbook and the Safety Handbook listed at the
bottom of that sign in sheet. Blakely testified that no one from the Union requested to bargain
15 over the handbooks. Blakely testified that during his tenure these were the first formal
handbooks distributed by Respondent. Blakely testified Respondent contracted with a Joe
Mlynek, a nationally recognized certified safety provider and occupational health and safety
technologist. Blakely testified that it was Blakely who wrote the handbooks with Mlynek's
assistance. Blakely identified the 2012 policy and safety handbooks which he testified were
20 distributed at the meeting. Blakely testified that to his knowledge, during the 2012 season and
prior to the 2013 season, no one from the Union requested to bargain over the over the 2012
policy and safety handbooks.

Blakely testified the policy and safety handbooks first came into existence in 2012.
Blakely testified that between the 2009 to 2012 shipping seasons, there was no formal policy
25 handbook or safety handbook in effect. Rather, during that time, there were just individual
policy pages. Blakely testified that Respondent hired the outside consultant to create handbook
policies at least a year prior to the 2012 safety meeting. He testified that at no time did he notify
the Union that he was drafting new handbook policies. Blakely testified this was despite the
Union and Respondent being in ongoing contract negotiations. Blakely identified certain
30 individual Respondent policies which existed but were not in handbooks prior to 2012. Blakely
testified the Work Rules acknowledgement and page entitled "Exhibit C, ILA Local 1982 Local
Work Rules (2/23/06)" are the work rules that are attached to the CBA. Blakely testified it was
his understanding those rules had been bargained over with the Union. Blakely testified that
35 excluding those work rules the remainder of the identified polices were not attached to the
contract. These policies are entitled: "Use of Confidential Information by Employees;" "Drug
Free Safety Policy March 23, 2007;" "Authorization For Release Of Information;" "Non-
Disclosure/Confidentiality Policy," dated February 23, 2009; "Cell Phone Use Policy," dated
February 27, 2009; "Nepotism Policy," dated March 31, 2009; "Vehicle and Equipment Misuse
40 and Abuse Program," dated March 20, 2010. Blakely testified that some of these policies were
included in the 2012 policy handbooks distributed by Respondent. Blakely testified that during
his time at Respondent he has not bargained with the Union over the policies listed in the safety
handbook and the policy handbook, nor has anyone from the Union requested to bargain over
those policies.

45 However, when Blakely initially testified concerning the 2012 annual meeting on 611-c
exam by counsel for the General Counsel his memory was not as clear. At that time, Blakely
testified he thought he attended the 2012 March annual safety meeting. When asked if Brown
spoke to Blakely about the handbooks prior to the meeting, Blakely testified, "I do not recall that
he did." In explaining his answer, Blakely testified, Blakely testified, these things kind of run
50 together, okay? So I do know I believe it was the 2012 meeting. ". Blakely testified when he

5 attends the safety meetings he arrives early, and lays out the documents and that is "pretty
much what I'm doing up until the time the meeting starts is I'm making sure people get the
documents, I'm making sure people sign in, so I -- it's highly unlikely that I had a conversation
with someone given those circumstances, and that's been my practice since 2011." Blakely
testified "I believe it was 2012, in that meeting when Otis Brown stood up and started asking all
kinds of questions about how I handle random drug testing. That I do remember, and I believe
that was 2012. But, I mean, you know, memory is memory, and I'm going to say -- I'm not
going to say categorically that didn't happen. But given what I have to do prior to the beginning
of these meetings, it's just not conducive to having a conversation with someone because I
10 need to make sure that everybody signs the thing, because people are paid for the meeting, and
that they, you know, get what they need, and if they have an address change, I have to explain
this to them and so forth and so on. So based upon that I would say, no, it didn't happen."

15 Brown testified he became president of the Union in August 2012, and he was not the
president at the time of the March 2012 safety meeting. However, Brown testified he did have a
conversation with Leach and Blakely in 2012 at the safety meeting. Brown explained he spoke
to Blakely and Leach in 2012, "Because the trustees were not there, and they had informed us
that the company had not presented the documents and they had not reviewed the documents
also and stuff and told us not to sign them. They told us to not sign it or sign it under protest."
20 Brown testified he did not have any position with the Union in the spring of 2012. Brown
testified he attended the 2012 annual March safety meeting, but did not attend the meetings
held since that time.

25 Blakely identified a letter to employees dated March 1, 2013, announcing the "Mandatory
Drug-Free Safety Program Training was to take place on March 15, 2013. He identified the sign
in sheets for the meeting which stated, "By signing this sheet, you acknowledge receipt of
paperwork for the pre-season drug screen to be completed on or before March 22, 2013."
Blakely testified there was not a new handbook distributed in the 2013 meeting. He testified the
2012 handbook was in effect during the 2013 shipping season. Blakely testified that handbook
30 was not distributed during the 2013 meeting. Blakely testified he could not recall whether
employees were explicitly told the 2012 policy handbook was in effect for 2013. However
Blakely testified that during that meeting they referenced the policies in the 2012 handbook. He
testified Respondent did not give employees anything to make them think that anything had
changed. Leach testified he attended the 2013 mandatory safety meeting. When asked if at
35 that meeting, Prentis Hubbard, the union vice president, objected to the implementation of the
handbook policies at that meeting, Leach testified, "I don't even know if he was around. I don't
think he was union steward. I think it was Fred at the time, Victorian, that is."

40 Hubbard testified that he attended the mandatory safety meeting in 2013. He testified
when the employees first arrive at the annual safety meeting they sign in to allow them to get
paid for attending. He testified they also have to sign to receive Respondent's handbooks.
Hubbard testified Respondent passed out new handbooks in the 2013 and 2015 safety
meetings. Hubbard testified that prior to signing in at the 2013 meeting, Hubbard had a
conversation with Leach. Hubbard testified that, "I told him that due to the fact that the
45 Company didn't come and bargain with the Union about the safety rules like they did prior, that
we're going to have -- I'm going to have to have the men sign them in protest." Hubbard
testified, at the time, Hubbard was vice president of the Union and a steward. Hubbard testified
Leach told him he had to do what he had to do. Hubbard testified that after he made the
statement to Leach, that Leach explained the handbooks to the assembled employees.
50 Hubbard testified that after Leach explained the policies, Hubbard told the members what

Hubbard had previously told Leach that the Union did not receive a copy of this, that they did not sit down and go over it with Respondent so the Union did not agree to it and "we were going to sign in protest." Hubbard testified that Leach was present when Hubbard made the statement. Hubbard testified he thought Blakely was also in attendance at the time.⁵

⁵ Brown initially testified he attended the annual safety meeting held in March 2013, but later on cross-examination he recanted this testimony and stated he was mistaken and it was the March 2012 meeting he attended, not the 2013 meeting. In his initial testimony concerning the March 2013 meeting, Brown went into some detail as to what transpired there. Brown described the procedure in the 2013 meeting as when employees walked in the door they saw a table containing different sheets for signatures. One was for showing employees' attendance, and there were separate sheets to sign for receipt of the policy and safety handbook. Brown testified he thought there were four signature sheets. Brown testified the procedure at this meeting was different from before. Brown testified that during the 2013 meeting he spoke to Leach briefly about the handbook policies he received at the meeting, and he spoke to Blakely in more detail. Brown testified he told Leach that Brown's concern was the employees were signing for receipt of things before they received them, and Brown noticed that was a change from when he had become the president. Brown testified he also spoke about the Union not receiving prior copies of the documents for its review. Brown testified, "at that point it was clear there was going to be no way we were going to stop it and postpone this, so I left the conversation at that." Brown testified Leach told Brown they would review the policies with the employees at the meeting. Brown testified he then made the decision upon speaking to Hubbard and the Union's trustees that they were going to sign the documents under protest. Brown testified, "So basically that's when we got started at the meeting, I informed the guys that we were going to sign it under protest." Brown testified, "If we could get around signing, not to sign, and if we had to sign, we would sign it under protest, and I believe I did manage to skip signing the documents all together or maybe one or two." Brown testified he also talked to Blakely. He testified "When I spoke to Mr. Blakely, I told Mr. Blakely this setup was done before, and you're asking us to sign for something before we even reviewed it." Brown testified Blakely told Brown that he should talk to Leach.

Brown testified that, as per Brown's instructions, Hubbard spoke to the employees during the 2013 meeting. Brown testified Hubbard made the announcement to members that the Union had not met with the Company to review the documents and the Union was not approving them, and they were going to sign under protest. Brown testified, "I know for sure Mr. Leach was in there. Mr. Blakely had stepped out a few times, but Mr. Leach was in there. I can attest that he was in there." Brown testified Blakely was in the meeting for the most part but at times he stepped out. Brown testified the Union did not receive the 2013 shipping season handbook prior to the March 2013 safety meeting.

However, after some repeated questioning on cross-exam when asked if he had a conversation with Leach and Blakely at the 2013 meeting, Brown testified, "Honestly, I talked to -- I know I was on the phone with Mr. Hubbard, and I instructed him to give the speech, now that he jogged my memory, ". Brown then testified that he did not think he attended the March 2013 meeting. He testified he instructed Hubbard to make an announcement at the meeting, but he gave Hubbard this instruction over the phone. Brown testified concerning the 2013 meeting, "I don't believe so at that meeting. I believe I was confused about the 2012 meeting, and I would have to stay with that." Brown was then shown the attendance sheet for the March 15, 2013 meeting, and he testified he did not sign in for attending the meeting. Brown was marked on the sheet as a no show for the meeting, although Hubbard had signed in. Brown, upon seeing the attendance sheet for the March 15, 2013 meeting, then testified to a certainty that he did not attend.

Christopher Bates was working for Respondent at the time of his testimony and had been employed there since 2007. Bates testified he is a member of the Union, but he has never been a union official. Bates testified he attended Respondent's March 2013 mandatory safety meeting. Bates testified Hubbard spoke at the meeting. Bates testified Hubbard stood up and stated that, "we as a Union did not go over the safety handbook," that "we had to sign like a paper, and he was stating that we didn't go over it, so we we're signing under duress." Bates testified Hubbard was referring to Respondent's acknowledgement form for the handbook. He testified that Hubbard was saying, "we were agreeing to it, but it was signed under duress." Cleophas Fisher, Jr. was employed by Respondent since 2009, at the time of his testimony. Fisher has never held union office. Fisher testified he attended the March 2013 mandatory safety meeting. He testified Hubbard spoke at the meeting. Fisher testified that after they explained all the forms and rules, Hubbard stood up and said, "you had to sign a paper, but you can protest. You can write protest on it." When asked to state what Hubbard said was the reason he was instructing people to write protest on the paper, Fisher testified, "I don't recall." Respondent's attendance records for the 2013 meeting reflect that Hubbard had signed in, but have Bates and Fisher listed as "No Show".

Blakely testified Respondent conducted a preseason meeting in March 2014, which took place on March 22. Blakely testified Respondent presented employees with new handbooks during the meeting. Blakely identified the 2014-2015 Policy Handbook and the 2014-2015 Safety Handbook, which he testified were distributed to employees at the March 22 preseason training meeting. Blakely testified he did not bargain with the Union concerning the handbooks, and that to his knowledge no one from the Union requested bargaining over the handbooks. Blakely testified the new handbooks were distributed because there were some policies added between 2012 and 2014. He testified he had attended Department of Labor training sessions for HR managers and in the sessions the DOL representative said Respondent should have policies on record retention. That is the company's policy on how long they keep personnel files to make sure they are in compliance with the law. He testified that you should have a policy that stipulates where the records are kept to protect things like HIPAA. He testified there also should be a safe harbor policy concerning what occurs if someone sees a mistake in their paycheck. Blakely testified that he might be missing a couple of the changes but mainly the changes related to what he learned by attending the DOL conference. He testified that after he distributed the handbooks no one from the Union requested to bargain over the changes. When asked if prior to that meeting if he sent a copy of the safety handbook policy or the policy handbook to the Union, Blakely testified, "I probably did not." Blakely testified the day of the meeting, when everyone shows up, he gave out the documents at that time before the meeting started. Blakely testified that he attended the Department of Labor meeting in 2013 and at no time did he notify the Union that Respondent was going to add policies to the handbooks.⁶

Leach, pertaining to the 2014 shipping season safety meeting, was asked if union steward Fred Victorian, Jr., objected to the employer's unilateral implementation of the handbooks. Leach testified, "As I recall, Fred did come to me and say that we're going to object and protest and we're not going to sign anything because he was informed by Mr. Otis not to

⁶ Respondent in its brief asserts that in 2014, Respondent made changes to the following policies: Progressive Disciplinary Policy #2000, Personnel File Access Policy #2900, Equipment and Vehicle Policy #3000, Technology Policy #3500, ILA Local 1982 Hiring Policy #4100 and Safe Workplace Environment Policy #4500; and that Respondent added two new policies; Employee Pay Practice Policy #2050 and Employee Record Policy #2925.

sign anything.” Leach testified Victorian, who had passed away prior to the trial, was a union steward at the time of the 2014 meeting. When asked who Don Russell was, Leach testified, “He was another ILA union employee.” When asked if Russell was a union steward, Leach testified, “Like I said, there is a lot of them. Whatever day they appointed one, that was their job for the day.”⁷ When asked if Russell spoke up during the 2014 safety meeting objecting to the Respondent’s unilateral implementation of the policies, Leach testified, “Yeah. He came into the room and said I’m not signing shit.”

Brown and Hubbard testified they did not attend Respondent’s annual safety meeting in March 2014. Brown testified that Respondent did not give the Union notice concerning any manuals that they were going to hand out during this meeting. He testified the Union did not receive the 2014 shipping season handbook prior to the March 2014 mandatory safety meeting. Brown filed an unfair labor practice charge on September 18, 2014 in case 8-CA-137044 on behalf of the Union alleging, in part, that since March 22, 2014, the Employer “failed to notify the Union regarding the scheduling of a safety/drug meeting; disseminated policy changes without notifying or bargaining with the Union regarding the changes;.” By letter dated November 28, 2014, the Regional Director notified Brown the charge was dismissed for insufficient evidence to establish a violation of the Act.

Respondent received an OSHA “Citation and Notification of Penalty” dated March 12, 2014, from the U.S. Department of Labor. It states, “The employer did not require that employees stay clear of the area beneath the overhead drafts or descending lifting gear.” It reads in part:

The employer failed to ensure an employee mechanically maintaining piles of pig iron for cranes extraction in hold #1 of the docked cargo vessel Drowsko was kept out of the fall zone of the cranes suspended bulk load. An employee operating a skid steer in the hold was struck-by a mass of iron after a piece became displaced from the cranes grapple and had entered the front opening of the skid steer working below. Employees working in the fall zone were exposed to struck-by hazards.

On March 22, 2014, Leach, on behalf of Respondent signed an “Informal Settlement Agreement” with OSHA. Included in the settlement were the following paragraphs:

8. The Employer agrees to systematically work through the Standard Operating Procedure (SOP) manual to review and update their procedures to create more specific SOP’s similar to the form of the “SOP-Loading and Unloading Material”. A labor representative will be part of this process; the make-up of the reviewing group can change based upon the procedure being reviewed, but a labor representative will be present for these reviews. The employer will provide the area office a copy of four of these SOP’s no later than July 31, 2014, in addition to the names and titles of the reviewers.

9. The Employer will agree to involve a labor representative in the investigation of safety incidents/accidents. The representative will be agreed upon by labor/management and

⁷ In a position statement dated November 23, 2014, filed by Respondent’s counsel for a prior charge pertaining to the March 2014 meeting, it was stated “union officials were invited to and were present at this training/meeting:” Included in the named union officials was Russell who was identified in the position statement as a union Trustee, Lines Dispatcher and frequent designated union steward.

5 the employer will have a third party conduct accident/incident investigation training for those tasked to conduct them. The Employer will provide the area office verification of this training and four accident/incident investigations, to include the date of the incident, the name and title of the investigators and corrective actions taken. The employer will provide these to the office within one year (3/22/15) or may stop after four have been provided.

10 Blakely identified a letter to Blakely dated March 19, 2015, he received from Hubbard, identifying Hubbard as the vice president of Local 1982. The letter states:

15 As you are well aware, Otis Brown is the chairman of both the union's safety and its training committee. In March 2014 a hearing was held for the purpose of addressing charges brought against the employer for violating OSHA safety rules. Mr. Brown attended that hearing and gave testimony on behalf of ILA local 1982.

20 Because of his participation in the hearing, this gave him a better insight as to the nature of the settlement agreement. Therefore, the Executive Board of ILA Local 1982 appointed him as our labor representative. As part of the agreed upon settlement, he is supposed to be part of the reviewing group that will work to improve the employers Standard Operating Procedures (SOP) for loading and unloading material from the various vessels, and to also participate as the labor representative in all safety incidents and accident investigations.

25 During a recent Executive Board Meeting it was brought to my attention that nearly a year has passed and the employer has not carried out its part of the agreed upon settlement or at least not allowed the union labor representative to participate. Whatever the case may be, I ask that you contact Otis Brown as soon as possible, with the hopes that we can work together to get this matter resolved.

30 Blakely also identified a letter to Blakely dated March 20, 2015, he received from Brown, identifying Brown as the president of Local 1982. In the letter Brown stated:

This letter is sent to address the employers continues malicious discontent for the union and its members. Today I would like to discuss the blatant disregard of the employer for the safety of the union and its member's/employees.

35 On March 21, 2014 the employer was summoned before the U.S. Department of Labor Occupational Safety and Health Administration to answer charges that were brought against the employer for violating OSHA regulations that resulted in the serious injury of one of my union officers, which has left him currently disabled.

40 During the hearing you and Mr. Terry Leach agreed to provide the union with copies of the company's safety handbooks and the work rules for our review, and to meet with union to discuss any discrepancies that may exist within those documents. As part of your written settlement agreement, you agreed to allow a union representative to assist the employer and work through the Standard Operating Procedure manuals to review and update them as needed. Also, you agreed to involve a union representative in the all incident and accident investigations, and to bring in a third-party to conduct incident and accident training for call of those who are tasked to conduct them.

45 Exactly one year has passed and the employer has not provided the union with any of those documents nor has the employer allowed the union representative to participate in any of the events as listed in the settlement agreement.

50 The union position in this matter is that since the employer refuses to provide the list of documents to the union representatives for review, and not allow them the opportunity

to raise any issues on discrepancies, then the union and its member will not be held bound by these documents.

5 Blakely testified, on January 20, 2016, that Respondent's annual safety meeting was held on March 21, 2015. Blakely testified that he hand delivered to the Union Respondent's 2015 to 2016 shipping season safety and policy handbooks on March 21. Blakely testified he did this when they were distributed to current employees, including those who were union officials, as they were entering the mandatory safety meeting held on that date. Blakely testified Hubbard attended the meeting. Blakely testified concerning the distribution of the 2015-2016 policies that, "There were tables, and people circled around the table, picked up the documents, and then signed a sign-in sheet and then went out into the bigger room and had a seat." Blakely testified that at no point prior to the meeting did he send a copy of the 2015 to 2016 safety policies or work rule policies to the Union. When asked if Hubbard objected to the handbook policies at the March 21 meeting, Blakely testified, "I -- I don't recall."

15 Leach was questioned on December 3, 2015, concerning the March 2015 mandatory safety meeting on 611-(c) exam by the General Counsel.⁸ During that questioning the following exchange took place:

20 BY MS. FRATERNALI: Q. Mr. Leach, isn't it true that at the 2015 mandatory safety meeting that union vice president Prentis Hubbard objected to the employer's implementation of the policies?

A. I don't recall if he was the union steward at the time. There's 11 of them so.

25 Q. Isn't it true that a union official objected to the employer's unilateral implementation of the 2015 policies?

JUDGE FINE: Which policies?

MS. FRATERNALI: The safety policies, the handbook, employee policies, and the ILA operating procedures policies.

A. I don't recall if it was Prentis or not, no.

30 Q. Did an individual at that meeting object to the implementation of the 2015 policy handbook, the 2015 safety handbook, and the ILA operating procedures handbook?

A. No. They objected to -- I know I can tell you that Don Russell objected to the meeting and said he wasn't signing anything, if that's what you're referring to.

35 Q. Isn't it true that Mr. Russell was not employed at the time of March 2015?

A. I don't recall the exact dates.

Q. Isn't it true that at the 2015 safety meeting, Mr. Prentis Hubbard informed employees to sign their work rule acknowledgement papers under protest?

A. You would have to ask Mr. Hubbard that question.

40 Q. You were at the meeting in March of 2015, correct?

A. That's correct.

Q. And you spoke at that meeting, correct?

A. I don't go over all the policies and stuff, but yes.

Q. You have no recollection of any employee speaking at the meeting?

⁸ Leach testified that all the employees who worked the 2015 to 2016 shipping season had to attend a mandatory safety meeting in March 2015. When Leach was asked if he distributed the 2015 to 2016 safety handbook to the Union prior to holding the 2015 mandatory safety meeting, he testified, "I don't recall that I did." When further pressed, Leach testified, "Yes, I did not." He also testified he did not recall anyone else making such a distribution.

A. I don't recall.

Hubbard testified he attended the mandatory 2015 safety meeting, which he thought took place around March 20. Hubbard testified he spoke with Leach prior to the start of the meeting. Hubbard testified, "I said we, the Union, wasn't given a chance to go over this with the Company, and we were going to have the men sign it in protest." Hubbard testified that Leach told him he had to do what he had to do. Hubbard testified that no one else was present for this conversation, and the discussion took place before Hubbard went inside. Hubbard testified that all the men in the Union attended the meeting and he estimated it was anywhere from 15 to 20. Hubbard testified Leach and Blakely attended the meeting. Hubbard testified employees are required to sign an acknowledgment form for receipt of the safety handbook, for the policy handbook, and for the ILA handbook. He testified they sign them as they are walking into the meeting. Hubbard testified employees also have to sign documents at the meeting when they go over the safety procedures, after every section they have to sign acknowledging that they were there for the class. Hubbard testified that he spoke during the 2015 meeting in the presence of Leach, Blakely and the union members. Hubbard testified he told the attendees that "due to the fact that the Company didn't come to the Union with the policies beforehand that we were going to have to sign it in protest." Hubbard testified the first time he saw an ILA standard operating procedures handbook was the one for the 2015 shipping season. Current employee Fisher also testified he also attended the March 2015 safety meeting, and he received the policy handbook, the safety handbook and the ILA operating procedures that day. Fisher testified Hubbard spoke and stated that we can write protest in that they can sign the paper and then protest, "I guess, what the paper was recommending."⁹

Blakely testified that, during the March 21, 2105 meeting, Respondent distributed new handbooks being the 2015-16 Policy Handbook, and the 2015-16 Safety Handbook. Blakely testified that "one of the things that we did starting in 2014 and then repeated in 2015 is we provided a sheet of paper that had the table of contents for the safety handbook and the table of contents for the policy handbook, so -- and then at the bottom it said like by signing this document, I acknowledge receipt of the safety handbook and the policy handbook, and then those are filed in each employee's personnel file. The reason we did that is because we needed to make sure that we had evidence that people, got the books and that seemed to be a cleaner way to do it. So the signature basically said I acknowledge receiving a copy of the handbook." Blakely testified in the past 2 years he had signature lines added to the handbook indexes on a separate sheet to the manual, and then when the employees came to the table at the meeting the document package already had the employee's name on it. Blakely testified the employees would sign the index and then take away a copy of the handbook. He testified that certain policies, the more critical ones that dealt with safety, they were given a packet that had those in there, and then when Respondent reviewed the policies, and asked if there were any questions, they would then sign the applicable form for collection by Respondent, and then Respondent would go to the next policy. Blakely testified everything an employee signed would go into their personnel file.

When asked if there were different policies in the 2015 handbook than in the 2014 handbook, Blakely testified he thought in the safety handbook there are four pages, one called driver safety and the other called visitor safety. Blakely testified those do not apply to the employees. He testified those are documents added at the advice of Mlynek. Blakely explained

⁹ Respondent's attendance records for the March 2015 meeting show that Hubbard and Fisher attended the meeting.

that in 2012, Mlynek had done an audit of the facility and recommended Respondent communicate to all visitors coming on the port Respondent's policies and safety policies, including wearing personnel protective equipment, and obeying signs. Blakely testified the reason why he included those in the employee handbook was to inform the employees that Respondent was communicating the information to visitors because there are people who do not follow the rules. Blakely testified he wanted the employees to understand if a truck driver said to an employee that the driver did not know a rule it was not an accurate statement. Blakely testified Leach stresses if there is an issue, the employee should contact Leach, the employee should not get into a confrontation with a truck driver. Blakely testified, "if there is a problem, don't -- we'll address it, but make us aware of it. Always make us aware of unsafe conditions." Blakely testified the policies were in practice prior to 2015, but this was the first time they were placed in the safety handbook. Blakely explained the policies were distributed to visitors as they enter Respondent's facility. Blakely testified the first time these rules were put into place for visitors was in 2012, which Blakely testified he explained at the 2015 meeting. Blakely testified a visitor would be anyone who is not an employee, stating there are different types of visitors, including contractors, truck drivers, customers, and port authority people who come and do a bus tour.

Blakely testified he made changes to Respondent's cell phone policy in the 2015 handbook. Blakely attributed the changes to the advent of the smart phone pertaining to distracted equipment operation. Blakely testified he also had a concern about people's right to privacy in terms of being photographed at work. He testified, if someone is photographed at work and the employer does not have some sort of statement on that, then the employer is liable, too. He testified the policy was put to protect people's rights to privacy, to prevent bullying and to prevent people from being harassed by being photographed at work. Blakely testified if someone went after someone for harassment they would go after the person with the deepest pocket which is the company. Blakely testified, "So I did that, I added things like that for that purpose."

Blakely testified there were also security concerns pertaining to the cell phone policy in that Boeing stores titanium billets at Respondent's facility, and "they are very concerned about people knowing, taking pictures, what's the content of them. I mean, that's their trade secrets and so forth and so on." He also testified Respondent also has calcium at the facility which can be used for explosives. Blakely testified having pictures and videos of those things put on social media is very dangerous and, "so we need to have a custody chain of that. We need to know if somebody were going to take something for documentation purposes, whether it be a customer because a product got damaged or a union official because they think that there is some sort of violation of their union rights or whatever, our policy says that's okay, but for security reasons we need to know have a chain of custody on that, who is going to have it, where is it going to go, what it's going to be used for. We don't want to find it up on some website with somebody saying here's a great supply of calcium nitrate that you could use, high jacking a truck that comes out of our facility." Blakely explained the reasons for the new cell phone policy are "safety, security, and basically protecting employees' rights."

Blakely testified he learned that a union official had taken a video of product. He testified it was at an earlier NLRB trial because the General Counsel wanted to enter it into evidence. Blakely testified it was not allowed in evidence at the trial, but it was given to Respondent's counsel. Blakely estimated that this took place in 2014. Blakely testified it was subsequently admitted into evidence at a later trial about Don Russell's termination, which Blakely thought was at the end of 2014. Blakely testified part of the video showed the

transferring and unloading of calcium bags into a J shed warehouse. Blakely testified the video was made by an employee who was the steward. Blakely testified the employee was driving a forklift going north and filming activity east to his right, and "it actually is apparent in the video as he pans with the smart phone while he's operating a forklift." Blakely testified operating
5 equipment while using a cell phone is a violation of the work rule which is in the contract and which is a violation of the old mobile device policy." Blakely testified, "You're not supposed to do that. And, when these devices weren't as addictive and as attractive, they really weren't as much of a problem."

10 Blakely testified that under the employer's new cell phone policy an employee is not prohibited from taking a video. He testified, "We use the word restricted because of the sensitive nature of -- because of security concerns and because of customer concerns." Blakely testified, "the policy states that if there is a need to document something, that you need to talk to the facility security officer. Then the other thing I would say is it needs to be done
15 safely. There is a lot of things happening down at our facility, and if people are totally engrossed in a smart phone and what they are doing, they could inadvertently hurt themselves and hurt others." Blakely testified he did not bargain with the Union over any of the changes noted in the 2015-2016 handbook. He testified that no one from the Union ever requested him to bargain.

20 Blakely testified he was part of the group that drafted Respondent's standard operating procedures manual in that he primarily did the drafting with others providing the content as Blakely testified he is not an operations person. Blakely testified he is familiar with the informal settlement agreement between Respondent and OSHA. Blakely testified that in terms of the
25 settlement OSHA area director, Kimberly Nelson, wanted Respondent to formalize the standard operating procedures they were using by placing them in writing. When asked if it was not true that a union officer was not present during the creation and drafting of that policy, Blakely replied, "A union member was present and participated." Blakely testified a labor representative was part of the process and his name is Juan Rizo.

30 Blakely testified pertaining to Respondent's 2015 to 2016 ILA Standard Operating Procedures it was his understanding that it provided, "a listing of procedures that were in place so it could be shared with everyone." He testified he was not aware of any prior written
35 procedures. Blakely testified he learned of the existing the procedures which he incorporated in the document by talking to people and being told what they said was taking place. When asked if he added any new procedures to the document, Blakely testified, "I mean, I really can't answer that question because that's an operations question; you know what I mean?" He testified he encapsulated what he was told was already being done by people in operations, and whether it was actually being done at the time he could not say. Blakely testified OSHA ordered
40 Respondent, as part of the informal settlement, to create the document.

Leach first testified about the implementation of Respondent's 2015-16 ILA Standard Operating Procedures when he was questioned by counsel for the General Counsel on 611-(c) exam. At that time, Leach denied that the Respondent implemented the ILA operating
45 procedures 2015 to 2016 handbook without negotiating with a union official, stating "No. That's false." Leach testified that Juan Rizo is an employee of Respondent. When asked if Juan Rizo was a union official, Leach testified, "I don't know. You'd have to ask the union." Leach identified Respondent's "2015-16 ILA Standard Operating Procedures" which is a 15 pages single spaced document containing separate procedures under the headings: Aluminum
50 Discharge; Calcium Discharge; Outgoing Bulk Commodities; Pig Iron Discharge; Salt or Sugar

Discharge; and Steel Coil Discharge. On page one of the document it contains a column marked original date of April 26, 2014, Rev 1 date May 6, 2014. It states it was revised by Brad Hendricks and Leach. Leach testified Hendricks is the assistant operations manager, and not a union official. It states it was reviewed by Blakely and Lauri Justen, who Leach testified was corporate HR, and Juan Rizo, who Leach testified "He's like a foreman for the ILA, has been since I've been there." When asked if any of the other named individuals were union officials, Leach testified, "No, just Juan Rizo." When asked if it was true that union officials did not have the opportunity to review the standard operating procedures prior to Leach handing them out at the 2015 mandatory safety meeting, Leach testified, "No. Juan Rizo did, John. He goes by John." When asked if Leach presented the document to anyone other than Juan Rizo prior to the 2015 safety meeting when the document was distributed to employees, Leach testified, "Not that I remember." When asked if he provided the Union with a copy of the 2015 to 2016 policy handbook prior to the March mandatory safety meeting, Leach testified, "Not that I recall." He testified, "Me personally, I personally didn't do it."

Leach later testified John Rizo is a union representative in that he is a "He's a member of the ILA 1982." When asked if Juan Rizo was a union official, Leach testified, "No, not that I know." When asked if he was required by the OSHA settlement to have a union representative involved in developing the document, Leach testified, "I did, John Rizo." However, Leach testified he was never notified that Rizo was a union official. Leach testified Juan Rizo is a union foreman who is very knowledgeable concerning Respondent's procedures. Leach testified Juan Rizo did not attend contract negotiations with Respondent on behalf of the Union. When asked who attended for the Union, Leach testified "It would be sometimes Otis Brown, Mr. Russell, Mr. Victorian, Mr. Hubbard, Mr. Sims, Andre Joseph." Leach testified these individuals had titles as union officials.

Leach testified concerning the procedures included in the "2015-16 ILA Standard Operating Procedures", that "It was part of the settlement with OSHA that we sit down and actually put in print what we're doing, how we operate. They wanted to see it in print so that we could share with everybody that this is the standard operating procedure. So there is no myths or anything else about it. The way they used to do it in the past, that's the way we've always done. I mean, we've got new equipment and stuff like that. You know, we try to better it. But part of the standard operating procedure, and this is the standard, this is the minimum you have to do especially when it comes to unloading, loading and offloading vessels, it's very important that everybody is on the same page." Leach testified they put in writing the same thing that they were doing since 2007 for the standard operating procedures. Leach testified following the 2014 OSHA hearing, "We put our operating procedures down on paper is what we did."

Concerning the "2015-16 ILA Standard Operating Procedures," Leach was asked, on cross-examination by Union President Brown if it was true that the front end loader procedure item 3 was in effect before the standard operating procedures were written, Leach replied, "Well, it would be awful unsafe if it wasn't in effect." Leach testified, "It was in effect. Now, whether the signalmen were doing it or not. Now that it's in print, they do it." Leach testified, "they were doing it all along, the ones that were doing it properly because you know better than anybody as an operator."

Brown testified he only first saw "2015-16 ILA Standard Operating Procedures" distributed by Respondent during the March 21, 2015 safety meeting around the end of March or the beginning of April. Brown testified he became aware of the policy when he received a copy from Hubbard who brought it to the Union's office. Brown testified following the March

2015 safety meeting, Hubbard also brought Brown a copy of Respondent's 2015-16 Safety Handbook which Hubbard informed Brown was distributed to members during the same March 2015 safety meeting. Brown testified the document was never given to him by Respondent. Brown also identified the "2015-16 Policy Handbook" that Respondent issued to Union members during the March 2015 safety meeting. Brown testified that the first time he saw the document was a week to 10 days after the meeting sometime in late March or early April in that a copy was furnished to him by one of the union members. Brown testified it was never delivered to him by Respondent. Brown testified Respondent did not give the Union notice that it would be presenting bargaining unit employees these documents prior to Respondent's March meeting.

Brown testified, contrary to Leach, that the front end loader procedure detailed in Respondent's "2015-16 ILA Standard Operating Procedures" was not in effect prior to the issuance of the 2015 to 2016 handbook policy. Brown testified on page 4, under front end loader number one where it states to determine the safety zone was something that was never done. Brown testified he has reviewed the old policies and he has worked that job before. Brown testified "the procedure was not in effect which led to the situation that took it to OSHA." Concerning the policies in the 2015 to 2016 ILA standard operating procedure, Brown testified the "policy covering the capacity of your forklifts was not being followed at that time. They are now, but at the time no." He testified this was an issue when the OSHA charge was filed in that "The lifting capacity was not followed." He testified that a comprehensive ILA standard operating procedures policy handbook did not exist prior to the 2015 to 2016 shipping season.

c. Respondent's Testimony Concerning Facility Security

Leach testified that, among his duties as director of operations, is being facilities security officer. Leach testified that as such he is in charge of developing and implementing a security plan for the port. Leach testified that a facility's security plan is a detailed plan mandated by Homeland Security, U.S. Customs, and the United States Coast Guard, and it has to deal with not only securing the waterways for the Port of Toledo, but also the surrounding lands and buildings. Leach testified once the plan is developed it has to be reviewed by outside personnel dealing with Homeland Security. He testified that after their review it goes to the US Coast Guard for approval. Leach testified when the plan is approved it is valid for approximately 5 years. However, the Coast Guard performs unannounced spot checks on Respondent, which also may include checking the location of the plan which has to stay locked in a designated location. Leach testified there is a fear about the plan getting into in the wrong hands because there is a lot of detailed information about cameras, fences, and lighting related to the port. Leach testified the Port of Toledo is considered a soft spot meaning it is vulnerable to terrorist organizations.

Leach identified a letter dated August 15, 2014, containing the letterhead US Department of Homeland Security and United States Coast Guard. The letter states effective the date of the letter Respondent must operate in compliance with this approved FSP and any additional requirements contained in 33 CFR parts 101 and 105. It states the facility was subject to inspections by the Coast Guard to verify compliance with its security plan. It states failure to comply with the requirements of 33 CFR part 105, including those as outlined in the facility security plan may result in suspension or revocation of the security plan approval, thereby making the facility ineligible to operate in, on, under, or adjacent to waters subject to the jurisdiction of the United States. It states the SFP's security sensitive information and must be protected in accordance with 49 CFR Part 1520 and a copy of the security plan and any amendments must be made available to Coast Guard personnel on request. The letter states

this approval will remain valid until 5 years from the date of the letter unless rescinded in writing by this office.

5 Leach testified Respondent has to have an annual audit, and role playing pertaining to certain events to protect the port. He testified if Respondent fails a spot check or audit the severest penalty that can be imposed is that the Coast Guard can shut down the port until Respondent reaches compliance. Leach testified Respondent could also be fined but they have not been fined to this point. Leach testified Respondent has received warnings to correct things pertaining to security. Leach testified that if the port was shut down due to a security problem 10 when it reopened it would probably be with a new company. Leach testified the Port Authority of Toledo owns the land and they would be responsible for getting an attendant to run things. Leach testified the last time he was told to correct something has been, "a couple of years, three or four years." He testified "I am very meticulous about the security, very meticulous."

15 Leach testified the federal regulations for the Coast Guard change constantly, and they will tell him there are new things that he has to start doing particularly with signage. Leach testified the past two seasons it has been the biggest thing with the Coast Guard because of calcium chloride Respondent has on the site for which they had to start posting signs for no smoking and things of that nature. He testified since the signs have been posted anyone who 20 comes by the port by the river can now see the signs. Leach testified, "you don't want to alert the media, but I have to follow what the Coast Guard does."

Leach testified Leach and Blakely are the only two of Respondent's personnel who are allowed to see the security plan. He testified the Coast Guard, U.S. Customs, and Homeland Security are allowed to see changes in the security plan or the whole plan. Leach testified that 25 Homeland Security would not allow Respondent to operate the facility without the Coast Guard's approval of the security plan. Leach testified that in the last 2 years Respondent has not "really changed anything in that other than, like I said, it's always small thing like signs." Leach testified the only plan change in the past two years was the change in signage. Leach testified 30 the change was Respondent put up signs as required by the Coast Guard.

Leach testified part of the security is the safety of the employees, the safety of the customer's products, and the safety of the region. Leach testified the entire port is a secure 35 facility and it encompasses about 110 acres. Leach testified that Respondent has various cargos at the port that necessitate a security plan. He testified these materials include calcium nitrate and titanium. Leach testified company personnel and employees are required to carry identification to enter the facility called a TWIC, a transportation worker identification card. He testified obtaining one of these cards requires a federal background check. Leach testified if 40 someone does not have a TWIC, a third party escorts them in and out of the facility. Leach testified when visitors come in they have to be escorted. It was pointed out to Leach that article 15 of the parties' most recent CBA contains a list of cargo. However, Leach denied that the public knows the list of cargo at the facility from the agreement. He testified the CBA lists the "types of products that these gentlemen are allowed to handle. That's why it's in this. But as far 45 as knowledge of what's stored in our facility, no." Leach testified that multiple other products could be stored at the facility then what is listed in the CBA, but the CBA lists what the bargaining unit employees handle if it was stored at the facility. Leach testified there are additional hazardous products stored at the facility that are not listed in the CBA. He testified these products are listed on his MSDS material safety data sheets. Leach testified the Union is provided two of the MSDS sheets. He testified they have negotiated hazard pay for working

with these materials before and if the employees are working calcium chloride, they get the extra money, but any of the other hazardous materials these employees are not handling.

5 Todd Audet, called as a witness by Respondent, testified he has two positions in that he is the ODOT District 2 Deputy Director where he manages the transportation system for northwest Ohio for the department, and he is also the Chief of Staff for the Ohio Air National Guard Joint Force Headquarters, for which he holds the rank of brigadier general. Audet worked for Respondent from approximately 2008 to about 2010 as vice president of operations. He was responsible for the overall operation of the facility one terminal.

10 Audet testified that while he worked for Respondent he oversaw the development of the port security plan. Audet testified Respondent operates an international port, and it is part of the layer of defense for the homeland, that being a porthole into the United States. Audet explained that ships from anywhere on the planet can call on the port of Toledo. Audet testified he did not work on any rules pertaining to employees' use of cameras while he worked for Respondent. Audet testified there is a requirement for a port of entry to have a layered security system. Audet testified, "I don't know if there was a requirement for cameras, but we chose cameras as a means to put the layered security at the facility." In terms of material coming to the port, that Audet thought they should not be photographed and/or posted on the internet, he testified, there are several dimensions to that. He testified as to product, cargo, transformers, and products to the refinery had to be protected because of their sensitive nature. Audet testified the other dimension is how the port operated, where security was, where people moved around on the dock. He testified that anyone that would want to move on the facility would be gathering that information, so Respondent needed to be aware of all activity that was going on. Audet testified 25 that any sensitive installation has security requirements and publishing how they operate creates vulnerability to the operation and to the security of the facility.

d. Credibility

30 In assessing credibility in this case I have taken into consideration the remoteness of certain events, the documentary evidence, the witnesses' demeanor including whether they were argumentative, sought to deflect, and professed a lack of recall of certain events which under normal circumstances their recollection should have been clearer.¹⁰

¹⁰ As exhibited from the case history outlined in this decision, Respondent has been the subject of several unfair labor practice charges, and has in the past been found by the Board and other judges to have violated the Act, including engaging in discriminatory conduct against employees for their participation in union and related protected activities. There were a couple of instances where witnesses testified in this case who had given affidavits in other unrelated Board proceedings. The General Counsel asked that I conduct an in camera inspection of those affidavits, and only require production of portions of those affidavits relating to testimony provided on direct examination. I followed this request and ordered certain affidavits not to be disclosed, and others to be disclosed after redactions. Respondent was also provided with full affidavits which were given in support of the current charge. This procedure, although objected to by Respondent, is required by the Board's regulations and consonant with Board law. See, *Caterpillar, Inc.*, 313 NLRB 626 (1993). It is all the more applicable in this case in view of the nature of Respondent's prior unfair labor practices. While at one point I facetiously stated Respondent's counsel made an excellent argument pertaining to its attempt to pillage through

5 There was somewhat of a conflict between the testimony of Brown and Blakely as to
whether Brown protested Respondent's initial implementation of its policy and safety handbooks
during the March 2012 mandatory safety meeting. Brown initially testified his protest took place
10 during the March 2013 meeting, but when Respondent's attendance records showed he did not
attend that meeting, he concluded he was mistaken and the protest took place at the March
2012 meeting at the advice of the Union's trustees who were running Local 1982 at that time.
Blakely testified 2012 was the first year that Respondent implemented policy handbooks, but
15 claimed he could not recall whether Brown protested their implementation at the 2012 meeting,
although he admitted that Brown spoke at that meeting, but testified it was about another topic.
Blakely then, while pleading poor recollection of the meeting, by surmise concluded that Brown
did not object to the implementation of the handbooks prior to the meeting, because Blakely
would not have had enough time for such a conversation because he was busy preparing
20 documents for distribution at the meeting. I did not find Blakely denial of recollection to be
particular convincing but neither did I find Brown's recollection of this meeting to be of sufficient
clarity to meet the General Counsel's burden of proof of establishing that Brown protested the
implementation of the handbooks in March 2012. Moreover, even if he lodged such a protest,
he was not a union official at the time, nor was any evidence presented that he was authorized
to speak on behalf of the Union, or that Respondent was notified that he was doing so.

20 Pertaining to the March 2013, Union Vice President Hubbard, testified Respondent
passed out new handbooks in 2013, that he protested Respondent's failure to bargain about the
handbooks with the Union with Leach prior to the start of the meeting, and then again at the
25 meeting in the presence of Leach and Blakely, Hubbard reiterated the protest to the employees
stating that they should sign for the documents under protest. Hubbard's testimony concerning
his announcement to employees at the 2013 meeting was supported by the testimony of current
employees Bates and Fisher. However, Respondent's attendance records for the 2013 meeting
show that Bates and Fisher did not attend the meeting. The attendance records also show no
30 notation of handbooks being passed out at the meeting. Blakely testified that no new
handbooks were in fact passed out at the 2013 meeting, and that Respondent merely reviewed
the 2012 handbooks. It should be noted that Respondent's attendance records showed some
employees attended the 2013 meeting who were not present for 2012 meeting, in which case
they may have been tendered handbooks. Nevertheless, Respondent's records for the 2013
35 meeting appear to be more reliable than the witnesses' recollection of what transpired, and
those records fail to substantiate Hubbard's claim that new handbooks were passed out during
that meeting, or that employees had to sign for anything beyond their attendance at the
meeting, or their receipt of paperwork for their pre-season drug screen. In other words, I do not
find based on the evidence before me that Respondent introduced new policies at the 2013
40 meeting or that Hubbard raised a protest of any such new policies at the 2013 meeting.

45 Blakely testified that during the March 22, 2014, annual safety meeting, Respondent
passed out and had employees sign for a new policy handbook and a new safety handbook. He
testified he did not bargain with the Union concerning the handbooks, nor did he send the Union
a copy of the handbooks prior to the meeting. Rather, the documents were passed out to
employees, some of whom were union officials, right before the meeting started. Leach testified
then Union steward Fred Victorian, Jr., objected to the unilateral implementation of the

unrelated witness statements, this was only because the argument once heard did not require
repetition and delay of this proceeding.

5 handbooks at the 2014 meeting, stating he was under the instruction of Union President Otis (Brown) not to sign anything. Leach also testified that Don Russell, who he surmised was also a union steward, made a similar protest at the meeting. Brown and Hubbard did not attend the 2014 meeting but Brown filed an unfair labor practice charge on September 18, 2014, over the policy changes made at the March 22, 2014, meeting. Accordingly, I find as Leach testified that at the March 22, 2014, meeting employees who were union officials protested the policies unilaterally implemented by Respondent at that meeting, that they were under instruction by Brown to make such a protest, and that Respondent's officials knew that Brown had given those instructions.

10 Blakely testified that, during the March 21, 2105 mandatory annual meeting, Respondent distributed new handbooks being the 2015-16 Policy Handbook, and the 2015-16 Safety Handbook. Blakely testified that beginning in 2014 and continuing in 2015, Respondent provided a sheet of paper that had the table of contents for the safety and policy handbooks, which the employees had to sign, and which was placed in their personnel files. Blakely testified the reason this was done was because Respondent needed evidence that people received the books. Respondent also passed out for the first time an ILA Standard Operating Procedures handbook during the March 21, 2015 meeting.

20 By way of background on March 22, 2014, Respondent entered into an "Informal Settlement Agreement" with OSHA. Included in the settlement, Respondent agreed to "systematically work through the Standard Operating Procedure (SOP) manual to review and update their procedures to create more specific SOP's similar to the form of the "SOP-Loading and Unloading Material" A labor representative will be part of this process; the make-up of the reviewing group can change based upon the procedure being reviewed, but a labor representative will be present for these reviews." Hubbard sent Blakely a letter dated March 19, 2015, stating Brown was the chairman of both the union's safety and its training committee. It stated Brown attended the OSHA hearing and gave testimony on behalf of Local 1982. It stated the union executive Board appointed Brown as their labor representative pertaining to the OSHA settlement, and that as part of that settlement, Brown was "supposed to be part of the reviewing group that will work to improve the employers Standard Operating Procedures (SOP) for loading and unloading material from the various vessels, and to also participate as the labor representative in all safety incidents and accident investigations." The letter protested Respondent's failure to incorporate a union representative as required by the settlement and asked that Blakely contact Brown as soon as possible to resolve the matter. Brown sent Blakely a letter dated March 20, 2015, stating pertaining to the OSHA settlement, "you agreed to allow a union representative to assist the employer and work through the Standard Operating Procedure manuals to review and update them as needed. Also, you agreed to involve a union representative in the all incident and accident investigations, and to bring in a third-party to conduct incident and accident training for call of those who are tasked to conduct them." The letter stated Respondent had not provided the Union with required documents, "nor has the employer allowed the union representative to participate in any of the events as listed in the settlement agreement. The union position in this matter is that since the employer refuses to provide the list of documents to the union representatives for review, and not allow them the opportunity to raise any issues on discrepancies, then the union and its members will not be held bound by these documents."

50 Hubbard testified he attended the mandatory March 2015 safety meeting. Hubbard testified that he spoke with Leach prior to the start of the meeting. Hubbard testified, "I said we, the Union, wasn't given a chance to go over this with the Company, and we were going to have

the men sign it in protest.” Hubbard testified that Leach told him he had to do what he had to do. Hubbard testified that all the men in the Union attended the meeting, along with Leach and Blakely. Hubbard testified that he also spoke during the 2015 meeting in the presence of Leach, Blakely and the union members. Hubbard testified he told the attendees that “due to the fact that the Company didn’t come to the Union with the policies beforehand that we were going to have to sign it in protest.” Hubbard testified the first time he saw an ILA standard operating procedures handbook was the one for the 2015 shipping season. Current employee Fisher also testified he also attended the March 2015 safety meeting, and he received the policy handbook, the safety handbook and the ILA operating procedures that day. Fisher testified Hubbard spoke and stated that we can write protest in that they can sign the paper and then protest. I found Hubbard and Fisher testified in a credible fashion that Hubbard lodged a protest concerning Respondent’s unilateral action pertaining to the safety, policy, and standard operating procedures during the March 21, 2015 annual meeting. Leach admitted the Union had lodged a protest of Respondent’s policy changes during the 2014 meeting and in fact the Union had filed an unfair labor practice charge concerning them. Also both Hubbard and Brown had sent Blakely letters of protest shortly before the March 21, 2015 meeting. Given the receipt of the letters, and the prior history of the parties I do not credit Blakely’s claim that he did not recall whether Hubbard lodged such a protest at the 2015 meeting. I do not find the timing of the meeting was far enough back to test Blakely’s recall of such a protest, which I in fact found took place. Rather, I find that Hubbard lodged the protest as he testified, that Blakely recalled it, but refused to acknowledge it in his testimony. Similarly, I found Leach’s testimony when asked as to whether Hubbard lodged such a protest to be purposely evasive. I therefore I find that Hubbard protested the unilateral policy implementations by Respondent at the March 21, 2015, meeting and that both Leach and Blakely recalled that he did so, despite their refusals to acknowledge it.

I also note that Respondent has exhibited a history of animus towards employees’ union activities, in particular to that of Brown. The correspondence pertaining to the OSHA settlement reveals Brown played a role in the OSHA proceedings on behalf of the Union. I find that while both Leach and Blakely half-heartedly, during their testimony, labeled Juan Rizo, a foreman, who was a member of the bargaining unit as a labor representative, they were aware that Rizo did not occupy that status. This is particularly so since Blakely touted his prior union background before accepting employment with Respondent during the course of his testimony. Rather, I find Respondent hand-picked Rizo as the labor representative to participate in the drafting of the 2015 SOP in an effort to bypass Brown who was the union president, participated in contract negotiations on behalf of the Union, and served as chairperson on the Union’s safety committee, but whose discharge by Respondent in October 2013, has recently been found by a judge to have been an unlawful discharge.

Finally, the tenor of the OSHA citation and settlement agreement was that Respondent’s standard operating procedures were not sufficiently defined or being followed, so as to create a hazardous work environment. While Leach testified Respondent merely encapsulated in its written 2015-2016 ILA Standard Operating Procedures what had already it had already being doing in practice, I did not find his testimony to be particularly persuasive here. Leach’s testimony supports this conclusion. He testified, OSHA “wanted to see it in print so that we could share with everybody that this is the standard operating procedure. So there is no myths or anything else about it. The way they used to do it in the past, that’s the way we’ve always done. I mean, we’ve got new equipment and stuff like that. You know, we try to better it.” When asked about the front end loader procedure, Leach testified, “Well, it would be awful unsafe if it wasn’t in effect.” Leach testified, “It was in effect. Now, whether the signalmen were

doing it or not. Now that it's in print, they do it." Leach testified, "they were doing it all along, the ones that were doing it properly because you know better than anybody as an operator." I have credited Brown's testimony over that of Leach and find that the procedures were not sufficiently known, being followed, or as concrete in format as Leach portrayed them until Respondent unilaterally adopted its handwritten SOP manual in 2015, to the exclusion of the Union.

e. Analysis

The complaint alleges Respondent, in violation of Section 8(a)(1) of the Act, has maintained the following policies and/or work rules in its 2015-2016 Policy Handbook:

The Non-Disclosure/Confidentiality Policy #2500 provides the following:

Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such.

The Confidentiality Agreement Policy #2550 provides that employees must:

[M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company. (emphasis in original)

The Camera, Cell, Digital Device Policy #3100 provides:

In the Policy Overview, that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information."

Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras— while on duty or when performing any function for or on behalf of the company — is **restricted**. This policy applies to all full-time and part-time employees and visitors." (emphasis in original)

Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence."

Under Camera Use, that "[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture,

video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee.”

5 Under Camera Use, that “[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee.”

10 Under Camera Use, that “[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device.”

15 Under Camera Use, that “[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

20 Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.”

25 Under Camera Use, that “[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual’s expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken.”

Safe Workplace Environment #4500 policy prohibits an employee from “[v]iolating others’ expectation of privacy”

30 Safe Workplace Environment #4500 prohibits “[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed;”

The complaint alleges that Respondent, in violation of Section 8(a)(1) of the Act, Respondent has maintained the following policies and/or work rules in its 2015-2016 Safety Handbook:

35 The Incident Reporting Policy #1600 that states that “Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs...shall be marked as follows: “PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION.”

40 The Incident Reporting Policy #1600 that states that “[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO.”

The Driver Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

45 The Visitor Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

The complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act by:

Since March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Nondisclosure/Confidentiality Policy #2500 by promulgating new rules pertaining to camera usage.

Since on or about March 1, 2015, Respondent unilaterally changed the 2015-2016 Policy Handbook's Camera, Cell, Digital Device Policy #3100 by promulgating new rules pertaining to camera, digital device, and email usage.

Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Driver Safety Requirement.

Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented the 2015-2016 Safety Handbook's Visitor Safety Requirement.

Since on or about March 1, 2015, Respondent unilaterally promulgated and implemented a 2015-2016 ILA Standard Operating Procedures policy.

1. The Section 8(a)(1) allegations

In T-Mobile USA, Inc., 363 NLRB No. 171, slip op. at 1-5 (2016), the Board set forth the following principles:

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." *Id.* at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647.

In construing rules, *Lutheran Heritage* teaches that they are to be given a reasonable reading, and are not to be considered in isolation. *Id.* at 646. Further, any ambiguity in the rule must be construed against the drafter--here, the Respondent. *Lafayette Park*, above at 825.

Applying this legal standard to the four issues presented by the parties' exceptions, we agree with the judge, for the reasons she states, that the Respondent violated Section 8(a)(1) of the Act by maintaining language in section 4.4 of its Acceptable Use Policy prohibiting employees from permitting "non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources" without prior written approval, and by maintaining a "Commitment to Integrity" provision in its Code of Business Conduct that prohibits "arguing . . . with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork."⁶

Contrary to the judge, however, we find that the Respondent also violated Section 8(a)(1) by promulgating and maintaining rules in its employee handbook requiring employees "to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships" and prohibiting employees from making recordings in the workplace.

Rather, we find that employees would reasonably understand the rule's requirement that they communicate "in a manner that is conducive to effective working relationships" with coworkers and management as prohibiting disagreements or conflicts, including protected discussions, that the Respondent subjectively deems to not be conducive to "a positive work environment." See, e.g., *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 2 (2014), appeal dismissed, 2015 WL 3372275 (D.C. Cir. 2015) (finding rule requiring employees to represent the hospital "in the community in a positive and professional manner" just as overbroad and ambiguous as unlawful proscriptions of negative comments or attitude); cf. *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (finding rule prohibiting "negative conversations" about coworkers and managers unlawful).⁸ Moreover, employees would read the rule in context with other work rules, found unlawful here, prohibiting employees from "arguing" and from making "detrimental" comments about the Respondent. Because labor disputes and union organizing efforts frequently involve controversy, criticism of the employer, arguments, and less-than-"positive" statements about terms and conditions of employment, employees reading the rule here would reasonably steer clear of a range of potentially controversial but protected communication in the workplace for fear of running afoul of the rule.

The Respondent contends that, because the rule sets out the business-related objectives of "efficiency, productivity and cooperation," employees would reasonably understand that the rule is not intended to restrict Section 7 activity. We disagree. Those terms refer to the expectation that employees behave in a professional manner as set forth in the first sentence of the provision, which is not alleged to be unlawful. They do not provide employees with a basis for determining what communications would fail to contribute to "effective working relationships" or "maintain a positive work environment." Nor do those words shed light on how the Respondent would enforce the provision in the context of Section 7-protected discussions that the Respondent views as undermining a positive work environment. As explained in *Whole Foods Market*, 363 NLRB No. 87, slip op. at 4 fn. 11 (2015), "[w]here reasonable employees are uncertain as to whether a rule restricts activity protected under the Act, that rule can have a chilling effect on employees' willingness to engage in protected activity."

2. Also since at least January 16, 2014, the Respondent promulgated and has maintained the following handbook rule prohibiting employees from making recordings in the workplace:

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

For the following reasons, we reverse the judge and find the violation.

After the judge's decision issued, the Board issued decisions in *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 4 (2015), and *Whole Foods*, above, finding that

5 employer rules broadly prohibiting recording in the workplace on employees' own time and in nonwork areas restricted Section 7 activity in violation of Section 8(a)(1) of the Act. As the Board explained in those decisions, photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, may be protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Whole Foods*, above, slip op. at 3, citing *Rio All-Suites*, above, slip op. at 4. Such protected conduct may include, for example, recording images of protected picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. *Id.*¹⁰

10 The rule at issue here bans employees from recording "people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace" and, except for calls that the Respondent records for quality purposes, prohibits employees from making "sound recordings of work-related or workplace discussions." The rule does not differentiate between recordings that are protected by Section 7 and those that are not, and includes in its prohibition recordings made during nonwork time and in nonwork areas. The Respondent does not deny that the rule prohibits all recording and makes no exception for protected concerted activity. Accordingly, because of the rule's broad language, employees would reasonably read the rule to prohibit recording that would be protected by Section 7 of the Act. *Rio All-Suites*, above, slip op. at 5 (finding broad prohibition on workplace recording unlawful because employees "would reasonably interpret these rules to infringe on their protected concerted activity"); accord: *Whole Foods*, above, slip op. at 3.¹¹

15 The Respondent contends that the recording restriction is justified by its general interest in maintaining employee privacy, protecting confidential information, and promoting open communication. 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. As for protecting "confidential information," the Respondent has not excepted to the judge's findings that it unlawfully maintained other rules classifying employee information, including employee contact information and wage and salary information, as confidential. The Respondent also asserts that its recording prohibition is in place to prevent harassment and notes that, under federal and state laws, employers have an affirmative obligation to prevent harassing conduct. But the recording prohibition is not narrowly tailored to this interest; it neither cites laws regarding workplace harassment nor specifies that the restriction is limited to recordings that could constitute unlawful harassment.¹² Thus, the Respondent's proffered rationales cannot justify the rule's broad restriction that employees would reasonably read as prohibiting activity protected by Section 7. See *Whole Foods*, above, slip op. at 4 (finding employer's interests in preserving employee privacy, protecting confidential information, and encouraging open communication insufficient to justify broad and unqualified prohibition on recording).¹³

20 Accordingly, we find that employees would reasonably construe the rule to restrict activity protected by Section 7 of the Act, and that the Respondent's promulgation and maintenance of the rule violates Section 8(a)(1) of the Act as alleged.

25 In *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 4 (2015), the Board majority stated:

Moreover, our case law is replete with examples where photography or recording, often covert, was an essential element in vindicating the underlying Section 7 right.⁸ Our case law, therefore, supports the proposition that photography and audio and video recording at the workplace are protected under certain circumstances.⁹

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It was also stated in *Whole Foods Market, Inc.*, above, slip op. at 4 fn. 10 that:

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The Respondent contends that the rules are not unlawful because they are limited to recording that takes place on working time, and do not apply when the employee is not at work, or is on nonwork time such as break time. We reject this argument. The rules do not differentiate between recording on working and nonworking time.

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We also find that the rules are unlawful because they require employees to obtain the employer's permission before engaging in recording activity on nonwork time. The Board has stated that any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful. See *Brunswick Corp.*, 282 NLRB 794, 795 (1987) (rule found unlawful that required employees to obtain the employer's permission before engaging in union solicitation in work areas during nonworking time and required the employer's authorization in order to solicit in the lunchroom and lounge areas during breaks and lunch periods); *American Cast Iron Pipe Co.*, 234 NLRB 1126, 1131 (1978) (finding unlawful rule requiring employees to obtain permission before distributing union literature in nonwork areas on nonworking time), enfd. 600 F.2d 132 (8th Cir. 1979). See also *Rio All-Suites Hotel & Casino*, supra, 362 NLRB No. 190, slip op. at 4 fn. 10 ("Of course, the fact that these prohibitions are subject to discretionary exemptions by the Respondent does not make them any less unlawful.").

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I find the rule in Respondent's 2015-2016 Policy Handbook #2500 pertaining to the non-disclosure and confidentiality policy is unlawfully overbroad in violation of Section 8(a)(1) of the Act. The rule provides that, "Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations." It further states all images taken by employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device." Thus, the rule prohibits all photography and recording, without prior approval of the Director of Operations, and therefore unlawfully restricts the engagement of protected activity. See, *T-Mobile USA, Inc.*, above, and *Whole Foods Market, Inc.*, above. The rule on its face is overly broad in that it treads on employee Section 7 rights by providing that, "Employees who improperly use or disclose . . . confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information." It states "Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such." Thus, the rule provides that disclosing of labor relations information, personnel information, and union related business are considered to be disclosing confidential information and subject to discharge. The rule therefore explicitly restricts activities protected by Section 7 of the Act. See, *Cintas Corp.*, 344 NLRB 943 (2005), enfd., 482 F.3d 463 (D.C. Cir. 2007), (rule could be reasonably construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the Union violates Section 8(a)(1)); *Lily Transp. Corp.*, 362 NLRB No. 54 (2015) (maintaining a rule preventing disclosure of confidential information, including Company, customer information and employee information maintained in

confidential personnel files violated Section 8(a)(1); and *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001).

5 Respondent argues that the language does not prohibit photographs, it only restricts
them. It asserts Respondent is a secure facility, and the language is meant to keep out of the
public eye the type of cargo coming into the port for security reasons. I do not find the sweeping
10 nature of the language here justified by the announced security concerns, nor is there any
suggestion here that there was an attempt to temper the language to do so. Some of the
products which Respondent seeks to conceal are listed in the parties' CBA, a public document,
and others are provided to the Union in MSDS lists. In fact, Blakely testified concerning the
15 implementation of Respondent's video policies that the General Counsel introduced in evidence
a video made by an employee who was a union official at a prior NLRB trial. However, I find
Respondent was more concerned that an employee would gather evidence to be used against it
at a Board proceeding than possible security concerns raised by the video. Otherwise,
Respondent would not have introduced the same video on its own volition at the current NLRB
20 hearing. The video introduced at the current trial by Respondent is a short, but distant snippet
of alleged Teamsters moving what is described by the videographer as calcium bags while
claiming the Teamsters were doing "our" work. Calcium chloride is listed as an "Obnoxious and
Distressed" cargo in the CBA. The sweeping nature of Respondent's language in its rules
shows more an intent to quell protected activity than to alleviate security concerns.
25 Respondent's 5 year security plan approved by the Coast Guard was already in effect at the
time this rule was implemented, and Leach testified there were only minor changes to the plan
pertaining to signage, which were initiated by the Coast Guard. Thus, there is no claim that
these broad restrictions curtailing Section 7 rights were required by the plan, or even that they
were reported to the Coast Guard. Moreover, concerns expressed by Blakely concerning the
30 use of a cell phone while operating Respondent's equipment are prohibited by other of
Respondent's policies not challenged here.

Respondent also argues the Region did not challenge the maintenance of some of the
35 then existing rules when Respondent's rules were involved in an unfair labor practice charge
filed in 2014. However, correspondence concerning that charge as well as Respondent's
position statement pertaining thereto reveals these issues were not being considered by the
Region at that time. Moreover, since the continued maintenance of unlawfully restrictive work
rules is in itself a violation of the Act, the dismissal a prior unfair labor practice charge does not
40 impact on a finding of a violation here.

For similar reasons I find Respondent's Confidentiality Agreement Policy #2550 overly
broad and unlawful in that it provides that employees must "M]aintain the confidentiality of ALL
45 documents, credit card information, and personal information of any type and that such
information may only be used for the intended business purpose. Any other use of said
information is strictly prohibited and is cause for immediate dismissal. Additionally, should
[employees] misuse or breach, any personal information or the expectation of privacy of said
clients and/or employees; [employees] understand that [they] will be held fully accountable both
50 civilly and criminally, which may include, but not limited to, Federal and State fines, criminal
terms, real or implied financial damages incurred by the client, employee, or this company. It is
clear here that the rule requires "ALL documents" including personal information of any type" to
be kept confidential. This, along with the caution against breach of an expectation of privacy,
could be reasonably construed to restrict conversation about or disclosure of wages and
benefits. The sharing of this type of information between coworkers and their union
representatives is grist for protected conduct and union activities, and the threat of discharge

and legal action for using this information in this context could reasonably be interpreted to restrict conduct protected by Section 7 of the Act. See, also *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) and the cases cited therein.

5 The policy enunciated in Respondent's Policy Handbook entitled "Safe Workplace Environment #4500" policy prohibits an employee from "[v]iolating others' expectation of privacy" The policy is among a list of policies subjecting an employee to immediate discharge. I find the rule as overly broad, as it does not define what is to be kept private, and given the context of the other rules set forth above, it can clearly encompass terms and conditions of employment such as an employee's wage rates. See, *Costco Wholesale Corp.*, above, where a rule that employees shall refrain from discussing private matters of members and other employees, including topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc. was found to violate the Act. While the rule in the current case did not specifically define as the rule in *Costco* matters that were terms and conditions of employment, it certainly could be read by a reasonable employee to include such. See for example *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3 (1999), where a prohibition on employees revealing confidential information about "fellow employees" was found to be overly broad and unlawful; and *IRIS U.S.A. Inc.*, 336 NLRB 1013 (2001), where a handbook rule instructing employees to keep information about employees strictly confidential was found violative of the Act.

Respondent also maintains a rule in its policy handbook entitled "Safe Workplace Environment #4500 which prohibits "[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed." The Board has found similar no loitering rules unlawful in *Palms Hotel & Casino*, 344 NLRB 1363, 1363, 1391 (2005); *Lutheran Heritage Village - Livonia*, 343 NLRB 646, 649 fn. 16, 655 (2004); *Ark Las Vegas Restaurant Corp.*, 343 NLRB 1281 (2004); and *Tri-County Medical Center*, 222 NLRB 1089 (1976). In *Palms Hotel & Casino*, a Board majority found in agreement with the judge that a rule prohibiting employees from "loitering in company premises before and after working hours" violated Section 8(a)(1). 344 NLRB 1363, at fn. 3. The Board adopted the judge's rationale that the rule violated Section 8(a)(1) because the undefined terms "loitering" and "premises" could lead off-duty employees to conclude they could not engage in protected activities with other employees in nonworking areas of Respondent's property. In *Lutheran Heritage Village - Livonia*, above, at 655 the rule found to violate Section 8(a)(1) of the Act prohibited, "Loitering on company property (the premises) without permission from the Administrator." The judge found with Board approval that "loitering" is undefined and can reasonably be read to prohibit off-duty employees from engaging in protected communications with other employees in nonworking areas of the Respondent's property. It was also stated, that the term premises is not defined and employees could reasonably conclude that they could not engage in protected communications in the parking lot either before or after work.

In the present case the rule in question uses the term "loitering" which the Board has found can be sufficient to chill employees in the exercise of their Section 7 rights. However, Respondent goes further and erases any possible argument concerning the term loitering by also barring employees "presence on the jobsite without authorization before or after their assigned shift is completed." This clearly eradicates the possibility of off duty employees participating in protected conduct inside and outside Respondent's facility for the entire jobsite which would encompass work and nonwork areas and I find the maintenance of said rule violates Section 8(a)(1) of the Act. I do not find Respondent's argument that since the facility is a secure facility, that employees need a TWIC to enter it through secure gates, allows

Respondent to limit access to the entire jobsite for participation in off duty protected communications. Respondent has a 110 acre facility, which could be interpreted to include the whole jobsite. Employees are required to pass a background check to obtain passes to be present on the site. Having passed the background check, the Respondent has provided no basis to preclude them from engaging in off duty access normally accorded employees for participation in protected conduct.

Respondent maintains several rules pertaining to the use of recordings at its facility. The Board in *T-Mobile USA, Inc.*, above, relying on the Board's decisions in decisions in *Rio All-Suites Hotel & Casino* and *Whole Foods*, found employer rules there broadly prohibiting recording in the workplace on employees' own time and in nonwork areas restricted Section 7 activity in violation of Section 8(a)(1) of the Act. It was stated, that photography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, may be protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. In *T-Mobile* a rule that banned employees from employees from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace and which prohibits employees from making sound recordings of work-related or workplace discussions was found to have violated the Act. There, the rule did not differentiate between recordings that are protected by Section 7 and those that are not, and included in its prohibition recordings made during nonwork time and in nonwork areas. It was found that because of the rule's broad language, employees would reasonably read the rule to prohibit recording that would be protected by Section 7 of the Act. The Board rejected the respondent's contention that the recording restriction is justified by its general interest in maintaining employee privacy, protecting confidential information, and promoting open communication finding the respondent's proffered intent did not cure the rule's overbreadth, since neither the rule nor the proffered justifications were narrowly tailored to protect legitimate employer interests or to reasonably exclude Section 7 activity from the reach of the prohibition. It was noted that as to the "confidential information" aspect of the rule the respondent did not except to the judge's findings that it unlawfully maintained other rules classifying employee information, including employee contact information and wage and salary information, as confidential. The respondent's contention that the recording prohibition was to prevent harassment and employers have an affirmative obligation to prevent harassing conduct was also rejected by the Board because the recording prohibition was not narrowly tailored to this interest. It was concluded that the respondent's proffered rationales cannot justify the rule's broad restriction that employees would reasonably read as prohibiting activity protected by Section 7. Moreover, as stated in *Whole Foods, Inc.*, and other cases cited above, rules are unlawful when they require employees to obtain the employer's permission before engaging in recording activity on nonwork time.

In the instant case, I have found, as set forth above, that the maintenance of Respondent's Non-Disclosure/Confidentiality Policy #2500 pertaining to photography and recording is violative of Section 8(a)(1) of the Act. For the same reasons enunciated above, I find Respondent's maintenance of a policy in its 2015-2016 Safety Handbook under Driver Safety Requirements that states "[p]hotography and recording are restricted at this facility at all times;" and that under The Visitor Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times," are violative of Section 8(a)(1) of the Act. These rules preclude photography and recording without limitation, and do not provide for protection for such conduct that constitutes protected activity by employees; and/or for visitors such as union officials who may be lawfully investigation matters pertaining to employee safety and/or working conditions in general.

Respondent's Camera, Cell, Digital Device Policy #3100 provides that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information." As previously stated, Respondent's definition of confidential information includes matters pertaining to labor relations, and therefore is overbroad. Policy #3100 contains the statement that "Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when performing any function for or on behalf of the company –is **restricted**. This policy applies to all full-time and part-time employees and visitors." I do not find that the term on duty sufficiently alerts employees' to permissible usage during not working time. This ambiguity would serve to restrain legitimate usage during non- working time. The statement, "Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence" again is ambiguous in that it does not adequately distinguish between working and not working time, and the use of such terms as to comply with company rules and confidentiality, particularly the way the latter terms has been defined by Respondent will serve to inhibit participation in protected concerted activities. Moreover, the statement, "Under Camera Use, that "[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee," reveals an intent to prohibit all camera usage during working and non-working time, and the Board has rejected employer policies that require employer approval for employees to participate in activities protected by the Act. I also do not find this rule to be sufficiently narrowly drafted to meet any legitimate security concerns raised while protecting Section 7 rights. I therefore find the maintenance of the described policies violative of Section 8(a)(1) of the Act.

For the same reasons, I find the below policies in rule #3100 violative of Section 8(a)(1) of the Act because they explicitly inhibit conduct protected by the Act as they require clearance from Respondent's personnel, limit recordings only to investigatory purposes, and grant ownership of certain recordings to Respondent, and across the board inhibit conduct some which would be protected by the Act.

Under Camera Use, that "[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee."

Under Camera Use, that "[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device."

Under Camera Use, that "[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram,

SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.”

5 I also find the maintenance of the following rule to be violative of the Act, “Under
 Camera Use, that “[e]mployees may not take or use images or recording to harass,
 embarrass, annoy others and/or violate an individual’s expectation of privacy. All
 company policies, including policies on harassment, discrimination, and (professional)
 conduct, apply to photographs and/or recordings taken.” While this rule does not
 10 explicitly restrict activities protected by Section 7, it must be read in the context of
 Respondent’s other rules which do. I find that employees would reasonably read the
 rule to prohibit protected conduct. The rule here broadly restricts this form of employee
 communications and is not limited to conduct that would objectively be viewed as
 unprotected. Rather, statements such as annoy others; violate an individual’s
 15 expectations of privacy, or adhere to Respondent’s policies on professional conduct
 would reasonably lead employees to believe they are being restricted from disagreeing
 with management and/or co-workers concerning terms and conditions of employment
 and or from documenting work place transgressions for the grievance procedure and/or
 safety concerns for fear that they would be perceived of annoying someone, including
 20 the powers that be. See, *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. 1-5 (2016), for
 the discussion and cases cited therein.

In the current case, the complaint alleges Respondent, in violation of Section 8(a)(1) of
 the Act, has maintained in in its 2015-2016 Safety Handbook, The Incident Reporting Policy
 #1600 stating that “Because it is likely that incidents involving hospitalization or a fatality will
 25 result in litigation, all reports and related documentation, including photographs, shall be
 marked as follows: “PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT
 PREPARED IN ANTICIPATION OF LITIGATION.” It further states, that “[n]o incident report or
 related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by
 Alex Johnson, President and CEO.” This policy appears to be overbroad in that it appears to
 30 prevent employees from sharing all photographs and/or other documents relating to incidents
 involving hospitalization or fatalities with their co-workers, union, or government agencies. This
 rule broadly limits protected activities pertaining safety conditions at work, and as such, I find
 that it violates Section 8(a)(1) of the Act.

35 In this regard, the Board has held that a supervisor’s instructing an employee pertaining
 to allegations of sexual harassment in the work place by a USDA inspector that they were to
 confine their discussion of their problem to that management official or their immediate
 supervisor was violative of Section 8(a)(1) of the Act as the rule was so broad that it precluded
 the discussion of sexual harassment with other employees or bringing it to the attention of her
 40 union representative. See *All American Gourmet*, 292 NLRB 1111, 1130 (1989). See also, *In
 Re Phoenix Transit System*, 337 NLRB 510 (2002), enfd., 63 Fed. Appx. 524 (D.C. Cir. 2003),
 where the Board held the respondent violated Section 8(a)(1) of the Act by maintaining a
 confidentiality rule prohibiting employees from discussing their sexual harassment complaints
 among themselves. The Board found the respondent has failed to establish a legitimate and
 45 substantial justification for its rule. In *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12,
 slip op. at 8 (2014) the Board stated as follows:

50 There is no question that, as a general matter, employees have a Section 7 right to
 discuss with one another ongoing employer investigations into alleged employee
 misconduct, including allegations of sexual harassment.²³ Indeed, to prohibit such

discussions, an employer bears the burden of showing that it has a legitimate business justification that outweighs employees' Section 7 rights. See *Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011). In the particular circumstances of this case, we find that the Respondent made that showing.

5 There, it was noted that an employer under certain circumstances is responsible for acts of sexual harassment in the workplace. It was found the supervisor's instructions to the employee were limited in that the employee was instructed not to obtain additional statements from her co-workers in connection with the complaint. It was found the instruction was narrowly tailored to
10 address the need to conduct an impartial and thorough investigation. It was noted the employee was not prohibited from discussing the pending investigation with her coworkers, asking them to be witnesses for her, bringing subsequent complaints, or obtaining statements from coworkers in future complaints. It was found the instruction would reasonably be viewed as seeking to safeguard the integrity of the investigation, not restrict the employee in the
15 exercise of her Section 7 rights. The Board found the narrowly tailored instruction in the circumstances there did not violate the Act. In the instant case, I do not find Respondent's rule to be narrowly tailored, time limited, or otherwise justified by any evidence placed on this record.

20 2. The Section 8(a)(5) and (1) allegations pertaining to Respondent's March 2015 handbook changes

When employees are represented by a union, an employer violates Section 8(a)(5) and (1) of the Act by making a unilateral changes regarding terms and conditions of employment regarding a mandatory subject of bargaining. See, *NLRB v. Katz*, 369 U.S. 736, 747 (1962);
25 *Whitesell Corp.*, 357 NLRB 1119, 1171 (2011); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006); and *Associated Services for the Blind*, 299 NLRB 1150, 1164-1165 (1990). An employer's obligation to refrain from unilateral changes to mandatory subjects of bargaining applies when the parties' existing agreement has expired and negotiations have yet to result in a
30 successor agreement. *Lincoln Lutheran of Racine*, 362 NLRB No. 188 (2015). In those circumstances the employer must continue to abide by established terms and conditions of employment until the parties either negotiate a new agreement or bargain to a lawful impasse. *Id.* See also, *Register-Guard*, 339 NLRB 353 (2003). Changes in work rules, particularly when they can result in disciplinary action constitute a mandatory subject of bargaining. See, *Toledo Blade Co.*, 343 NLRB 385, 387 (2004); and *General Die Casters, Inc.*, 359 NLRB 89 (2012)
35 (Changing work rule pertaining to an employee handbook found to violate Section 8(a)(5) of the Act.). Work place safety is also a mandatory subject of bargaining. See, *Castle Hill Health Care Center*, 355 NLRB 1156, 1183 (2010); *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000); and *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983).

40 The complaint alleges Respondent violated Section 8(a)(5) and (1) of the Act by since March 1, 2015, unilaterally changing its Policy Handbook policy #2500 pertaining to camera usage; unilaterally changing its Policy Handbook policy #3100 pertaining to camera, digital device, and email usage; unilaterally promulgating and implementing its Safety Handbook's driver safety requirement; unilaterally promulgating and implementing its Safety Handbook's visitor safety requirement; and unilaterally promulgating and implementing a 2015-2016 ILA
45 Standard Operating Procedures handbook.

Respondent's 2015-16 Policy Handbook provides for a progressive disciplinary policy stating that "Disciplinary action may be required for violations of company policy or for engaging in an at-risk behavior." It later states, "An at-risk behavior is a behavior that

has the potential to cause serious harm to one's self, other employees, customers, visitors, property and/or the environment. Managers and supervisors are responsible for ensuring that employees follow all safety policies."

5 New language in 2015-16 Policy Handbook #2500 that was not in the predecessor policy handbook is:

10 Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by .employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

15 There is also new language in Policy #2500 pertaining to the section on Marketing documents pertaining to "photographs and recordings. Employees, by the terms of Policy #2500 were required to sign for its receipt, and were told the violation of it would subject them to disciplinary action, including termination.

20 The language in Policy #3100 in the 2015-16 Policy Handbook pertaining to camera, digital device, and email usage; was greatly expanded from that included in the prior handbook. The language in the predecessor handbook mainly only limited the use of a cell phone when operating equipment. The employees were required to sign for the 2015-16 version of the policy and by the terms of the policy handbook itself they were subject to disciplinary action for violating the policy.

25 In the 2015-16 Policy Handbook "Safe Workplace Environment #4500" states an employee can be disciplined or discharged for failure to report a known violation of this Safe Workplace Environment Policy. In Respondent's 2015-16 Safety Handbook, Respondent added two new sections, one pertaining to driver safety and the other pertaining to visitor safety. Blakely testified that it was incumbent on employees to report violations of these policies to management. Implicit in this reporting requirement as pronounced by Blakely is that failing to make such a report could subject an employee to discipline.

35 Respondent also introduced to employees at its March annual meeting the 2015-16 ILA Standard Operating Procedures. The origination of this manual was the result of a March 2014 settlement agreement with OSHA requiring Respondent to document its standard operating procedures. At the start of this manual, employees are cited to related documents including Respondent's Policy Handbook, Safety Handbook, Work Rules in the parties expired CBA, OSHA Regulations, among others. They are also referenced to various CBA work rules, and the safety and policy handbooks in the discussion pertaining to the individual operating procedures. The reference to the policy and safety manuals, and the CBA work rules clearly implies the potential for disciplinary action for employees failing to following the operating procedures. The formalization of these operating procedures involved work place safety stemming from an OSHA settlement.

50 The alleged unilateral changes in the complaint, as described above, are substantial and they involve work rules the failure of which to follow an employee can be disciplined and even discharged. The rule change in the Safety Handbook and in the ILA Standard Operating

Procedures also involve issues of safety, all of which are mandatory subjects of bargaining. See, *Toledo Blade*, above; *General Die Casters, Inc.*, above; *Castle Hill Health Care Center*, above; *Kohler Mix Specialties*, above; and *Minnesota Mining & Mfg. Co.*, above. Moreover, I find these changes were handed out to Union officials who were employees at the time they entered the March 21, 2015 mandatory annual safety meeting at the same time they were handed out to all bargaining unit employees. At the time the employees were required to sign for the receipt of these policies. Therefore all of these policies were implemented at the same time they were disclosed to employees who happened to be union officials. Respondent engaged in a similar tactic at the March 2014 annual safety meeting, which according to Leach resulted in a protest by employees who were also union officials who attended that meeting, over the then implemented unilateral changes, as well as the Union's subsequent filing of an unfair labor practice charge against Respondent over the 2014 changes. The unfair labor practice charge was subsequently dismissed with a short form dismissal letter, which did not provide specific reasons for the dismissal. Regardless, of the reasons for the dismissal, Respondent, prior to March 2015, was aware that the Union objected to unilateral changes in its policy manuals. See, *PRC Recording Co.*, 280 NLRB 615, 636 (1986).

Nevertheless, Respondent, undaunted and perhaps emboldened by the dismissal of the prior unfair labor practice charge, engaged in more unilateral changes in March 2015. The OSHA settlement required Respondent to incorporate a labor representative in the drafting of the standard operating procedures. Respondent's officials testified in a tongue in cheek fashion concerning this aspect of the settlement. Although Respondent was in negotiations for a new CBA with Union President Brown, and Union Vice President Hubbard, and was aware that Brown was the head of the Union's safety committee, Respondent did not reach out to them or otherwise inform the Union that it was creating the ILA Standard Operating Procedures manual. In fact, Brown and Hubbard's letters to Blakely in March 2015, reveal that Brown participated in the OSHA proceeding on behalf of the Union. Respondent's ILA SOP manual shows it was originated on April 26, 2014, and revised on May 6, 2014. Yet, the Union was never provided an advanced copy, or offered an opportunity to negotiate over its terms. Rather, Respondent's witnesses testified that the Union was represented in the drafting of the document by union member foreman Juan Rizo, although there was no claim that Rizo was a union official, or that Respondent was ever informed of such. Blakely, who touted his prior experience as a union official in the teachers union, it seems should have known better. Moreover, Respondent's history of union animus as found in a prior Board and judges decisions, in particular, directed at Brown and Hubbard, indicates it was Respondent's intent to bypass these union officials and in turn undermine the union by its unilateral conduct. Regardless, of the literal wording of the OSHA settlement using the term "labor representative," Respondent's employees were represented by a Union and Respondent had an obligation to bargain with that union and did not have a right to pick its own labor representative and avoid its statutory obligations. In *Whitesell Corp.*, 357 NLRB 1119, 1142 (2011), it was stated, "[E]ach party to a collective bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), *enfd. sub nom. Auto Workers v. NLRB*, 670 F.2d 663 (6th Cir. 1982).¹¹

¹¹ Respondent argues that the Union, knowing of the March 2014 OSHA settlement waited until March 2015, to notify Respondent of its labor representative pertaining to the drafting of the Standard Operating Procedures. I reject this argument, for as set forth above, it was incumbent on Respondent to notify the Union of its planned changes in a timely fashion, and afford the Union an opportunity to bargain. Juan Rizo's being a bargaining unit member did not constitute

I also do not find the Union's failure to request bargaining about the Respondent's unilateral changes made at the March 21, 2015 meeting, following that meeting constitutes a waiver pertaining to those changes. Both Brown and Hubbard sent letters to Blakely in advance of the meeting protesting any potential changes relating to the OSHA settlement, and Brown in particular concerning the implementation of Respondent's other policies. Hubbard also objected to Respondent's new policy manuals immediately before and during the March 21 meeting on behalf of the Union. Nevertheless, Respondent's officials handed out the policy manuals at the meeting to the employees, had them sign for them and implemented them over the Union's protest. An employer has an obligation to provide a union with notice and a meaningful opportunity to bargain concerning changes to terms and conditions of employment. In *Defiance Hospital*, 330 NLRB 492, 493 (2000), the Board stated:

"It is settled law that an employer violates Section 8(a)(5) and (1) if a material change in the conditions of employment is made without consulting with the employees' bargaining representative and providing a meaningful opportunity to bargain." *Ciba-Geigy Pharmaceuticals Division v. NLRB*, 722 F.2d 1120, 1126 (3d Cir. 1983). "An employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals." *NLRB v. Centra*, 954 F.2d 366, 372 (6th Cir. 1992). "If a policy is implemented too quickly after notice is given, or an employer has no intention of changing its mind, the notice constitutes nothing more than informing the union of a *fait accompli*." *Id.*

"By announcing the [wage increase] to the [Unions] at the same time as all other employees, the Respondent essentially ignored the representative status of the employees' bargaining agent. Such failure to acknowledge the [Unions'] proper role in negotiating terms and conditions of employment severely diminished, if not effectively foreclosed, any meaningful opportunity for the [Unions] to exercise [their] authority in any subsequent discussion of this matter." *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 fn. 4 (1997), *enfd.* 162 F.3d 513 (7th Cir. 1998). See *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 ("most important factor" dictating finding that employer's announcement of change was "fait accompli" was that the union was notified at the same time as the employees), *enfd.* 722 F.2d 1120 (3d Cir. 1983).

In *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993), it was stated:

Finally, we reject the Respondent's contention that the Union waived the right to bargain about the changes in cafeteria hours. Regarding the May 19 discontinuance of the 2 to 4 a.m. weekend hours, we find no merit in the Respondent's contention that its rejection of the Union's May 15 proposal constituted bargaining. The parties stipulated that the Respondent instituted the May 19 changes without prior notice to the Union and without affording the Union an opportunity to bargain. In the absence of clear notice of the

notice to the Union, as Rizo has no special status with the Union, was a foreman, was only one person in a fairly large unit, and Respondent had no reasonable expectation that Rizo would have notified union officials of the drafting of the SOP. See *Stone Boat Yard v. NLRB*, 715 F.2d 441, 445 (9th Cir. 1983) (concluding that knowledge possessed by union members was not attributable to union because there was no evidence in the record that the members were agents of the union). See also, *Brimar Corp.*, 334 NLRB 1035, 1037 fn. 1 (2001); and *Catalina Pacific Concrete Co.*, 330 NLRB 144 (1999).

intended change, there is no basis on which to find that the Union waived its right to bargain. See *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990).

5 In the instant case, Respondent presented the policy changes in dispute to the employees and the Union at the March 21 meeting as a *fait accompli*. It undermined the Union by its conduct, and the Union was not required to request bargaining in the circumstances here.¹²

10 Respondent claims the Union waived its right to bargain over work rules in March 2015 by Respondent's unilateral implementation of rules in the past. A waiver of statutory rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). In *American Diamond Tool, Inc.*, 306 NLRB 570 (1992), the Board noted that "Waivers can occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties, including past practices, bargaining history and action or inaction), or by a combination of the two." In the instant case, 15 the parties' most recent CBA expired in 2010. Under Board law the management rights clause contained in that agreement did not survive the CBA's expiration, absent evidence of the parties' contrary intent, and no evidence of such intent was presented here.¹³ See, *E.I. DuPont de Nemours*, 364 NLRB No. 113 (2016); *WKYC-TV, Inc.*, 359 NLRB 286, 288 (2012); *E.I. DuPont de Nemours*, 355 NLRB 1084, 1085, fn. 1 and 2 (2010), enf. denied 682 F.3d 65 (D.C. Cir. 2012); *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 fn. 6 (2001), enfd. in rel. part 317 F.3d 316 (D.C. Cir. 2003); *Guard Publishing*, 339 NLRB 353, 355 (2003); *Paul Mueller Co.*, 332 NLRB 312, 313 (2000); *Presbyterian University Hospital*, 325 NLRB 443, 443 fn. 2, enfd. 182 F.3d 904 (3d Cir. 1999); *Ironton Publications*, 321 NLRB 1048 (1996); *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enf. granted in part, denied in part on other grounds 25 106 F.3d 413 (10th Cir. 1997); *Buck Creek Coal*, 310 NLRB 1240 fn. 1 (1993); *Furniture Renters of America*, 311 NLRB 749, 751 (1993) enfd. in rel. part 36 F.3d 1240, 1245 (3d Cir. 1994); *Holiday Inn of Victorville*, 284 NLRB 916 (1987); *Control Services*, 303 NLRB 481, 484 (1991), enfd. 961 F.2d 1568 (3d Cir. 1992); and *U.S. Can Co.*, 305 NLRB 1127 (1992), enfd. 984 F.2d 864 (7th Cir. 1993).

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¹² Moreover, Union officials Joseph and Brown credibly testified that Respondent had made a series of regressive proposals at the bargaining table pertaining to the expired CBA, and that the parties had agreed to a bargaining procedure, for which in view of the Respondent's other proposals they had not reached work rules during the course of their latest stage of negotiations.

¹³ Leach and Blakely were not employed by Respondent at the time the expired CBA was negotiated and no evidence pertaining to the negotiations of that contract was placed into evidence. Respondent did not contend in its post-hearing brief that the management rights clause extended past the 2010 expiration date of the parties' CBA. While there was testimony that the parties were following the terms of the expired CBA it is required, as set forth above, that they follow terms and conditions of employment of that agreement until a lawful impasse or a new agreement. However, as the above case law states, this does not apply to a management rights clause. Similarly, Brown testified without contradiction that it was Respondent's position that grievances were not arbitrable under the expired CBA. Finally, as reflected in *Midwest Terminals of Toledo International*, 362 NLRB No. 57 slip op. at 1-2 fn. 2 (2015), Respondent attempted to cancel dues checkoff following the expiration of the CBA, but was found to have violated of the Act, because it had signed a post-CBA agreement with the Union extending the CBA's checkoff provision. There is no contention here of any such extension or agreement to extend the management rights clause.

Respondent, upon asserting that its unilateral actions were lawful because they were consistent with the parties' past practice, bears the burden of establishing this affirmative defense. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), *enfd.* 317 F.3d 316 (D.C. Cir. 2003). In *Verizon New York, Inc. v. NLRB*, 360 F.3d 206, 209 (D.C. Cir. 2004), the court stated:

(a) "union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time," *Owens-Corning Fiberglas Corp.*, 282 N.L.R.B. 609, 1987 WL 90160 (1987). See *Ciba-Geigy Pharmaceuticals Div. v. NLRB*, 722 F.2d 1120, 1127 (3d Cir.1983).

Similarly, in *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir.1969), the court stated:

Respondent next contends that because Union failed to object to the previous unilateral issuance of plant rules by other employers and because of the clause in the collective bargaining agreement allowing discharge for 'cause,' it has waived any right to now request negotiations. The first part of this argument is unconvincing because it is not true that a right once waived under the Act is lost forever. *Pacific Coast Ass'n of Pulp & Paper Mfrs. v. NLRB*, 304 F.2d 760 (9th Cir. 1962). Each time the bargainable incident occurs- each time new rules are issued- Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent 'close-out;' as in contract law, an offer once declined but then remade can be subsequently accepted. Cf. *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874 (3d Cir. 1968); *General Tel. Co. v. NLRB*, 337 F.2d 452 (5th Cir. 1964).

See also, *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993); and *Owens-Corning Fiberglass*, 282 NLRB 609 (1987).

In the instant case, Respondent took over the facility in 2004, at which time the Union was representing bargaining unit employees. There was a collective-bargaining agreement in effect between the parties from 2006 to December 31, 2010. Leach was employed by Respondent in 2007, and Blakely was employed by in May 2010. The expired CBA contained the following provision under management rights:

20.3 The management of the Company has established certain reasonable rules and policies for all its employees. These are attached hereto and the Company shall have the right at any time to add further rules or subtract or change otherwise existing rules, as long as these rules are reasonable and not contrary to specifications set forth in the labor agreement. Such rules must be posted on bulletin boards or in such locations as to be readily accessible to the employees of the company.

Attached to the CBA was Exhibit C entitled "Work Rules (2/23/06)."

Leach testified that between 2010 and 2012, union trustees were negotiating on behalf of Local 1982 for a new CBA. Leach estimated there were about eight or nine negotiation sessions with the trustees. He testified to his recollection he attended every negotiation session with the trustees. Joseph, a vice-president for the Atlantic Coast District of the International Longshoremens's Association of the Great Lakes Area, served as one of the trustees who negotiated on behalf of Local 1982. Joseph began participating in the negotiations on behalf of

Local 1982 beginning in September 2011. Joseph testified Leach and Blakely were on the Respondent's negotiating committee.

5 Joseph estimated he attended over 10 bargaining sessions during the trusteeship. He testified the Union provided proposals to Respondent including a proposed employee policy handbook. Joseph testified he provided Leach and Blakely copies of the Union's proposed handbook drafts as they went along. Joseph testified that most of the handbook was language contained in the expired CBA which Joseph removed and placed into a handbook. He testified the handbook was to have been a signed document between the parties. Joseph identified a document entitled "ILA Local 1982 Employee Handbook." It states it was compiled on 10 December 1, 2011. Joseph testified the document was provided to Leach and Blakely. The document by its terms contains listings of color codes for Union and Employer inserts, although the copy tendered into evidence was in black and white. The proposed handbook includes sections entitled: Referral and Seniority List, Skilled Employees, Regular Employees, Casual 15 Employees, Employment Procedures, Seniority, Attendance, Pay Period/Payday, Medical Insurance, Pension Benefit, Drug and Alcohol, and Standard Operating Procedures. Joseph identified a second draft of the proposed Employee Handbook compiled on December 8, 2011, containing the same or similar headings. He testified he thought this was the last draft which parties agreed to. While Joseph testified most of the handbook language was derived from the CBA there appears to be large sections of the handbook not contained in the CBA, for example a section labeled "Drug and Alcohol." There is another section in the handbook labeled "Rules and Regulations Accident Policy," which provides in part, "The Company and the Union reserve the right to revise the Rules and Regulations listed herein." Even sections contained in the handbook that related to provisions in the expired CBA contained changes. For example, the 25 CBA states under 5.2.1 B. "The hiring of individuals on the skilled list shall be from those individuals who make themselves available for work by reporting to the Company at times designated and who are qualified to perform such work as is required." Whereas the handbook language states, "The hiring of individuals on the skilled list shall be from those individuals who make themselves available for work by reporting to the Union Hall. " There are similar 30 changes throughout the handbook sections relating to the expired CBA.

Blakely testified, concerning contract negotiations in the fall of 2011, that Joseph had an employee handbook that Blakely thought came from Burns Harbor. Blakely testified he received a document entitled, "ILA Local 1982 Employee Handbook" from the Union with the statement 35 on the cover page that it was "Compiled December 1, 2011" during negotiations. Blakely testified the last two pages of the expired CBA contain work rules dating back to the 1990's which were negotiated between the Union and the Employer.

Blakely testified in 2011, Respondent's annual mandatory drug safety training was held 40 on March 18. Blakely identified the sign in sheets for the March 18 meeting, which stated "By signing this sheet you acknowledge receipt of MWTTI Policy Packet (MWTTI Drug Policy, Cell Phone Policy, Equipment Policies, Violence in the Workplace Policy, Shape-Up Hiring, Grievance turn in). He testified these policies were distributed at the March 18 meeting. Blakely testified the company did not bargain with the Union over the policies listed at the 45 bottom of the page on the sign in sheets. Blakely testified that no one from the Union requested to bargain over those rules. However, Blakely identified a series of singular policies, which he testified were in existence, before Respondent distributed its first policy books in 2012. One of which was Respondent's "Drug Free Safety Program #4000." Blakely testified he inserted the "#4000" in the label for the purpose of creating the handbook, but the policy itself by its terms 50 was created on March 23, 2007. In the packet of policies submitted by Respondent pre-existing

the 2012 handbook is a "Cell Phone Use Policy" dated February 27, 2009; a "Vehicle and Equipment Misuse and Abuse Program" dated March 20, 2010; a "No Weapons/ Violence in the Workplace Policy" dated March 2010. In other words, Respondent failed to show when the policies distributed at the March 18, 2011 meeting originated, and it is clear some, if not all, came into effect prior to Blakely's employment with Respondent, and likely during the term of the CBA which expired on December 31, 2010.

Blakely testified Respondent's annual mandatory preseason meeting in 2012 was held on March 16, 2012. Blakely identified the sign in sheets for attendance at the March 16 meeting which state, "By signing this sheet, you acknowledge receipt of MWTTI Policy Handbook, MWTTI Safety Handbook and paperwork for the pre-season drug screen to be completed on or before March 23, 2012." Blakely testified the Policy Handbook and the Safety Handbook were distributed to employees at the meeting. Blakely testified that he did not bargain with the Union over the Policy Handbook and the Safety Handbook listed at the bottom of that sign in sheet. Blakely testified that no one from the Union requested to bargain over the handbooks. Blakely testified that to his knowledge these were the first formal handbooks distributed by Respondent. Blakely testified that up until that time there were just individual policy pages. Blakely testified Respondent contracted with an outside contractor to work with Blakely in creating the handbooks, and this was done at least a year prior to the 2012 safety meeting. He testified that at no time did he notify the Union that he was drafting new handbooks. Blakely testified this was despite the Union and Respondent being in ongoing contract negotiations. Blakely testified, and by the dates of the policies included the 2012 Policy Handbook, several of those policies had been in effect prior to 2012, and prior to the expiration of the CBA.¹⁴

It was the Union's position at a prior unfair labor practice trial that the parties reached a new CBA on about December 9, 2011, although that position did not prevail before the Board. Joseph testified his last day as a trustee was either in late July or August 2012. Brown testified he became president of Local 1982 on August 7, 2012. Brown estimated that the parties resumed negotiations for a new CBA in October 2012, but as of the time of his testimony at the current trial, the parties had not reached a new CBA.

Blakely testified Respondent made no changes to its Policy or Safety handbooks during Respondent's March 1, 2013, annual mandatory meeting, and for reasons stated in the credibility section of this decision, I have concluded the General Counsel has failed to establish the Union protested Respondent's policies during that meeting.

Respondent conducted its mandatory preseason 2014 safety meeting on March 22. Blakely testified Respondent presented employees with new handbooks during the meeting entitled the 2014-2015 Policy Handbook and the 2014-2015 Safety Handbook. Concerning the new policies contained in these handbooks, Blakely testified he had attended Department of Labor training sessions, during which the DOL representative said Respondent should have policies on record retention pertaining to how long they keep personnel files to make sure they are in compliance with the law. He testified there also should be a policy concerning the procedure followed if someone sees a mistake in their paycheck. Blakely testified mainly the

¹⁴ While Brown testified that he protested the implementation of the 2012 policy books, during the March 16, 2012 meeting, for reasons stated in the credibility section of this decision I have found the General Counsel failed to establish that Brown protested the implementation of Respondent's 2012 handbooks. Moreover, as stated in that section, Brown was not a union official at the time.

handbook changes related to what he learned at the DOL conference in terms of policies the company needed to make to be in compliance with the law. Blakely testified he did not bargain with the Union over these changes. Blakely testified that he attended the DOL meeting in 2013 and at no time did he notify the Union Respondent was going to add policies to the handbooks. 5 Leach testified, pertaining to the 2014 shipping season safety meeting, that during the meeting then union steward Fred Victorian, Jr., objected to the employer's unilateral implementation of the policy handbooks. Leach testified, "As I recall, Fred did come to me and say that we're going to object and protest and we're not going to sign anything because he was informed by Mr. Otis (Brown) not to sign anything." Leach testified that Don Russell, who he acknowledged 10 may have been a union steward at the time, also objected to Respondent's unilateral implementation of the policies. Brown testified that Respondent did not give the Union advanced notice concerning any new manuals to be handed out at 2014 meeting. Brown filed an unfair labor practice charge on September 18, 2014 on behalf of the Union alleging, in part, that since March 22, 2014, the Employer failed to notify the Union regarding the scheduling of a 15 safety/drug meeting; and disseminated policy changes without notifying or bargaining with the Union regarding the changes. By letter dated November 28, 2014, the Regional Director notified Brown the charge was dismissed.

Respondent received an OSHA "Citation and Notification of Penalty" dated March 12, 20 2014, from the U.S. Department of Labor. On March 22, 2014, Leach, on behalf of Respondent signed an "Informal Settlement Agreement" with OSHA. Included in the settlement was the requirement that Respondent "agrees to systematically work through the Standard Operating Procedure (SOP) manual to review and update their procedures to create more specific SOP's similar to the form of the "SOP-Loading and Unloading Material" The settlement agreement 25 states, "A labor representative will be part of this process; the make-up of the reviewing group can change based upon the procedure being reviewed, but a labor representative will be present for these reviews. The employer will provide the area office a copy of four of these SOP's no later than July 31, 2014, in addition to the names and titles of the reviewers." However, as set forth above, rather than contacting Local 1982 officials for a labor 30 representative to serve as part of the reviewing group, Respondent bypassed the Union and handpicked a foreman, who was a member of the bargaining unit as its own labor representative.

Hubbard, by letter to Blakely dated March 19, 2015, stated that Union President Brown 35 was the chairman of both the Union's safety and its training committees. Hubbard cited the OSHA proceedings and stated Brown attended the OSHA hearing and gave testimony on behalf of ILA local 1982. The letter stated Local 1982's executive board appointed Brown "as our labor representative" and that Brown is supposed to be part of the reviewing group that will work to improve the employers Standard Operating Procedures (SOP) for loading and unloading 40 material from the various vessels, and to also participate as the labor representative in all safety incidents and accident investigations." Hubbard asked Blakely to contact Brown as soon as possible. Similarly, Brown sent a letter to Blakely dated March 20, 2015, wherein Brown cited the OSHA settlement. Brown stated that during a March 21, 2014 hearing, Blakely and Leach 45 "agreed to provide the union with copies of the company's safety handbooks and the work rules for our review, and to meet with union to discuss any discrepancies that may exist within those documents. As part of your written settlement agreement, you agreed to allow a union representative to assist the employer and work through the Standard Operating Procedure manuals to review and update them as needed." Brown stated, "Exactly one year has passed 50 and the employer has not provided the union with any of those documents nor has the employer allowed the union representative to participate in any of the events as listed in the settlement

agreement." He stated, "The union position in this matter is that since the employer refuses to provide the list of documents to the union representatives for review, and not allow them the opportunity to raise any issues on discrepancies, then the union and its members will not be held bound by these documents."

5

Respondent held its annual mandatory safety meeting on March 21, 2015. At that time, Blakely passed out to the employees in attendance Respondent's new 2015 to 2016 Safety and Policy handbooks, as well as a first time standard operating procedure handbook. Blakely testified that at no point prior to the meeting did he send a copy of the new handbooks to the Union. When asked if Hubbard objected to the handbook policies at the March 21 meeting, Blakely testified, "I -- I don't recall." Similarly, Leach, who attended the meeting, when asked if Hubbard informed employees at the meeting to sign the work rules acknowledgement papers under protest, responded, "You would have to ask Mr. Hubbard that question." When asked if he had any recollection of any employees speaking at that meeting, Leach replied, "I don't recall." As set forth above, I did not find Blakely and Leach's professed lack of recall to be credible here. The event in question was not that far removed from the time of their testimony, Blakely admitted to receiving protest letters from Brown and Hubbard concerning the failure to include the Union in the formulation of the standard operating procedures, and Leach recalled the protest by the Union of Respondent's unilateral rule changes during the March 2014 meeting, but strange to say could not or would not recall a similar protest taking place at the 2015 meeting which coincidentally involved the allegations at the current unfair labor practice trial.

Hubbard testified he attended the mandatory 2015 safety meeting. Hubbard credibly testified he spoke with Leach prior to the start of the meeting and informed Leach that the Union was not given the opportunity to review with Respondent its new handbooks and the Union was going to have the men sign for them under protest. Hubbard credibly testified that he spoke during the 2015 meeting in the presence of Leach, Blakely and the union members. Hubbard testified he told the attendees that "due to the fact that the Company didn't come to the Union with the policies beforehand that we were going to have to sign it in protest."

In sum, the parties had bargained over work rules which were attached as an exhibit to the expired CBA which contained sections of telephone and cell phone usage. Moreover, there were fairly extensive negotiations between the Union and Respondent in 2011, over a comprehensive employee handbook proposed by then trustee for the Union Joseph, which included a section on standard operating procedures, and to which Joseph testified the parties had reached an agreement in principle. During the course of the 2006 to 2010 CBA, Respondent implemented some separate policies of varying dates, to which Blakely testified were not negotiated between the parties. However, these policies pre-dated Blakely's employment with Respondent, so his testimony on how they were formulated was speculative at best. During the 2011 annual safety meeting, Respondent distributed these pre-existing policies to employees and had them sign for them. There is no contention that these were new policies first implemented at that time. Rather, if as the evidence suggests they were first implemented during the term of the CBA, they were in fact bargained with the Union in that the Union had agreed to the inclusion of the management rights clause in the CBA. At the March 2012, meeting, Respondent for the first time implemented policy and safety handbooks. The policy handbook is mostly a compilation of Respondent's pre-existing policies that were in place during the term of the CBA as exhibited by the dates of those policies in the handbook. The Union at the time was going from the end of the term of trustee representation to elected local Union officials, as Brown was elected president in August 2012. There were no new handbooks

presented at the 2013 meeting. Blakely testified Respondent introduced new policy and safety handbooks in 2014, which according to Blakely mainly referenced changes in document storage and access. Yet, the Union protested these unilateral changes during the March 2014 meeting, and followed up by filing an unfair labor practice charge over those changes, although the charge was ultimately dismissed, the protest was lodged. The Union also protested the changes Respondent made during the 2015 meeting, by letters to Blakely from Hubbard and Brown, and by Hubbard's verbal protest immediately before and during the meeting, although those changes were made to the Union as a *fait accompli* during the March 2015 meeting. Thus, the record only produced one set of changes following the expiration of the CBA ergo the end of the management rights clause, where there Union failed to protest that change and that was in 2012. I do not find that Respondent has met its burden of proof concerning a past practice concerning the unilateral changes in work rules or work policies to afford it the right for its unilateral action here. See, *Beverly Health & Rehabilitation Services*, above; *Verizon New York, Inc. v. NLRB*, above; *NLRB v. Miller Brewing Co.*, above; *Owens-Brockway Plastic Products*, above; and *Owens-Corning Fiberglass*, above. Rather, the evidence shows the parties had a history of bargaining over work rules, some of which were attached as an exhibit in the expired CBA, and in negotiations that took place in 2011 following the CBA's expiration. Moreover, the Union lodged strong protests in 2014 and 2015 against Respondent's unilateral changes in its handbooks. Thus, I reject Respondent's claim that there was a waiver by past practice.

I therefore have rejected all Respondent's defenses pertaining to the unilateral change allegations alleged in the complaint. Since the enumerated changes involved mandatory subjects of bargaining, I find Respondent violated Section 8(a)(5) and (1) of the Act by those changes as alleged in the complaint.

CONCLUSIONS OF LAW

1. Respondent, Midwest Terminals of Toledo International, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 1982, International Longshoremen's Association, AFL-CIO (the Union or Local 1982) is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times, the following described unit has been an appropriate unit for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

The terms members of the collective bargaining unit, employee or employees, as used in the Agreement, mean employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, fork-lift operators, end-loaders, material handlers, checkers, signalmen, winchmen, linemen, line dispatcher, and hatch leaders.

4. At all material times, the Union has been, and is now, the exclusive representative for the employees in the bargaining unit described above in paragraph 3 (the unit employees) for the purposes of collective-bargaining within the meaning of Section 9(a) of the Act.

5. Respondent, violated Section 8(a)(5) and (1) of the Act by since March 21, 2015, unilaterally changing the following without bargaining with the Union by:

- (a) Adding new language to its Policy Handbook policy #2500 pertaining to camera usage reading "Photography and all types of recording are restricted on all

company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

- (b) Adding new language to its Policy Handbook policy #2500 pertaining to the section on Marketing documents pertaining to "photographs and recordings."
- (c) Adding new language in Policy #3100 in the 2015-16 Policy Handbook pertaining to camera, digital device, cell phone and email usage; in essence rewriting Policy #3100 and greatly expanding its restrictions from that included in the prior handbook.
- (d) Adding two new sections to its 2015-16 Safety Handbook, one called "Driver Safety Requirements" and the other called "Visitor Safety Requirements."
- (e) Promulgating and implementing its 2015-2016 ILA Standard Operating Procedures.

6. Respondent violated Section 8(a)(1) of the Act by maintaining the following overly broad work rules, policies, and or procedures which improperly restrict employees in the exercise of their rights protected by Section 7 of the Act:

In its 2015-2016 Policy Handbook the following:

The Non-Disclosure/Confidentiality Policy #2500 provides:

Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such.

The Confidentiality Agreement Policy #2550 provides that employees must:

[M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

The Camera, Cell, Digital Device Policy #3100 provides:

In the Policy Overview, that employees and visitors are prevented from "the improper disclosure of company trade secrets and confidential business information."

Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when performing any function for or on behalf of the company –

is **restricted**. This policy applies to all full-time and part-time employees and visitors." (emphasis in original)

Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence."

Under Camera Use, that "[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee."

Under Camera Use, that "[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee."

Under Camera Use, that "[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device."

Under Camera Use, that "[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee."

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others."

Under Camera Use, that "[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual's expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken."

Safe Workplace Environment #4500 policy prohibits an employee from "[v]iolating others' expectation of privacy".

Safe Workplace Environment #4500 prohibits "[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed."

In its 2015-2016 Safety Handbook the following:

The Incident Reporting Policy #1600 that states that "Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs, shall be marked as follows: "PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION."

The Incident Reporting Policy #1600 that states that "[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO."

The Driver Safety Requirements states that "[p]hotography and recording are restricted at this facility at all times."

The Visitor Safety Requirements states that “[p]hotography and recording are restricted at this facility at all times.”

7. The unfair labor practices described above constitute unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in conduct violating Section 8(a)(5) and (1) of the Act, it is ordered to cease and desist therefrom, and to take the following affirmative action deemed necessary to effectuate the policies of the Act. Respondent is ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit found here to be appropriate. Respondent shall, on request by the Union, rescind the Policy and Safety Handbook policies found herein to be improperly implemented as unilateral changes. See, *Scepter Ingot Castings, Inc.*, 331 NLRB 1509 (2000), enfd. 280 F.3d 1053, (D.C. Cir., 2002). As well as upon request by the Union rescind 2015-2016 ILA Standard Operating Procedures policy, or portions thereof, specified by the Union, until it has bargained with the Union in good faith concerning the implementation of the 2015-2016 Standard Operating Procedures. In this regard, I note that the procedures were formulated as a result an OSHA settlement. I have found Respondent unlawfully bypassed the Union in terms of the implementation of this settlement. However, because of the safety concerns bringing about the OSHA settlement I would suggest that the Union review the Standard Operating Procedures, and would recommend that it only seek to rescind those portions of the Operating Procedures for which it has an issue in terms of safety, or other particularities such as omissions, or better procedures to be implemented. Respondent shall also rescind or rewrite all policies the maintenance of which have been found herein to violate Section 8(a)(1) of the Act, to bring them in compliance with the protection of employee Section 7 rights. Respondent shall remove, all discipline from employees files, who have been disciplined within the six month period of the filing of the current unfair labor practice charge for the enforcement of the policies which have found to have been unlawfully maintained, notify employees and the Union, each in writing, that the discipline has been removed, and make employees whole for any loss of earnings imposed by any such discipline in the manner required by traditional Board remedies, until such times as the policies are rescinded or rewritten in a manner meeting the requirements of this decision to protect employee Section 7 rights.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

It is hereby ordered that Respondent Midwest Terminals of Toledo International, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - a. Refusing to bargain in good faith with Local 1982, International

¹⁵ 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.

Longshoremen's Association, AFL-CIO (the Union or Local 1982) concerning the rates of pay, wages, hours, and working conditions of employees in the following appropriate unit:

5 The terms members of the collective bargaining unit, employee or
employees, as used in the Agreement, mean employees of the
Company in stevedore and warehouse operations such as
10 longshoremen, warehousemen, crane operators, power operators,
fork-lift operators, end-loaders, material handlers, checkers,
15 signalmen, winchmen, linemen, line dispatcher, and hatch
leaders.

b. Unilaterally changing terms and conditions of employment, including those
maintained in its Policy Handbook, Safety Handbook, and Stand Operating Procedures.

15 c. From its maintaining in its 2015-16 Policy Handbook or subsequent policy
handbooks the following provisions:

The Non-Disclosure/Confidentiality Policy #2500 providing the following:

20 Photography and all types of recording are restricted on all company property and
cannot take place without prior written permission from the Director of Operations. All
images and recordings taken by . employees and/or visitors remain solely the property
of MWTTI or MWTT, including any image or recording taken with a personally owned
cell phone camera or other digital imaging device.

25 Employees who improperly use or disclose . confidential business information, to
include information regarding labor relations, will be subject to disciplinary action,
including termination of employment and legal action, even if they do not actually benefit
from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting
data, all personnel information, and union related business are considered confidential
business information and should be guarded as such.

30 The Confidentiality Agreement Policy #2550 providing that employees must:

35 [M]aintain the confidentiality of ALL documents, credit card information, and
personal information of any type and that such information may only be used for the
intended business purpose. Any other use of said information is strictly prohibited and is
cause for immediate dismissal. Additionally, should [employees] misuse or breach, any
personal information or the expectation of privacy of said clients and/or employees;
[employees] understand that [they] will be held fully accountable both civilly and
criminally, which may include, but not limited to, Federal and State fines, criminal terms,
real or implied financial damages incurred by the client, employee, or this company.

The Camera, Cell, Digital Device Policy #3100 providing:

40 In the Policy Overview, that employees and visitors are prevented from "the improper
disclosure of company trade secrets and confidential business information."

45 Under the General Policy, Digital Equipment Usage, that the "[u]se of cameras,
whether cell phone cameras, stand-alone cameras, or cameras contained on any other
devices, whether digital or conventional film cameras—while on duty or when performing
any function for or on behalf of the company —is **restricted**. This policy applies to all full-
time and part-time employees and visitors."

50 Under Cellular Telephone Use, that "[o]n-duty use of cell phones to send electronic
mail is expected to comply with company rules and policies including sexual
harassment, discrimination, ethics, code of conduct, confidentiality and workplace
violence."

Under Camera Use, that “[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee.”

5 Under Camera Use, that “[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee.”

10 Under Camera Use, that “[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device.”

15 Under Camera Use, that “[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

20 Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.”

25 Under Camera Use, that “[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual's expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken.”

Safe Workplace Environment #4500 policy that prohibits an employee from “[v]iolating others' expectation of privacy”.

30 Safe Workplace Environment #4500 that prohibits “[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed;”

d. Maintaining in its 2015-2016 Safety Handbook, or subsequent safety handbooks, the following provisions:

35 The Incident Reporting Policy #1600 that states that “Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs, shall be marked as follows: “PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION.”

40 The Incident Reporting Policy #1600 that states that “[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO.”

The Driver Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

The Visitor Safety Requirements that states that “[p]hotography and recording are restricted at this facility at all times.”

45 e. 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. On request, bargain collectively and in good faith concerning wages, hours, and other terms and conditions of employment with the Union as the exclusive representative of employees in the above-described unit.

50 b. On the request of the Union, rescind the language in Respondent's 2015-16 Policy

Handbook policy #2500; policy #3100; the language in its 2015-16 Safety Handbook pertaining "Driver Safety Requirements" and the other called "Visitor Safety Requirements"; and the 2015-16 ILA Standard Operating procedures, in whole or in part as requested by the Union, that has been found to have constituted unlawful unilateral changes in this decision, as directed in the remedy section of this decision, and notify the Union and the bargaining unit employees that any requested rescissions have been made.

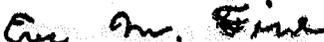
c. Within 14 days of the Board's Order, rescind or revise the provisions and rules set forth in paragraphs 1(c) and (d) above.

d. Furnish all current or former employees who received the described 2015-2016 Policy and/or Safety Handbooks with written inserts that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute a revised Policy and Safety Handbooks that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

e. Within 14 days after service by the Region, post at Respondent's facility where notices to employees are customarily posted copies of the attached notice marked "Appendix"¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 8, 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, or other electronic means, if the Respondent customarily communicates with their employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since November 14, 2014.

f. Within 21 days after service by the Region, file with the Regional Director for Region 8 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.

Dated, Washington, D.C. September 19, 2016.


Eric M. Fine
Administrative Law Judge

¹⁶ If this Order is enforced by a Judgment of the 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."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively with Local 1982, International Longshoremen's Association, AFL-CIO (Local 1982) as the exclusive bargaining representatives of employees in the following unit:

The terms members of the collective bargaining unit, employee or employees, as used in the Agreement, mean employees of the Company in stevedore and warehouse operations such as longshoremen, warehousemen, crane operators, power operators, fork-lift operators, end-loaders, material handlers, checkers, signalmen, winchmen, linemen, line dispatcher, and hatch leaders.

WE WILL NOT unilaterally, without bargaining with Local 1982, change terms and conditions of employment, including those maintained in our Policy Handbook, Safety Handbook, and Stand Operating Procedures.

WE WILL NOT maintain the following provisions currently included in our 2015-16 Policy Handbook, or in any subsequent handbook:

The Non-Disclosure/Confidentiality Policy #2500 providing:

Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by .employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.

Employees who improperly use or disclose .confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such.

The Confidentiality Agreement Policy #2550 providing that employees must:

[M]aintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should [employees] misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; [employees] understand that [they] will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

The Camera, Cell, Digital Device Policy #3100 providing:

In the Policy Overview, that employees and visitors are prevented from “the improper disclosure of company trade secrets and confidential business information.”

Under the General Policy, Digital Equipment Usage, that the “[u]se of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other devices, whether digital or conventional film cameras—while on duty or when performing any function for or on behalf of the company —is **restricted**. This policy applies to all full-time and part-time employees and visitors.”

Under Cellular Telephone Use, that “[o]n-duty use of cell phones to send electronic mail is expected to comply with company rules and policies including sexual harassment, discrimination, ethics, code of conduct, confidentiality and workplace violence.”

Under Camera Use, that “[e]mployees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices — including cell phone cameras — without prior written authorization from the Facility Security Officer or his designee.”

Under Camera Use, that “[a]ll on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee.”

Under Camera Use, that “[a]ny photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device.”

Under Camera Use, that “[n]o photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.”

Under Camera Use, that “[e]mployees may not take or use images or recording to harass, embarrass, annoy others and/or violate an individual’s expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken.”

Safe Workplace Environment #4500 policy that:

Prohibits an employee from "[v]iolating others' expectation of privacy"

Prohibits "[l]oitering or presence on the jobsite without authorization before or after assigned shift is completed"

WE WILL NOT maintain the following provisions currently included in our 2015-16 Safety Handbook, or in any subsequent handbook:

The Incident Reporting Policy #1600 that:

States that "Because it is likely that incidents involving hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs. .shall be marked as follows: "PRIVILEGED AND CONFIDENTIAL – ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION."

States that "[n]o incident report or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO."

The Driver Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

The Visitor Safety Requirements that states that "[p]hotography and recording are restricted at this facility at all times."

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

WE WILL rescind or revise the unlawful provisions and rules described above, to ensure they do not prevent employees from engaging in conduct protected by the National Labor Relations Act.

WE WILL furnish all current or former employees who received the described 2015-2016 Policy and/or Safety Handbooks with written inserts that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful rules or publish and distribute revised Policy and Safety Handbooks that (a) do not contain the unlawful rules or (b) provide the language of lawful rules.

WE WILL from remove employees' files all disciplinary action made pursuant to the unlawful rules, make employees whole for any such discipline as required by the Board's decision and inform said employee(s) and the Union in writing that this has been done.

WE WILL on the request of Local 1982 rescind the language in our 2015-16 Policy Handbook policy #2500; policy #3100; the language in its 2015-16 Safety Handbook pertaining "Driver Safety Requirements" and the other called "Visitor Safety Requirements" not contained in our prior handbooks, and bargain in good faith with Local 1982 about any future changes to our handbooks.

WE WILL on the request of Local 1982 rescind policies contained in our 2015-16 ILA Standard Operating procedures, in whole or in part, as requested by Local 1982, and bargain in good faith with the Union concerning the replacement of any of the provisions for which it requests to be rescinded, and/or any future provisions.

MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.
(Employer)

Dated _____ By _____
(Representative of Midwest Terminals of Toledo International, Inc.) (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.

1240 East 9th Street, Room 1695, Cleveland, OH 44199-2086
(216) 522-3715; Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/08-CA-152192 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, (216) 522-7960

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RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE ALJ FINE' DECISION

Exception I – ALJ Fine erred in certain credibility findings. Decision pp. 7, 25-26 and 41, FN 12.

Exception II – ALJ Fine erred in finding Respondent's Non-Disclosure/Confidentiality Policy #2500 violated Section 8(a)(1) of the Act. Decision pp. 31-32.

Exception III – ALJ Fine erred in finding Respondent's Confidentiality Agreement Policy #2550 violated Section 8(a)(1) of the Act. Decision, pp. 32-33.

Exception IV – ALJ Fine erred in finding Respondent's Safe Workplace Environment #4500 violate Section 8(a)(1) of the Act. Decision, pp. 33-34

Exception V – ALJ Fine erred in finding Respondent's Driver Safety Requirements and Visitor Safety Requirements violated Section 8(a)(1) of the Act. Decision, p. 34.

Exception VI – ALJ Fine erred in finding Respondent Camera, Cell, Digital Device Policy #3100 violated Section 8(a)(1) of the Act. Decision, pp. 35-36

Exception VII –ALJ Fine erred in finding Respondent's Incident Reporting Policy #1600 violated Section 8(a)(1) of the Act. Decision, pp. 36-37.

Exception VIII – ALJ Fine erred in finding that the union did not waive its right to bargain over the Policy and Safety Handbooks and, therefore, Respondent unilaterally changed and subsequently implemented the following policies in violation of Sections 8(a)(5) and (1) of the Act: (1) 2015-2016 Policy Handbook – Nondisclosure/Confidentiality Policy #2500 as it relates to camera usage; (2) 2015-2016 Handbook – Camera, Cell, Digital Device Policy #3100; (3) 2015-2016 Safety Handbook – Driver Safety Requirements; (4) 2015-2016 Safety Handbook – Visitor Safety Requirements; and (5) 2015-2016 Standard Operating Procedures. Decision, pp. 37-47.

I. STATEMENT OF THE CASE

On August 28, 2015 the Regional Director for Region 8 issued a Complaint and Notice of Hearing (“Complaint”). The Complaint alleged various violations of 8(a)(5) and (1) of the Act. The Hearing was conducted in Bowling Green, Ohio on December 3-4, 2015 and Fostoria, Ohio on January 20, 2016. Administrative Law Judge Eric Fine (“ALJ Fine”) issued his Decision on September 19, 2016 (JD-89-16 “Decision”) and Midwest Terminals of Toledo International, Inc., (“Midwest,” “Company” or “Respondent”) hereby files its Exceptions and Brief in Support to ALJ Fines’ Decision.

II. FACTS

A. GENERAL BACKGROUND

Midwest is a full-service U.S. port at the mouth of the Maumee River located at the west end of Lake Erie. It is part of the St. Lawrence Seaway system, providing international access to the heart of North America. It is linked to major rail (CSX) and interstate trucking routes (I-75/I-80/90) feeding the Midwest. Midwest’s facilities total over 100 acres and 600,000 square feet of warehousing with Foreign Trade Zone (FTZ #8), London Metal Exchange (LME) and NYMEX availability.¹ Vessels from all over the world can call on the port via the St. Lawrence Seaway. (Transcript [“Tr.”] 164.)

B. PORT SECURITY

Midwest is required by federal law to ensure that the facility operates in compliance with 33 C.F.R. Chapter I, Part 105, Maritime Security: Facilities. (Tr. 394-395 & Respondent’s Exhibit [“R. Ex.”] W.) Terry Leach (“Leach”), Midwest’s Director of Operations, also acts as the Company’s Facility Security Officer (“FSO”) pursuant to R. Ex. W. (Tr. 382, 398-399 & R.

¹ www.midwestterminals.com

Ex. W.) As the Company's FSO, Leach is responsible for developing and implementing a Facility Security Plan ("FSP") for the Port. (Tr. 383 and R. Ex. U.) The FSP is a detailed plan mandated by the U.S. Department of Homeland Security, U.S. Customs ("Homeland Security") and the United States Coast Guard ("Coast Guard"). (Tr. 383 and R. Ex. W.) The FSP is meant to secure the Port's waterways as well as the land and buildings surrounding the Port. (Tr. 383.) Without an approved FSP, Homeland Security would not allow the Midwest to operate the Port. (Tr. 391.)

Once the FSP is developed, it must first be reviewed by Homeland Security and then the Coast Guard. (Tr. 383.) If approved, the Coast Guard will send correspondence to the FSO stating as much. (Tr. 394-395 & R. Ex. U.) Once approved, the FSP is generally valid for 5 years. (Tr. 383-384 & R. Ex. U.) Pursuant to the FSP, the Port is subject to inspections by Coast Guard personnel to verify compliance with the FSP. (Tr. 384 & R. Ex. U.) Failure to comply with 33 C.F.R. § 105 and/or the guidelines set forth in the FSP could result in suspension or revocation of the FSP approval, thereby making Midwest ineligible to operate the Port. (Tr. 386 & R. Ex. U.) The FSP is considered sensitive security information and must be protected in accordance with 49 CFR § 1520. (R. Ex. U.) The FSP is located in a safe at the facility. (Tr. 390-391.) The only two individuals at the facility who have access to and are authorized to view the FSP are Leach and Chris Blakely (Blakely"), Midwest's Human Resources Manager. (Id.) The FSP and any amendments made thereto must be available to Coast Guard personnel upon request. (Id. & R. Ex. U.) Ultimately, the FSP is meant to ensure the safety of the employees, the customers' product and the Region. (Tr. 399-400.)

Midwest's entire 110 acres is a secure facility. (Tr. 400.) Company personnel and employees are required to have a Transportation Worker Identification Card ("TWIC") in order

to enter the gated facility. (Tr. 400-401.) Persons must pass a background check performed by the federal government check in order to obtain a TWIC. (Id.) Any person who does not have a TWIC must be escorted into the facility by Company personnel who do have a TWIC. (Tr. 401) Furthermore, when a vessel arrives in Port, Leach receives prior notification of everybody on the vessel. (Tr. 402.) Leach also receives notification from the FBI if potential “unwanted” may be on the vessel. (Tr. 403.) Once the vessel arrives, Leach and the Chief Officer of the vessel go over a declaration of security; a checklist. (Id.) Depending on the cargo and where the vessel came from, shipmates may be prohibited from leaving the vessel and setting foot on the dock. (Tr. 402-403.) There have been instances where armed guards are stationed at the end of the gangway and they are instructed to shoot if shipmates attempt to de-board the vessel. (Id.)

C. MANDATORY PRE-SEASON TRAINING/MEETINGS

Each and every March² Midwest conducts mandatory pre-season training. (Tr. 316-318.) During the training, Midwest reviews its drug free safety program and distributes its Policy Handbook and Safety Handbook. (Id.) Midwest reviews the policies set forth in the Handbooks and conducts a question and answer session with the employees regarding said policies. (Id.)

1. 2011 pre-season meeting.

On March 18, 2011, Midwest conducted its mandatory pre-season training at St. Charles Mercy Hospital. (Tr. 320-321 & R. Ex. A.) During the meeting, the employees received Midwest’s Drug Policy, Cell Phone Policy, Equipment Polices, Violence in the Workplace Policy, Shape-up Hiring and Grievance turn in.³ (R. Ex. A.) Midwest did not bargain with the

² Blakely has participated in and attended every mandatory pre-season meeting since 2011.

³ Prior to 2012 Midwest did not have formal Handbooks. Rather, they had individual polices. (Tr. 310-311, 361-362 & R. Ex. R.) The policies outlined in R. Ex. R were implemented as far back as 2007, 2009 and 2010. (R. Ex. R.) The majority of the policies set forth in R. Ex. R were included in the Company’s 2012 Handbooks. (Tr. 362.)

union over any of these policies, nor did anyone from the union request to bargain over the aforementioned policies. (Tr. 320-321.)

2. 2012 pre-season meeting.

On March 16, 2012, Midwest conducted its mandatory pre-season training at St. Charles Mercy Hospital. (Tr. 322-323 & R. Ex. B.) During the meeting, the employees received Midwest's Policy Handbook and Safety Handbook. (Tr. 322-323, R. Ex. B and Joint Exhibit ["J. Ex.,"] G and H.) Midwest did not bargain with the union over any of the policies set forth in the Handbooks, nor did anyone from the union request to bargain over the aforementioned policies. (Tr. 320-321.)

3. 2013 pre-season meeting.

On March 1, 2013, the Company conducted its mandatory pre-season training at St. Charles Mercy Hospital. (Tr. 325-326.) The Company did not distribute new Handbooks for the 2013 shipping season. (Id.) The Handbook that was distributed during the 2012 meeting would still be in effect during the 2013 shipping season. (Tr. 326.) During the meeting the Company reviewed and referenced the policies in the 2012 Handbook, (Id.) At no time during the 2012 shipping season or prior to the 2013 mandatory pre-season meeting did anyone from the union request to bargain over the Handbooks. (Tr. 327.)

4. 2014 pre-season meeting

On March 22, 2014, the Company conducted its mandatory pre-season training on site in its J-Shed conference room. (Tr. 328-329 & R. Ex. M, pp. MWTTI_8-CA-137044_00269-00274.) The Company distributed a new Policy Handbook and Safety Handbook, reviewed the policies therein, as well as the work rules attached to the collective bargaining agreement. (Tr. 328, 330-331, R. Ex. M, pp. MWTTI_8-CA-137044_00269-00274, R. Ex. O & P and J. Ex. E &

F.) Midwest did not bargain with the union over the new Handbooks, nor did anyone from the union request to bargain over the Handbooks. (Tr. 331.) Midwest made changes to and added policies to its 2014 Handbooks subsequent to Blakely attending a Department of Labor training session for HR managers. (Tr. 331-332 & #79-380.) Overall, Midwest made changes to the following policies: Progressive Disciplinary Policy #2000, Personnel File Access Policy #2900, Equipment and Vehicle Policy #3000, Technology Policy #3500, ILA Local 1982 Hiring Policy #4100 and Safe Workplace Environment Policy #4500. (Tr. 331-332, R. Ex. M and J. Ex. E & F.) Midwest also added two new policies; Employee Pay Practice Policy #2050 and Employee Record Policy #2925. (Id.) Midwest did not bargain with the union over the aforementioned changes or new policies. (Tr. 332.)

On September 18, 2014, the union filed an ulp charge (8-CA-137044) against Midwest alleging violations of 8(a)(1) and 5 of the Act. (Tr. 380 and R. Ex. M.) The union alleged in relevant part that Midwest disseminated policy changes (2014 Policy and Safety Handbooks) without notifying or bargaining with the union over these changes. (R. Ex. M.) Midwest provided a Position Statement on November 23, 2014 along with various exhibits. (Id.) On November 28, 2014, the Regional Director for Region 8 dismissed the charge noting: “[w]e have carefully investigated and considered your charge that [Midwest] has violated the National Labor Relations Act. **Decision to Dismiss:** Based on that investigation, I have decided to dismiss your charge because there is insufficient evidence to establish a violation of the Act.” (Id.)

4. 2015 pre-season meeting

In March 2015, the Company conducted its mandatory pre-season training. (Tr. 333.) The Company distributed a new Policy Handbook and Safety Handbook, reviewed the policies

therein, as well as the work rules attached to the collective bargaining agreement. (Tr. 333, R. Ex. Q and J. Ex. B & C.) The 2015 Handbooks contained sections of new language in the Nondisclosure/Confidentiality Policy #2500, Camera, Cell, Digital Device Policy #3100, Safe Workplace Environment #4500, Driver Safety Requirements and Visitor Safety Requirements.⁴ (Tr. 345-350 and Jt. Ex. B & C.) Just as in years past, Midwest did not bargain with the union over the Handbooks, nor did anyone from the union request to bargain over the Handbooks. (Tr. 331 & 360.)

D. STANDARD OPERATING PROCEDURES

On March 22, 2014, Midwest entered into an informal settlement agreement with the U.S. Department of Labor Occupational Safety and Health Administration (“OSHA”). (Tr. 367, 404-405 and General Counsel’s Exhibit [“GC. Ex.”] E.) As part of the settlement agreement Midwest was required to review, update and draft formal standard operating procedures, i.e., put in writing the procedures Midwest had already been using. (Tr. 368, 405 & GC. Ex. E.) Thus, while the document entitled Standard Operating Procedures was new (J. Ex. D), the procedures themselves were not. (Tr. 375.) The methods outlined in the Standard Operating Procedures (J. Ex. D) are the same methods Midwest has used since Leach was hired in July, 2007. (Tr. 406.) Also, the informal settlement agreement required that a “labor representative” be a part of the process. Accordingly, Midwest inquired the assistance of Juan “John” Rizo (“Rizo”), a union foreman, in the drafting and reviewing of the procedures. (Tr. 76, 78-79.) Leach has leaned on Rizo since Leach’s hiring in July 2007 because Rizo has the most experience and is the most

⁴ The Driver and Visitor Safety Requirements were not new policies as they had been in place since 2012. Notwithstanding, the 2015-2016 Safety Handbook was the first time these requirements were placed in the Handbook. (Tr. 346-348.)

knowledgeable of any of the men when it comes to all aspects of the facility. (Tr. 38-39, 83-84, 382 & 425-427.)

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

1. Preponderance of the evidence.

The burden of proof to prove a violation of the Act lies with the General Counsel and can only be upheld by a preponderance of the evidence. See, *Keller Manufacturing Co., Inc.*, 272 NLRB 763, 766 (1984). General Counsel cannot sustain its burden of proof by only discrediting any of Respondent's evidence. *Id.* Rather, in order to prevail, the General Counsel must support its case with substantial evidence *and* the Respondent must fail to counter with affirmative evidence of its own. *Id.* Importantly, the "burden of proof never shifts to Respondent nor is any onus imposed upon Respondent to disprove any allegation" set forth in the Complaint. *Id.*

A preponderance of evidence means that a party has shown that its version of facts, is more likely than not the correct version. See, <http://courts.uslegal.com/burden-of-proof/preponderance-of-the-evidence/>. The notion of "preponderance of the evidence" can be visualized as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. *Id.* If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail. *Id.* Accordingly, speculative, conjectural, and/or vague evidence clearly does not meet the preponderance of the evidence burden of proof.

2. Written work rules and/or policies

An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See, *T-Mobile*

USA, Inc., 2016 NLRB LEXIS 313, *3, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage*, 343 NLRB 646 (2004). *Id.* Under *Lutheran Heritage*, a work rule is unlawful if “the rule *explicitly* restricts activities protected by Section 7.” *Id.*, citing *Lutheran Heritage* at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.*, citing *Lutheran Heritage* at 647.

Here, the General Counsel has not alleged any of the policies at issue herein explicitly restrict protected activity or to have been promulgated in response to or applied to restrict Section 7 activities. Accordingly, the relevant inquiry is whether the employees would reasonably construe the policies at issue herein to prohibit Section 7 activity.

3. Credibility.

The Board’s long established policy is not to overrule an administrative law judge’s credibility findings unless the clear preponderance of all the evidence establishes that those findings are incorrect. *See, Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d (3rd Cir. 1951).

B. EXCEPTION I – ALJ FINE ERRED IN CERTAIN CREDIBILITY FINDINGS

Midwest has excepted to certain of ALJ Fine’s credibility findings. Midwest maintains that the totality of the record evidence unquestionably establishes by the clear preponderance of all the evidence that ALJ Fine’s credibility findings are erroneous.

1. Otis Brown is not a credible witness

Otis Brown is not a credible witness and ALJ Fine erred in crediting Brown's testimony over that of Leach with respect to the OSHA settlement agreement. (Decision pp. 25-26.) ALJ Fine also erred in crediting Brown's testimony that the parties had a procedure with respect to bargaining. (Decision pp. 7 and 41, FN 12.) Any testimony Brown presented that conflicted with the testimony of the Company's witnesses should not have been credited.

For example, on direct examination Brown testified in great detail about the 2013 mandatory pre-season training meeting indicating that he was present, that he talked to both Leach and Blakely and that he informed Leach that the union did not have the opportunity to review the polices prior to the meeting and that he instructed the union members to sign under protest. (Tr. 230-237.) *However, on cross-examination Brown was forced to acknowledge that he was not even present at the 2013 meeting after he was presented with the sign in sheet for the meeting establishing his absence.* (Tr. 262-264, 268-270 & R. Ex. C.) ALJ a full page footnote (FN 5) on page 11 of his decision outlining Brown's untruthful testimony. Notwithstanding, ALJ Fine credited Brown's testimony over Leach in regards to OSHA settlement and Standard Operating Procedures. Leach credibly testified that that standard operating procedures put in writing per the OSHA settlement were already being used by Midwest. Leach's testimony was corroborated by Blakely, who was questioned at length on this issue by ALJ Fine (Tr. 376-378). Conversely, Brown offered testimony that the procedures put into writing per the OSHA settlement were not being *followed* prior to the OSHA settlement. Importantly, Brown did not testify that the procedures were not in place prior to the settlement, only that some of the union employees were not following the already established procedures.

ALJ Fine also credited Brown's testimony that the parties had an agreement to negotiate the Handbook last, in its current negotiations with Midwest. (Decision, p. 7 and 41, FN 12.) ALJ Fine did so in order to explain away the union's past and ongoing failure (over 4 years) to request bargaining over or make proposals related to the Company's handbooks. Like Brown's testimony, ALJ Fine's credibility determinations are self-serving.

**C. EXCEPTION II – ALJ FINE ERRED IN FINDING RESPONDENT'S NON-DISCLOSURE/CONFIDENTIALITY POLICY #2500 VIOLATED
SECTION 8(A)(1) OF THE ACT**

Midwest's Nondisclosure/Confidentiality policy # 2500 states as follows:

*The protection of confidential business information and trade secrets is vital to the interests and success of MWTTI and MWTT. **Photography and all types of recording are restricted on all company property and cannot take place without prior written permission from the Director of Operations. All images and recordings taken by clients, contractors, employees and/or visitors remain solely the property of MWTTI or MWTT, including any image or recording taken with a personally owned cell phone camera or other digital imaging device.***

Employees who improperly use or disclose trade secrets or confidential business information, to include information regarding labor relations, will be subject to disciplinary action, including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

Marketing documents specific to a customer, all contact information, all accounting data, all personnel information, and union related business are considered confidential business information and should be guarded as such. Password--protect and lock your computers when not in use, safe guard files, and keep good accountability of all electronic media (e.g. CD, DVD, and memory sticks), photographs and recordings.

Employees who violate this policy will be subject to disciplinary action, up to and including employment termination.

Employees are required to sign in acknowledgement that they have read and understand this policy and the potential disciplinary consequences of violating it.

This policy will be reviewed periodically, and enforced at all times.

(See, J. Ex. B, p. 8). The language in bold italics is new language included in the 2015-2016 Policy Handbooks and is the only language change in this policy since at least 2009. (See, J. Ex. E, p. 8, J. Ex. G, p. 5 and R. Ex. R.)

The bold italicized language does not prohibit photographs and recordings, it only restricts them. Midwest is a secure facility pursuant to 33 C.F.R. §105 et seq. The Port of Toledo is considered a soft spot for terrorists and the number one spot on the Great Lakes for a potential attack. (Tr. 385.) Accordingly, this language is meant to keep out of the *public eye* the type of cargo that is coming into the Port and how the Port is operated from a security standpoint. (Tr. 166-167.) Cargo that can be used as explosives is sometimes stored at the Port, as well as other cargo that can be sold on the black market for significant amounts of money. (Tr. 399-400.) Midwest's policies are meant to ensure the safety of its employees, the customer's product and the Region as a whole. Nevertheless, ALJ Fine contemptuously marginalized Midwest's FSP which is mandated by the U.S. Coast Guard and U.S. Dept. of Homeland Security. (R. Ex. U and W). ALJ Fine determined that the mere possibility that the rule could have a chilling effect on employees' Section 7 rights is more important than preventing a possible terrorist attack using the various cargo stored at the Port. ALJ Fine stated as follows: "I find Respondent was more concerned that an employee would gather evidence to be used against it at a Board proceeding than possible security concerns raised by the video." (Decision, p. 32.) ALJ Fine makes much of the fact that Respondent introduced a video of cargo recorded by former union steward. As such, ALJ Fine concluded that that the Respondent was not really all that concerned about port security. Contrary to ALJ Fine's specious assertion, Midwest decided to introduce the video as an example of the potential threat that the rule is meant to alleviate.

Further, Midwest was not aware that this video existed until the General Counsel attempted to introduce it at an earlier hearing, but did not do so after off the record discussions between the parties. Under the policy as written, Midwest would have been made aware of the existence of the video.

Based upon all of the above, this policy should be determined as lawful under the parameters of *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), enfd. in relevant part 715 F.3d 928, 404 U.S. App. D.C. 453 (D.C. Cir. 2013), where a Board Majority found that an employer policy that prohibited the use of cameras for recording images in a hospital setting did not violate the Act. The *Flagstaff* policy prohibited the use of electronic equipment, including cameras, during work time, as well as “[t]he use of cameras for recording images of patients and/or hospital equipment, property or facilities.” *Id.* at slip op. 4-5, 25. The *Flagstaff* majority determined that patient privacy interests and the employer’s HIPAA obligation to prevent the wrongful disclosure of individually identifiable health information outweighed the Section 7 rights of employees, i.e., employees would reasonably interpret the rule to protect those privacy interests, not as a prohibition of Section 7 rights. *Id.* at slip op. 5. Here, given the delicate security interests, employees would reasonably interpret the rule to protect those security interests, not as a prohibition of Section 7 rights.

Further, the language in italics only (not bolded), is not new language. This language was also included in the 2014-2015 Policy Handbook. The union filed charge No. 8-CA-137044 related to the Company’s 2014-2015 Handbooks in September 2014. Midwest submitted its position statement on November 23, 2014 and Region 8 subsequently dismissed the charge on November 28, 2014. (R. Ex. M.) Almost two years ago, the General Counsel did not believe the aforementioned language was unlawful. However, ALJ Fine determined as follows:

Respondent also argues the Region did not challenge the maintenance of some of the then existing rules when Respondent's rules were involved in an unfair labor practice charge filed in 2014. However, correspondence concerning that charge as well as Respondent's position statement pertaining thereto reveals these issues were not being considered by the Region at that time. Moreover, since the continued maintenance of unlawfully restrictive work rules is in itself a violation of the Act, the dismissal a prior unfair labor practice charge does not impact on a finding of a violation here.

(Decision, p. 32.) The mere fact that the Region did not care enough to issue a Complaint in 2014 related to Midwest's Handbooks only further reinforces the reasoning of Court of Appeals for the 4th Circuit. With respect to purported handbook violations the Court of Appeals for the 4th Circuit eloquently stated: "[S]omewhere, in the vast human experience, there must be an inconvenience so minimally damaging, so utterly trivial, so profoundly petty, that it should not give rise to a Section 8(a)(1) violation. If so, this is it." See, *Eastern Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 426 (4th Cir. 1999). General Counsel's allegations are trivial and petty as evidenced by their inaction to this exact same language in November 2014. For this reason, this allegation should be dismissed pursuant to § 10(b) of the Act.

Even if not dismissed, the language in italics is not broadly written with sweeping non-exhaustive categories that encompass nearly any and all information related to Midwest. On the contrary, the language expressly prohibits only information related to "company trade secrets" and "confidential business information." Midwest has an interest in protecting its trade secrets as it is in competition with other Ports throughout the Great Lakes region and, as such, seeks to ensure that pictures and video illustrating how Midwest performs its services are not revealed to its competitors. A rule or policy violates § 8(a)(1) if it can be reasonably be read by employees to chill their § 7 rights. See, *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). Here, a reasonable employee would not interpret

“company trade secrets” and “confidential business information” to prohibit their right to discuss wages, benefits and other terms and conditions of employment with co-workers, non-employees, or union representatives. See e.g., *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003) (rule prohibiting disclosure of “employee information, including organizational charts and databases, where context indicated that rule was limited disclosure of employer’s private business information.) Employees reading the entire rule would not believe that wages were the kind of information that falls within the scope of “company trade secrets” or “confidential business information.” Midwest is entitled to protect its proprietary information as to how the dock operates.

D. EXCEPTION III – ALJ FINE ERRED IN FINDING RESPONDENT’S CONFIDENTIALITY AGREEMENT POLICY #2550 VIOLATED SECTION 8(A)(1) OF THE ACT

Midwest’s Confidentiality Agreement policy #2550 states as follows:

Use of Confidential Information by Employees

I, _____, as an Employee of Midwest Terminals of Toledo International, Inc. (MWTTI) or Midwest Terminals of Toledo, Inc. (MWTT) I do hereby acknowledge that I must comply with a number of State and Federal Laws that regulate the handling of confidential and personal information regarding both customers/clients of this company and its other employees. These laws may include but not be limited to FACTA, HIPAA, GINA, The Economic Espionage Act, The Privacy Act, Gramm/Leach/Bliley ID Theft Laws (where applicable), Trade Secrets Protections, and Implied Contract Breach.

I understand that I must maintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose. Any other use of said information is strictly prohibited and is cause for immediate dismissal. Additionally, should I misuse or breach, any personal information or the expectation of privacy of said clients and/or employees; I understand that I will be held fully accountable both civilly and criminally, which may include, but not limited to, Federal and State fines, criminal terms, real or implied financial damages incurred by the client, employee, or this company.

I further agree to follow the rules and regulations this company has in place as regards to the handling of confidential information so as to protect the privacy of all involved.

See, J. Ex. B, p. 10. ALJ Fine found this language overly broad and unlawful. Decision, pp. 32-33. To the contrary, the first paragraph specifically limits this policy to certain federal and state laws related to the handling of confidential and personal information. The opening paragraph cannot be discounted. “[I]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” See, *Lutheran Heritage, supra*, at 646. ALJ Fine did precisely what the Board in *Lutheran Heritage* said *not* to do – read particular phrases in isolation and presume improper interference with employee rights. Based upon the explanation of the type of information covered by the policy expressly set forth in first paragraph, employees would reasonably understand the rule to be limited the federal and state laws explicitly set forth in paragraph 1 and not a prohibition on conversations and/or disclosures about wages and benefits.

Moreover, this policy has been in place since at least December 2006 and has remained unchanged since that time. (See, J. Ex. E, p. 10, J. Ex. G, p. 7 and R. Ex. R.) The union filed charge No. 8-CA-137044 related to the Company’s 2014-2015 Handbooks in September 2014. Midwest submitted its position statement on November 23, 2014 and Region 8 subsequently dismissed the charge on November 28, 2014. (R. Ex. M.) Almost two years ago, the General Counsel did not believe the aforementioned language was unlawful on its face. However, ALJ Fine determined as follows:

Respondent also argues the Region did not challenge the maintenance of some of the then existing rules when Respondent’s rules were involved in an unfair labor practice charge filed in 2014. However, correspondence concerning that charge as

well as Respondent's position statement pertaining thereto reveals these issues were not being considered by the Region at that time. Moreover, since the continued maintenance of unlawfully restrictive work rules is in itself a violation of the Act, the dismissal a prior unfair labor practice charge does not impact on a finding of a violation here.

(Decision, p. 32.) The mere fact that the Region did not care enough to issue a Complaint in 2014 related to Midwest's Handbooks only further reinforces the reasoning of Court of Appeals for the 4th Circuit. With respect to purported handbook violations the Court of Appeals for the 4th Circuit eloquently stated: "[S]omewhere, in the vast human experience, there must be an inconvenience so minimally damaging, so utterly trivial, so profoundly petty, that it should not give rise to a Section 8(a)(1) violation. If so, this is it." See, *Eastern Omni Constructors, Inc.*, 170 F.3d at 426. General Counsel's allegations are trivial and petty as evidenced by their inaction to this exact same language in November 2014. For this reason, this allegation should be dismissed pursuant to § 10(b) of the Act.

E. EXCEPTION IV – ALJ FINE ERRED IN FINDING RESPONDENT'S SAFE WORKPLACE ENVIRONMENT #4500 VIOLATE SECTION 8(A)(1) OF THE ACT

Midwest's Safe Workplace Environment policy #4500 states as follows:

Teamwork, safe work behaviors and cooperation from all employees will help provide a safe and efficient work environment. Any employee who refuses or fails to follow the standards set forth herein will be subject to disciplinary action up to and including discharge. In cases not specifically mentioned, employees are expected to use good judgment and refer any questions to a supervisor.

Employees found participating in any of the following activities on any jobsite will be subject to immediate discharge (firing).

- Fighting or attempting a willful act to cause bodily injury upon another person – which constitutes Violence in the Workplace.
- Insubordination, threatening, or intimidating a supervisor, another employee or other site personnel – which constitutes Violence in the Workplace.

- Possession and/or use at any time of a prohibited weapon on Company property, in any facility maintained by the Company, and/or in Company---supplied vehicles or in personal vehicles while on Company property. Exceptions to this policy must have prior approval from the Company President.
 - Prohibited weapons include any form of weapon and any form of explosive restricted under local, state, or federal regulation. This includes all firearms, or other weapons covered by the law, regardless of whether the person is licensed to possess and/or use a weapon or not.
- Refusing to submit to a search when requested by management in accordance with this policy.
 - Upon reasonable suspicion, the Company reserves the right to conduct searches of any person, vehicle, or object on Company property at any time. Pursuant to this provision, the Company or its agent, is authorized to search lockers, desks, purses, briefcases, baggage, toolboxes, lunch sacks, clothing, vehicles parked on Company property, and any other personal effect or item in which a weapon may be hidden.
- *Violating others' expectation of privacy*
- Failing or refusing to cooperate with any investigation relating to a possible violation of this Safe Workplace Environment Policy

Employees found participating in any of the activities listed below are subject to disciplinary actions up to and including discharge:

- Violations of safety rules or OSHA standards;
- Harassment (of any form), horseplay, pranks, malicious mischief, or immoral conduct or other conduct affecting the right of others, or which violates the common decency of fellow associates;
- Failure to comply with TWIC/ gate admittance procedures;
- *Loitering or presence on the jobsite without authorization before or after assigned shift is completed;*
- Failing or refusing to report a known violation of this Safe Workplace Environment Policy.

This Safe Workplace Environment Policy does not constitute a contractual undertaking by the Company and the Company does not through this Policy, assume or offer to assume any obligations beyond that which may be imposed by applicable law. The Company reserves the right to alter, amend, or discontinue any Policy or program included in the Safe Workplace Environment Policy without notice at its sole discretion. The failure of the Company to exercise any function in any particular way shall not be

considered a waiver of the Company's right to exercise such function or preclude the Company from exercising that prerogative in some other way.

The Safe Workplace Environment Policy establishes clear guidelines that address prohibiting weapons, fighting, harassment and violence in the workplace to ensure a safe work environment.

I do hereby certify and acknowledge that I have received and read the Safe Workplace Environment Policy. I understand that engaging in prohibited behavior under the policy may result in discipline, up to and including removal from Midwest Terminals of Toledo International, Inc. (MWTTI) and/or Midwest Terminals of Toledo, Inc. (MWTT) premises, termination and legal action. I agree to uphold the Safe Workplace Environment Policy.

I release and agree to hold harmless MWTTI and MWTT, and its directors and associates for any action taken by the Company in compliance with the provisions of this policy.

A photocopy/facsimile of this authorization and release shall have the same force and effect as the original.

(See, J. Ex. B, pp. 44-45.)

ALJ Fine determined that the bold italicized language was overly broad. (Decision, p. 33.) Notwithstanding, the bolded italicized language noted above is not broadly written with sweeping non-exhaustive categories that encompass nearly any and all information related to Midwest. The phrase "violating others' expectation of privacy" addresses someone using a digital device to bully or harass another employee. For instance, taking a picture of another employee in the restroom or taking a picture of employees (without their permission) in a non-flattering circumstance and posting it online. (Tr. 348-350.) "Employees have a right to a workplace free of unlawful harassment." See, *Lutheran Heritage, supra*, at 648.

"[I]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Id.* at 646. Again, ALJ Fine did exactly

what the Board in *Lutheran Heritage* said *not* to do – read particular phrases in isolation and presume improper interference with employee rights. The phrase at issues herein (prohibition on the violation others’ expectation of privacy) is found in the Section entitled Safe Workplace Environment Policy #4500. The second page of the policy states: “The Safe Workplace Environment Policy established clear guidelines that address prohibiting weapons, fighting harassment and violence in the workplace to ensure a safe work environment.” A reasonable reading of the rule, in its entire context, precludes a finding that employees would construe the rule to prohibit Section 7 activity.

ALJ Fine determined that the italicized language was unlawful because the term “loitering” was not defined. (Decision, p. 33.) Additionally, ALJ Fine reasoned as follows:

[Midwest] goes further and erases any possible argument concerning the term loitering by also barring employees “presence on the jobsite without authorization before or after their assigned shift is completed.” This clearly eradicates the possibility of off duty employees participating in protected conduct inside and outside Respondent’s facility for the entire jobsite which would encompass work and nonwork areas and I find the maintenance of said rule violates Section 8(a)(1) of the Act. I do not find Respondent’s argument that since the facility is a secure facility, that employees need a TWIC to enter it through secure gates, allows Respondent to limit access to the entire jobsite for participation in off duty protected communications. Respondent has a 110 acre facility, which could be interpreted to include the whole jobsite. Employees are required to pass a background check to obtain passes to be present on the site. Having passed the background check, the Respondent has provided no basis to preclude them from engaging in off duty access normally accorded employees for participation in protected conduct.

(Decision, p. 33-34.)

First, this language has been in existence since at least March 2010. (See, R. Ex. R.) In 2014, this language was deemed lawful when the Region dismissed the union’s ulp charge related to the 2014-2015 Handbooks. (R. Ex. M). However, ALJ Fine determined as follows:

Respondent also argues the Region did not challenge the maintenance of some of the then existing rules when Respondent's rules were involved in an unfair labor practice charge filed in 2014. However, correspondence concerning that charge as well as Respondent's position statement pertaining thereto reveals these issues were not being considered by the Region at that time. Moreover, since the continued maintenance of unlawfully restrictive work rules is in itself a violation of the Act, the dismissal a prior unfair labor practice charge does not impact on a finding of a violation here.

(Decision, p. 32.) The mere fact that the Region did not care enough to issue a Complaint in 2014 related to Midwest's Handbooks only further reinforces the reasoning of Court of Appeals for the 4th Circuit. With respect to purported handbook violations the Court of Appeals for the 4th Circuit eloquently stated: "[S]omewhere, in the vast human experience, there must be an inconvenience so minimally damaging, so utterly trivial, so profoundly petty, that it should not give rise to a Section 8(a)(1) violation. If so, this is it." See, *Eastern Omni Constructors, Inc.*, *supra*, at 426.

General Counsel's allegations are trivial and petty as evidenced by their inaction to this exact same language in November 2014. For this reason, this allegation should be dismissed pursuant to § 10(b) of the Act.

Even if not dismissed, this policy language is lawful. Midwest is a secure facility and employees must enter and exit through a gate maintained by third party security guards. In order to gain entry, persons must have a TWIC and/or be escorted into the facility by someone who does. Midwest's policy is specifically limited to the "jobsite," i.e. the area necessarily inside the gates. In *Tri-County Medical Center*, 222 NLRB 1089 (1976) the Board stated that a no-access rule concerning off duty employees is valid if:

- (1) limits access solely with respect to the interior of the plant and other working areas;
- (2) is clearly disseminated to all employees; and
- (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

Midwest's policy meets all of the above criteria. Further, employees are not permitted inside the gate unless there is work available for them to perform based upon their seniority and qualifications. If work is not available to them they are not permitted entry. See, e.g., *Midwest Terminals of Toledo Int'l, Inc.*, 2015 NLRB LEXIS 231, *27-30 (2015) [Section entitled "Order of Call Procedure"] and *Midwest Terminals of Toledo Int'l, Inc.*, JD-04-16, p. 31, line 7 – p. 32, line 6 and p. 35, lines 21-35.

F. EXCEPTION V – ALJ FINE ERRED IN FINDING RESPONDENT'S DRIVER SAFETY REQUIREMENTS AND VISITOR SAFETY REQUIREMENTS VIOLATED SECTION 8(A)(1) OF THE ACT

Midwest's Driver and Safety Requirements state as follows:

Driver Safety Requirements

- Check in and out at the guard shack at the facility entrance.
- Driver must have a TWIC card or be escorted by a MWTTI employee while on company property.
- Drivers should remain in their trucks at all times except when performing work related activities.
- Wear the following required personal protective equipment when outside of the cab:
 - Hardhat
 - Safety Glasses
 - Reflective/High Visibility Clothing
- Forklifts, loaders, pedestrians, and trains have the right of way.
- Obey all traffic signs and posted speed limits, particularly when approaching and crossing rail tracks.
- Report all vehicle accidents, spills, injuries and property damage to MWTTI management.
- Do not park within eight (8) feet of any railroad tracks.

- Smoking is not allowed on MWTTI property. *Photography and recording are restricted at this facility at all times.*
- Chock wheels prior to loading/unloading activities at loading docks.

Visitor Safety Requirements

- Check in and out at the guard shack at the facility entrance.
- Visitors must be escorted by an MWTTI employee while on company property. Visitors must stay with the designated escort at all times.
- Visitors must park in appropriate designated areas.
 - Hardhat
 - Safety Glasses
 - Reflective/High Visibility Clothing
- Yield to all forklifts, trains, front---end loaders and other mobile equipment.
- Obey all traffic signs and posted speed limits particularly when approaching and crossing rail tracks.
- Visitors must report all vehicle accidents, injuries and property damage to MWTTI management.
- Smoking is not allowed on MWTTI property.
- *Photography and recording are restricted at this facility at all times.*

See, J. Ex. C, pp. 70-71. ALJ Fine determined that the language in italics violated Section 8(a)(1).

The 2015-2016 Safety Handbook was the first time this language was ever included in a Company Handbook. (Tr. 346-347.) However, these policies have been in place since 2012. (Id.) When a truck driver would enter the facility he would receive the aforementioned policies on a yellow sheet of paper and a visitor would receive the policies on a blue sheet of paper. (Tr. 347.) Blakey explained this to the employees during the March 2015 pre-season meeting. (Tr.

347-348.) Blakely wanted the employees to be aware that the Company was distributing safety provisions to various third parties upon entrance to the facility. (Tr. 348.)

A rule or policy violates § 8(a)(1) if it can be reasonably be read by employees to chill their § 7 rights. See, *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52, 340 U.S. App. D.C. 182 (D.C. Cir. 1999). Here, a reasonable employee would not interpret “driver safety requirements” and “visitor safety requirements” to prohibit their § 7 rights. ALJ Fine read these particular phrases in isolation and presumes improper interference with employee rights in violation of *Lutheran Heritage, supra*. The policies apply to drivers and visitors, not employees.

G. EXCEPTION VI – ALJ FINE ERRED IN FINDING RESPONDENT CAMERA, CELL, DIGITAL DEVICE POLICY #3100 VIOLATED SECTION 8(A)(1) OF THE ACT

Midwest’s Camera, Cell, Digital Device policy #3100 states as follows:

Policy Overview

The purpose of this policy is to regulate the use of company-issued and personal cell phones (and similar digital devices) in order to prevent distractions in the workplace and to help ensure the privacy, safety, and security, of all Midwest Terminals of Toledo International, Inc. (MWTTI) & Midwest Terminals of Toledo, Inc. (MWTT) *employees and visitors as well as prevent the improper disclosure of company trade secrets and confidential business information.*

Policy Requirements

Training: This policy should be reviewed with all employees annually. This policy should be reviewed with newly hired employees during the orientation process. Clear, posted signage both at the entrance and throughout the facility serves to communicate the basic policy to visitors and also remind employees of their responsibilities.

Procedural: To insure employee and visitors’ privacy, safety and security, all are expected to abide by this policy while on facility property.

Documentation: Annual review of this policy with all employees should be documented. The new employee orientation program should also include a review of this policy.

General Policy

I. Digital Equipment Usage

Employee cellular phone usage and use of personal digital devices (e. g. cameras, smartphones, tablets, and other mobile devices) while on duty shall be limited to necessary work-related activity whether the device is provided by the company or owned by individuals. Personal use of cell phones is only permitted during limited times when work responsibilities are not being performed.

*Use of cameras, whether cell phone cameras, stand-alone cameras, or cameras contained on any other such devices, whether digital or conventional film cameras – while on duty or when performing any functions for or on behalf of the company – is **restricted**.*

This policy applies to all full-time and part-time employees as well as all visitors. Employees who violate this policy are subject to disciplinary action, up to and including termination. Visitors who violate this policy will be immediately removed from the facility.

II. Procedures

Company-Issued Cell phones

A. Cell phones issued by MWTTI & MWTT are company property; consequently, employees must comply with requests to make their company-issued cell phone available for any reason (e. g. upgrades, replacement, or inspection).

B. Company-issued cell phones are to be used for business purposes; however, occasional personal use is acceptable provided conversations are kept brief.

C. Employees are responsible for the security of the company-issued cell phone. If lost or stolen, promptly notify your immediate supervisor.

D. Employees are prohibited from using company-issued cell phones to operate a business, solicit money for personal gain, campaign for political cause, or promote a religious or other personal cause.

E. Employees are prohibited from using company-issued cell phones to play online games, visit chat rooms, access any pornographic material, or engage in any illegal activity.

F. Employees should have no reasonable expectation of privacy when it comes to business and personal use of company-issued cell phones.

Personal Cell Phones

- A. Personal cell phones are not required by MWTTI and MWTT; therefore, employees should not expect reimbursement for use.
- B. MWTTI and MWTT are not responsible for costs associated with damage to or use of personal cell phones.
- C. Although MWTTI and MWTT allows employees to bring their personal cell phones to work, personal conversations should be kept to a minimum. Frequent or lengthy personal calls can affect safety, productivity, disturb others and may result in disciplinary action.
- D. Overtime rules apply to any type of work done after hours. All overtime work—including work-related calls—must be approved in writing in advance by the employee's immediate supervisor.

Cellular Telephone Use

- A. Cellular telephones are permitted to be carried while on duty, but must be placed on vibrate or silent mode; allowing for voice mail to answer calls. Messages may be checked on "down time" when not actively involved in the process of performing working duties. All phones should be silenced during business meetings, operations, seminars, conferences, and training.
- B. Cell phones should be carried in a safe area on the person that does not interfere with the physical requirements of the job, will not fall off, or cause others to be distracted by the presence or appearance of the device.
- C. Cell phone use must never be cause for delay in performing one's duties when on duty.
- D. While operating equipment or engaged in an operation, employees shall not, under any circumstances, respond to (or make) a personal cellular telephone call, send text messages, or check electronic mail on PDAs or other such devices.
- E. While on duty, employees are prohibited from using language that is obscene, discriminatory, sexually suggestive, intimidating, misleading, defamatory, and otherwise offensive (e. g. jokes, disparaging remarks, and inappropriate comments related to ethnicity, race, color, religion, sex, age, disability, or sexual orientation are prohibited).
- F. *On duty, use of cell phones to send electronic mail is expected to comply with company rules and polices including sexual harassment, discrimination, ethics, code of conduct, confidentiality, and workplace violence.*

G. Employees are prohibited from accessing any pornographic material while on duty or while on facility property.

H. Employees are **prohibited** from using hand-held cell phones while driving or operating company vehicles. When operational necessity requires making or receiving a cell phone call, stop the equipment and/or vehicle prior to making or taking a cell phone call.

Camera Use

A. *Employees while on duty and/or on facility property shall not be permitted to use cameras or other audio, picture, video, or image generating devices – including cell phone cameras – without prior written authorization from the Facility Security Officer or his designee.*

B. *All on-site photography or recording shall be for documentation or investigation purposes only and conducted at the direction or authorization of the Facility Security Officer or his designee.*

C. *Any photographs or recordings taken by an employee while on duty or facility visitor while on site are solely the property of MWTTI and/or MWTT and not the property of the individual. This includes any photograph or recording inadvertently taken with a personally owned cell phone camera or other digital imaging or recording device.*

D. *No photograph or recording (taken by an employee on duty or a facility visitor) may be used, printed, copied scanned, e-mailed, posted, shared or distributed in any manner without the express, written approval of the Facility Security Officer or his designee.*

Example: This prohibition includes but is not limited to posting photos or videos on Websites such as FaceBook, Instagram, SnapChat, Twitter, YouTube, or MySpace, or on other websites or e-mailing to friends, colleagues or others.

E. *Employees may not take or use images or recordings to harass, embarrass, annoy others and/or violate an individual's expectation of privacy. All company policies, including policies on harassment, discrimination, and professional conduct, apply to photographs and/or recordings taken.*

This policy will be reviewed annually or as needed and enforced at all times.

(See, J. Ex. B, pp. 20-23.) (emphasis in original.) Although Midwest has had a cell phone policy since at least February 2009, the policy outlined above far more detailed. (See, J. Ex. E, p. 20, J.

Ex. G, p. 15 & R. Ex. R.) Midwest also has a work rule prohibiting the use of cell phones while working. (See, work rules attached to collective bargaining agreement, J. Ex. A.) ALJ Fine determined that the italicized language is overly broad and restrains conduct protected by the Act because they “require clearance from [Midwest’s] personnel, limit recordings only to investigatory purposes and grant ownership of certain recordings to [Midwest], and across the board inhibit conduct some which [sic] would be protected by the Act” in violation of Section 8(a)(1). (Decision, pp. 34-36.)

Camera, Cell, Digital Device Policy #3100 is meant to ensure the privacy, safety and security of ALL employees and visitors (including but not limited to contractors, ships’ crews, etc.). As noted above, the Port of Toledo is considered a soft spot for terrorists and the number one spot on the Great Lakes for a potential attack. (Tr. 385.) Accordingly, this language is meant to keep out of the *public eye* the type of cargo that is coming into the Port and how the Port is operated from a security standpoint. (Tr. 166-167.) Cargo that can be used as explosives is sometimes stored at the Port, as well as other cargo that can be sold on the black market for significant amounts of money. (Tr. 399-400.) Midwest’s polices are meant to ensure the safety of its employees, the customer’s product and the Region as a whole. Midwest has an obligation to ensure all employees (and visitors) expectation of privacy. Midwest also has an obligation to its customers to provide a secure facility for loading, off-loading and storage of their cargo. Additionally, Midwest has an interest in protecting its trade secrets as it is in competition with other Ports throughout the Great Lakes region and, as such, seeks to ensure that pictures and video illustrating how Midwest performs its services are not revealed to its competitors. Put simply, Midwest has an obligation to provide a safe work environment and this policy sets forth what is and is not permitted to ensure said work place environment. (Tr. 348-350.)

Midwest is not prohibiting recordings and photographs, it is merely restricting them. For instance, as initially discussed above, R. Ex. AA is a 2014 video taken by a former union steward regarding the unloading of calcium bags. Under Midwest's new 2015 policy, the recording is not prohibited, but it is restricted due security concerns and customer concerns related to cargo. (Tr. 353-355.) The policy requires approval from the FSO. (Id.) Moreover, any recordings must be done in safe manner, i.e., not while operating equipment. (Tr. 255-256.) The video portrayed in R. Ex. AA was recorded by the union steward while he was operating a forklift, a violation of the work rules and the old cell phone policy. (Id.)

The policy specifically states that all photography and recording shall be for documentation or investigation purposes only..." Midwest is clearly recognizing the employees' rights to document or investigate any Section 7 concerns. Moreover, contrary to ALJ Fine's findings otherwise, the policy is limited to working time (on duty time) thereby distinguishing itself from the unlawful rules in *Rio All Suites Hotel and Casino* which contained no such limits. See, 2015 NLRB LEXIS 663, * 12 (2015) ("Camera phones may not be used to take photos on property without permission from a Director or above" and "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes.") Lastly, employees do not have Section 7 right to harass other employees. See, *Lutheran Heritage, supra* at 648 ("Employees have a right to a workplace free of unlawful harassment").

H. EXCEPTION VII – ALJ FINE ERRED IN FINDING RESPONDENT'S INCIDENT REPORTING POLICY #1600 VIOLATED SECTION 8(A)(1) OF THE ACT

Midwest's Incident Reporting Policy # 1600 states as follows:

Policy Overview

Incident Reporting (injuries, fires, property damage, releases/spills, etc.) is a critical function in which all levels of the organization assume a major responsibility. This policy directs each management level to take an active role to lead, guide and assist employees in creating an injury free workplace. The following procedure outlines the roles and responsibilities for Incident Reporting.

Policy Requirement

Training: All levels of the organization should review this policy on an annual basis. All new employees should review this policy during the orientation process.

Procedural: All levels of the organization must take an active role in administering the Safety Program.

Documentation: All new employees will be made aware of this policy at the time of their orientation. All levels of management should review this policy on an annual basis. All reviews of this policy will be documented appropriately.

General Policy Incident Reporting Procedures

1. Responsibilities

- 1.1 The Director of Operations and Operation Managers will be responsible for monitoring and providing a safe job site.
- 1.2 All employees are responsible for the immediate reporting of all incidents to their supervisor. Creation of a record in the online Incident Reports DB will generate and send an email to all parties requiring notification. Injuries requiring medical attention (High Priority) will be reported to the corporate office immediately after the 911 call. Medium and Low Priority incidents (i. e. injuries requiring First Aid, non-treatment, minor property damage, and near misses) will be reported to the corporate office the same day of the incident. The Operations Manager will determine priority level.
- 1.3 The HR Manager is responsible for following up and making certain all Incident Report information is accessible to the corporate HR Director.
- 1.4 On occasions where a HR Manager is present, s/he will provide technical support for the Operations Manager and/or Supervisors.
- 1.5 All incidents must have appropriate reporting, accurate recording and thorough investigation.

2. Reporting

2.1 The MWTTI Incident Report Form must be submitted when an incident occurs:

2.1.1 The Supervisor must complete and sign this form. An Incident Report must be submitted when the following incidents occur:

- A MWTTI employee suffers a work---related injury.
- Contractor, customer, or visitor suffers an injury.
- Damage to MWTTI property
- Damage to another's property by a MWTTI employee.
- Situation occurs which has the potential of causing an injury, damage or loss of property (near miss).

2.2 When an injury occurs requiring treatment beyond First Aid, all appropriate US Department of Labor forms must be completed by the HR Manager and submitted to the corporate HR Director for final approval and mailing to the USDOL.

2.3 Notify Occupational Safety and Health Administration (OSHA) and other applicable regulatory authorities immediately if required. OSHA must be notified within eight (8) hours after the death of any employee from a work related incident or the inpatient hospitalization of three or more employees as a result of a work-related incident. Report the fatality/multiple hospitalization by telephone or in person to the area OSHA office, U.S. Department of Labor that is the nearest to the site of the incident. The OSHA toll-free central telephone number may also use: 1-800-321-OSHA (6742).

2.4 If any of the above incidents occur, the safety of the individuals is the primary concern. If an injury is reported, the Operations Manager or Supervisor must ensure that the injured party receives prompt medical attention. Consult Crisis Management procedures for requesting medical or emergency assistance.

2.5 All injuries must be reported, no matter how minor in nature. This includes Non-Treatment, First Aid, and Medical Treatment and/or Lost Time cases. It is important that all First Aid or Non-Treatment injuries

are documented in the event future medical attention may become necessary.

- 2.6 The report(s) must be ACCURATE and FULLY COMPLETED along with the SIGNATURE of the individual(s) completing the form. Missing information will require the form to be RETURNED FOR COMPLETION thus causing delays in payment of medical fees and/or compensation benefits to the injured Associate in the case of an injury report. When describing the events leading to the injury or property damage, be specific. Describe in detail the incident, the location, and if any safety equipment was or was not being used. Forward the completed report(s) to corporate headquarters, to the attention of the HR Director, who will make necessary distribution.

3. Incidents Involving Hospitalization or a Fatality

- 3.1 *Because it is likely that incidents involving a hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs, shall be prepared for review by legal counsel, so that legal counsel may provide the company with advice. Accordingly, all reports and related documents shall be marked as follows:*

PRIVILEGED AND CONFIDENTIAL - ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION

This legend is included on the MWTTI Incident Report Forms and is to be checked when reporting these types of incidents.

- 3.2 *No incident reports or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO.*

(See, J. Ex. C, pp. 44-46.) ALJ Fine concluded that the italicized language was overly broad as related to safety conditions at work in violation Section 8(a)(1) of the Act. ALJ Fine specifically stated: “This policy appears to be overbroad in that it appears to prevent employees from sharing all photographs and/or other documents relating to incidents involving hospitalization or fatalities with their co-workers, union, or government agencies.” (Decision, p. 36.)

First, this language was first implemented in 2012 and the language has remained unchanged since its inception. (See, J. Ex. F, pp. 46-48, J. Ex. H, pp. 46-48.) In 2014, this

language was deemed lawful when the Region dismissed the union's ulp charge related to the 2014-2015 Handbooks. (R. Ex. M). However, ALJ Fine determined as follows:

Respondent also argues the Region did not challenge the maintenance of some of the then existing rules when Respondent's rules were involved in an unfair labor practice charge filed in 2014. However, correspondence concerning that charge as well as Respondent's position statement pertaining thereto reveals these issues were not being considered by the Region at that time. Moreover, since the continued maintenance of unlawfully restrictive work rules is in itself a violation of the Act, the dismissal a prior unfair labor practice charge does not impact on a finding of a violation here.

(Decision, p. 32.) The mere fact that the Region did not care enough to issue a Complaint in 2014 related to Midwest's Handbooks only further reinforces the reasoning of Court of Appeals for the 4th Circuit. With respect to purported handbook violations the Court of Appeals for the 4th Circuit eloquently stated: "[S]omewhere, in the vast human experience, there must be an inconvenience so minimally damaging, so utterly trivial, so profoundly petty, that it should not give rise to a Section 8(a)(1) violation. If so, this is it." See, *Eastern Omni Constructors, Inc.*, *supra*, at 426 (4th Cir. 1999). General Counsel's allegations are trivial and petty as evidenced by their inaction to this exact same language in November 2014. For this reason, this allegation should be dismissed pursuant to § 10(b) of the Act.

Notwithstanding, the language noted above is limited to incidents involving hospitalization or a fatality. The rule is not overly broad. The inquiry necessitates a case by case determination. Under the Board's balancing test, the employer would have a legitimate business interest in certain circumstances involving hospitalization and most especially with fatalities. See, *Hyundai America Shipping Agency*, 2011 NLRB LEXIS 498 (2011) (to justify a prohibition on employee discussions concerning ongoing investigations, an employer has to establish a legitimate business justification that outweighs employees section 7 rights; a generalized concern with

protecting the integrity of investigations is not enough.) Again, Midwest's policy is limited and is not a blanket restriction on all incident reports and/or investigations. More importantly, ALJ fine determined that this policy "*appears* to be overbroad." (emphasis added.) Board precedent is clear that the test is whether a rule reasonably "would" be construed as curtailing Section 7 activity, not whether it "can," "could," or "appears" to be so construed. *See, e.g., Lutheran Heritage, supra*, at 647 ("Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.") (Emphasis in original.)

I. EXCEPTION VIII – ALJ FINE ERRED IN FINDING THAT THE UNION DID NOT WAIVE ITS RIGHT TO BARGAIN OVER THE POLICY AND SAFETY HANDBOOKS AND, THEREFORE, RESPONDENT UNILATERALLY CHANGED AND SUBSEQUENTLY IMPLEMENTED THE FOLLOWING POLICIES IN VIOLATION OF SECTIONS 8(A)(5) AND (1) OF THE ACT: (1) 2015-2016 POLICY HANDBOOK – NONDISCLOSURE/CONFIDENTIALITY POLICY #2500 AS IT RELATES TO CAMERA USAGE; (2) 2015-2016 HANDBOOK – CAMERA, CELL, DIGITAL DEVICE POLICY #3100; (3) 2015-2016 SAFETY HANDBOOK – DRIVER SAFETY REQUIREMENTS; (4) 2015-2016 SAFETY HANDBOOK – VISITOR SAFETY REQUIREMENTS; AND (5) 2015-2016 STANDARD OPERATING PROCEDURES

ALJ Fine concluded that the following polices were unilaterally changed and subsequently implemented in violation of Sections 8(a)(1) and (5) of the Act: (1) 2015-2016 Policy Handbook – Nondisclosure/Confidentiality Policy #2500 as it relates to camera usage; (2) 2015-2016 Handbook – Camera, Cell, Digital Device Policy #3100; (3) 2015-2016 Safety Handbook – Driver Safety Requirements; (4) 2015-2016 Safety Handbook – Visitor Safety Requirements; and (5) 2015-2016 Standard Operating Procedures. (Decision pp. 37-47).

a. Policy and safety handbooks.

Midwest maintains that the union has waived its right to bargain over the Policy and Safety Handbooks. In order to establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment of that right. See, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Waiver can occur in any of three ways: by express contract language, by the parties' conduct (including past practice, bargaining history, action or inaction) or by a combination of the two. See, *American Diamond Tool*, 306 NLRB 570 (1992). Here, past practice, bargaining history and the union's inaction clearly establish waiver.

Midwest has not and does not bargain with the union over its Handbooks. (Tr. 362.) To be sure, as of the date of the hearing, no member of the union's bargaining committee (Brown, Prentis Hubbard ["Hubbard"]⁵ and Andre Joseph ["Joseph"]⁶) has ever requested that the Company bargain over to policies set forth in the Policy Handbook or the Safety Handbook. (Tr. 363.) Joseph testified that since 2012 he has not requested any changes to the Midwest's Handbooks. (Tr. 150-151.) Hubbard testified that he has attended numerous bargaining sessions since October 2012 and the union has never requested that the Company bargain over the Policy Handbook and/or the Safety Handbook. (Tr. 194 & 196.) Brown testified that since the time he took office in 2012 the parties have participated in over 24 bargaining sessions and the union has not proposed a Handbook nor has the union requested that Midwest bargain over its Policy Handbook and/or Safety Handbook. (Tr. 250, 271-273.) The union's own witnesses corroborated the testimony elicited by the Company, i.e., Midwest has never bargained with the

⁵ Hubbard has worked at Midwest since 2006 and is a union official; Vice President, Dock Steward, Financial Secretary and member of the Safety Committee. (Tr. 169-170.)

⁶ Joseph is the Vice President for the Atlantic Coast District of the International Longshoremen's Association and has participated in contract negotiations with the Company since 2011 when he was appointed as a Trustee. (Tr. 104-105.)

union over the policies set forth in its formal Handbooks or the various individual policies in place prior to 2012.

Secondly, the union, through past practice, is well aware that Midwest conducts mandatory pre-season training/meetings *every* March prior to the beginning of *each* shipping season. During these meetings, the Company reviews the collective bargaining work rules⁷ and Company policies and, starting in 2012, distributed a Policy Handbook and a Safety Handbook. Christopher Bates, a member of the union testified that the meetings occur every year. (Tr. 95-96.) Hubbard testified that every year the union went to the pre-season meeting and the Company never met with the union prior to distributing the Handbooks. (Tr. 199.) Hubbard later testified that prior to the 2012 meeting the union did have a chance to go over the Handbook. (Tr. 200.) Even if true, one-time events are not the equivalent of establishing a past practice. See, *American Electric Power*, 2015 NLRB LEXIS 387, *76 (2015). See also, *Crittenden Hospital*, 2002 NLRB LEXIS 230, *26 (2002) (one-time change in the dress code, even if undertaken unilaterally by the Hospital without consulting union, hardly qualifies as a longstanding and established past practice); *Blue Circle Cement Co., Inc.*, 319 NLRB 661, 667 (1995) (one-time occurrence not sufficient to indicate a past practice); and *Piggly Wiggly Midwest, LLC*, 2012 NLRB LEXIS 287, *116 (2012) (one-time event does not constitute evidence of a an established past practice.) Brown testified that Midwest has consistently held pre-season meetings for the past ten (10) years wherein the Company reviews its policies. (Tr. 256.)

⁷ The work rules are attached to the collective bargaining agreement (J. Ex. A) and the parties did bargain over these rules. (Tr. 361.)

Nonetheless, the union has never requested that Midwest bargain over the Handbooks both prior to or subsequent to any of these meetings. Additionally, the union filed a ulp charge with respect to changes made to the 2014-2015 Handbooks alleging that Midwest violated Sections 8(a)(1) and (5) of the Act. (R. Ex. M.) Region 8 dismissed the charge. (Id.) At no time subsequent to the dismissal did anyone from the union request that Midwest meet and bargain over the Handbooks. It is clear that the parties' conduct (past practice and bargaining history) and the union's inaction constitutes a waiver.

Midwest's waiver argument and past practice argument necessarily include the survival of the management rights clause. Midwest made the same argument during Region 8's investigation of 8-CA-137044. (R. Ex. M, Midwest's Position Statement). ALJ Fine admitted there was no testimony presented by the union that the management rights clause did not survive the contract expiration. Brown himself testified that the parties were following the terms and conditions of the expired contract, save for the arbitration clause. (Decision, p. 41, FN 13.) ALJ Fine is merely making conclusions not supported by the record in an effort to support his findings. Notably, in litigation before United States District Court, Northern District of Ohio, Case No. 3:13-cv-868, the union is maintaining that the contract did not expire pursuant to the evergreen clause in the collective bargaining agreement. Here, the union maintains and ALJ Fine obliges, that the collective bargaining agreement has expired because it better fits their agenda for a results oriented decision against Midwest.

In an attempt to contest Midwest's waiver claim ALJ Fine relied upon the testimony of Hubbard, Joseph and Brown. Hubbard testified that he informed Leach at both the 2014 and 2015 pre-season meeting that the men were going to sign the Handbooks under protest because the Company did not bargain with the union over the Handbooks as they have done in years past.

(Tr. 173-176 & 178). First, Hubbard's testimony is untrue as the record evidence unquestionably establishes that the parties never bargained over the Company's Handbooks or the policies outlined therein. Hubbard also testified that in 2012 the union was able to review the Handbooks prior to distribution. Even so, it is clear the union did not bargain over the 2012 Handbooks or the policies outlined therein. Secondly, Hubbard acknowledged that even though the union signed the Handbooks under protest, the union never once raised this issue during contract negotiations. (Tr. 205.)

Joseph testified that he bargained over an Employee Handbook during the 2011 negotiations. (Tr. 109.) Notwithstanding, Joseph acknowledged that the provisions in his Handbook were nothing more than Articles from the expired contract and/or the Master Agreement that were simply removed from the contract and placed into the Handbook. (Tr. 113-118 & 130-132.) Similarly, Blakely testified that in 2011 Joseph provided a sample Handbook from Burns Harbor. (Tr. 300-302.) The Handbook did not contain any work rules. The work rules are attached the collective bargaining agreement and those were negotiated by the union and Midwest. (Tr. 300-302 & 304-305.) Rather, Joseph's Handbook was a lot of duplication from the Master Agreement and included things such as the hiring process, job descriptions, how one is referred, medical insurance and the skilled list, regular list and casual list. (Tr. 300-302, 304-306 and Decision, p. 5.) Joseph and the union were not proposing new policies. They were only moving certain articles from the expired contract and the Master Agreement and into an Employee Handbook.

Brown and Joseph admitted that they have yet to make any proposals with respect to the Employee Handbook because they had not yet had the opportunity to do so. (Decision, pp. 7 and 41, FN 12.) Contrary to ALJ Fine's findings noted on page 41, FN 12, Joseph did not testify that

the parties had agreed to a bargaining procedure in which they had not yet reached the work rules. Joseph simply testified that the union (over 3-4 year period) had not yet had the opportunity to make any proposals related to the handbook. (Decision, p. 7.) Generally, speaking, parties negotiate language first and then economics. Brown's testimony necessarily maintains that the parties agreed to negotiate language first (CBA only), then economics, then the handbook. (Id.) Brown's testimony is self-serving and, as discussed in Section III, B, *infra*, Brown is not a credible witness as he is prone to fabricating testimony. Nevertheless, ALJ Fine was all too eager to rely upon Brown's testimony to support his decision that the union had not waived its right to bargain over the Handbook even though the union admitted to never having requested to bargain over the Company's Handbooks or ever having made any proposals related to the Company's Handbooks,

ALJ Fine ultimately concluded as follows:

I do not find that Respondent has met its burden of proof concerning a past practice concerning the unilateral changes in work rules or work policies to afford it the right for its unilateral action here. See, *Beverly Health & Rehabilitation Services*, above; *Verizon New York, Inc. v. NLRB*, above; *NLRB v. Miller Brewing Co.*, above; *Owens-Brockway Plastic Products*, above; and *Owens-Corning Fiberglass*, above. **Rather, the evidence shows the parties had a history of bargaining over work rules, some of which were attached as an exhibit in the expired CBA**, and in negotiations that took place in 2011 following the CBA's expiration. Moreover, the Union lodged strong protests in 2014 and 2015 against Respondent's unilateral changes in its handbooks. Thus, I reject Respondent's claim that there was a waiver by past practice.

(Decision, p. 47.) (emphasis added.) Midwest readily admits that the work rules attached to the CBA were bargained for. However, those rules are not at issue herein, only the Handbooks. The record is replete with evidence that Midwest has never bargained with the union over the policies set forth in its Safety Handbook and Policy Handbook. To be sure, on September 18, 2014 the union filed a ulp charge (8-CA-137044) with Region 8 alleging that Midwest violated Sections

8(a)(5) and (1) of the Act when on or about March 22, 2014 Midwest “disseminated policy changes without notifying or bargaining with the union regarding these changes.” (R. Ex. M.) On November 28, 2014, the Region dismissed the charge noting that there was insufficient evidence to establish a violation of the Act. (Id.) Midwest followed the same procedure in 2012, 2013, and 2015 as it did in 2014 when the Region determined that Midwest’s actions did not violate the Act. It is clear that the union waived its right to bargain and that this complaint allegation should have been dismissed.

b. Standard operating procedures

ALJ Fine determined that Midwest failed to bargain over the Standard Operating Procedures set forth in J. Ex. D. (Decision, pp 37-47.) However, there was nothing to bargain. Midwest simply put into writing the procedures it had long followed. Midwest was required to do so as part of an March 22, 2014 informal settlement agreement with OSHA. Midwest was required to do the following:

The Employer agrees to systematically work through their Standard operating Procedure (SOP) manual to review and update their procedures to create more specific SOP’s similar to the format of the “SOP - Loading and Unloading Material”. A labor representative will be part of this process; the make-up of the reviewing group can change based upon the procedure being reviewed, but a labor representative will be present for these reviews.

(GC. Ex. E, ¶ 8.) The plain language of the document is clear. Midwest was to review and update their procedures and a labor representative was to be a part of the process. This is precisely what Midwest did and Rizo, the union’s own foreman, was a part of the process. Rizo is the most experienced and knowledgeable worker when it comes to all aspects of the facility. Midwest simply put into writing the operating procedures it had been using since 2007 when Leach hired.

Even if Midwest was required to bargain over this issue, the union waived its right to do so. Brown was present during the OSHA meeting and knew Midwest was required to review and update its SOP's. In any event, the union waited until March 19, 2015 to inform Midwest that he was the union's "labor representative." As noted in the SOP Manual, the SOP's were updated and reviewed in April and May 2014 (J. Ex. D), long before the union designated a "labor representative." As noted above, the union's own foreman was part of this process.

IV. CONCLUSION

For the reasons outlined above and in accordance with the evidence, the Respondent respectfully requests that the Board find contrary to Administrative Law Judge Fine's rulings, findings, conclusions and the recommended Order with respect to the issues presented in these exceptions and dismiss the Complaint allegations.

Dated at Dublin, Ohio on this 31st day of October, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 31, 2016, an electronic original of Respondent Midwest Terminals of Toledo International, Inc.'s Exceptions and Brief in Support was filed via the Department Of Labor, National Labor Relations Board electronic filing system, Office of the Executive Secretary and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL, INC.**

and

CASE 08-CA-152192

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 1982, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board (Board), the undersigned Counsel for the General Counsel respectfully files this Answering Brief to Respondent's Exceptions to Administrative Law Judge Eric Fine's Decision.¹

On December 3 and 4 2015, in Bowling Green, Ohio, and on January 20, 2016 in Fostoria, Ohio, a hearing concerning this matter was held before the Honorable Eric Fine (ALJ). On September 19, 2016, the ALJ issued his detailed and well-reasoned decision in JD-89-16 (ALJD). The ALJ concluded that Respondent committed several Section 8(a)(1) violations as alleged in paragraphs 7, 8, 9 and 10 of the Complaint. The ALJD provided for a remedy, recommended Board Order and Notice to Employees to remedy these violations of the Act. On October 31, 2016, Respondent filed its Exceptions to the ALJ's Decision.

A. Exception I – the ALJ Did Not Err in Crediting Otis Brown.

Respondent's first exception, which generally challenges all of the ALJ's credibility findings, specifically challenges the ALJ's credibility findings regarding Union President Otis

¹ In this Brief, Midwest Terminals of Toledo International, Inc. will be referred to as "Midwest," "Respondent" or "Employer;" International Longshoreman's Association, Local 1982, AFL-CIO will be referred to as "Charging Party" or "Union." The ALJ's Decision in JD-89-16 will be identified with "ALJD" and P. __, Ln. __; Respondent's Exceptions and Brief in Support to the ALJ's Decision will be identified with "Respondent's Exceptions" and P. __; and references to the official transcript of this proceeding will be referred to as Tr. __.

Brown. Respondent asserts that the ALJ erred in crediting Brown over Terry Leach, Midwest's Director of Operations, regarding their testimony about the Employer's failure to follow the OSHA settlement. ALJD, P. 26, Ln 2-3. Respondent also argues that the ALJ erred in crediting Brown's testimony that the parties had an agreed-upon procedure as determined in their last contract negotiations to address the employee handbook. ALJD P. 7, Ln 35-37; P. 41, fn. 12.

Established Board precedent requires a clear preponderance of all relevant evidence to predicate a finding that an ALJ's credibility resolutions are incorrect. Dayton Heidelberg Distrib. Co., 364 NLRB No. 148, fn. 1 (2016); NLRB v. Electro-Wire Truck & Indus. Prod. Grp., 995 F.2d 1067 (6th Cir. 1993); Inova Health Sys. v. N.L.R.B., 795 F.3d 68, 74 (D.C. Cir. 2015); Standard Dry Wall Products, 91 NLRB 544, 545 (1950), *enfd.* 188 F. 2d 362 (3d Cir. 1951); *see also* E. Coal Corp., 79 NLRB 1165, 1166 (1948) ("Because a Trial Examiner has the opportunity of observing the demeanor of witnesses who are testifying, it is the established policy of the Board to attach great weight to his credibility findings and it will not overrule them unless they clearly appear to be unreasonable"). This is the Board's standard of review in reviewing an ALJ's credibility findings. The ALJ's credibility determinations are fully supported by the record evidence and testimony and there is no clear preponderance of the evidence to support that the ALJ's credibility resolutions should be overruled.

Respondent misstates Brown's testimony regarding his attendance at a 2013 meeting. Respondent's Exceptions at P. 9. The ALJ acknowledged that Brown, upon reviewing the sign-in sheet, admitted his mistake that he did not attend the meeting in question. ALJD P. 23, Ln 5-6, and P. 11, fn. 5. The ALJ stated in his decision that in making his credibility determinations, he duly considered "the remoteness of certain events, the documentary evidence, the witnesses' demeanor including whether they were argumentative, sought to deflect, and professed a lack of recall of certain events which under normal circumstances their recollection should have been clearer." ALJD P. 22, Ln 30-33.

Next, Respondent attacks the ALJ's credibility determinations regarding the testimony of Terry Leach and of Brown regarding the OSHA settlement and Standard Operating Procedures. Respondent's Exceptions at P. 9. Respondent argues that the inconsistencies in Brown's testimony regarding his attendance at the 2013 mandatory pre-season meeting color all of Brown's testimony. Notwithstanding Respondent's all-or-nothing approach with respect to Brown's testimony, it fails to identify and address Leach's inconsistent, contradictory and self-serving testimony, and

conveniently ignores the ALJ's conclusion that he did not find Leach's testimony on this issue to be persuasive. ALJD P. 25, Ln. 44. Instead, the ALJ cited specific examples as to why Leach's testimony should not be credited over that of Brown. Specifically, the ALJ found that the Respondent's standard operating procedures were not sufficiently know, being followed, or as concrete in format as Leach portrayed them until the Respondent unilaterally adopted its handwritten manual in 2015, to the exclusion of the Union. ALJD P. 25, Ln. 44-50; P. 26, Ln. 1-5.

Finally, Respondent argues at P. 10 of its Exceptions that the ALJ made "self-serving" credibility determinations to explain the Union's bargaining posture with respect to the handbooks, in an effort to explain away the Respondent's perception that the Union failed to request bargaining over or make proposals regarding the Respondent's handbooks. Respondent, however, fails to offer any evidence as to why the ALJ's finding that Brown credibly testified regarding the parties' bargaining was incorrect. Respondent also fails to acknowledge that the ALJ found the testimony of Union witness Andre Joseph corroborated Brown's testimony. ALJD P. 41, fn. 12.

On the basis of the above, Counsel for the General Counsel urges the Board to reject Respondent's Exception I.

B. Exception II - ALJ Fine Did Not Err in Finding that Respondent's Non-Disclosure/Confidentiality Policy #2500 Violates Section 8(A)(1) of the Act.

Respondent argues that the language in this rule does not prohibit photographs and recordings, rather it only restricts them. It claims that the rule is properly constructed to address Respondent's unique security and the rule is not unlawfully overbroad. Respondent's Exceptions, P. 11. The ALJ fully considered Respondent's argument about its asserted security needs, and properly focused on the rules' lack of any limiting language, absence of any descriptive context, and complete deficiency in detailing its specific security concerns. ALJD P. 32, Ln. 6-7, 19-20.

Despite the fundamental difference in the rules at issue, Respondent incorrectly relies upon Flagstaff Medical Center, 357 NLRB 659 (2011). The rule in that case specifically prohibited that the photography during "work time." Id. at 662, 683. The ALJ paid particular attention to this important distinction in his analysis of whether or not an employer's prohibition would reasonably be interpreted to restrict Section 7 activity when it is limited to work time. Whole Foods Mkt., Inc., 363 NLRB No. 87, at fn. 10 (2015); *and* T-Mobile USA, Inc., 363 NLRB No. 171, slip op. at 1-5 (2016); *See also* Brunswick Corp., 282 NLRB 794, 795 (1987)

(holding that any rule that requires employees to obtain an employer's permission before engaging in protected concerted activity on an employee's free time and in non-work areas is unlawful).

The Employer's policy also prohibits employees from improper use or disclosure of confidential business information, relying on a broad definition covering union matters, personnel information, contact information and accounting data, without providing specific inclusions or exclusions, and without providing proper context. The ALJ properly found that the rule "explicitly restricts activities protected by Section 7 of the Act." ALJD P. 31, Ln. 45. Respondent's definition of confidential business information is simply too expansive and written so broadly that it covers *all* contact information, *all* accounting data, *all* personnel information, and union related information (emphasis added). Any single item from this list would be construed by employees restrict discussion of wages and other terms and conditions of employment with their fellow employees, and is unlawfully overbroad under Board law. Cintas Corp., 344 NLRB 943 (2005), *enfd.* 482 F.3d 463 (2007); Lily Transportation Corp., 362 NLRB No. 54, (2015).

Respondent also incorrectly claims that allegations concerning rules that have been maintained since 2014, or earlier, are time-barred by Section 10(b). Respondent fails to address that it has continuously maintained these work rules; and also ignores that there are rules at issue in this proceeding that by Respondent's own admission have been established and maintained within the Section 10(b) period. Respondent's Exceptions, P. 11-12. As previously argued in Counsel for the General Counsel's post-hearing brief, the Respondent distributed the handbooks to employees at the beginning of the shipping season in March 2015. Tr. 294. The charge and first-amended charge were filed on May 14 and July 28, 2015, respectively, well within the six-month time period prescribed by Section 10(b) to support the allegations of the complaint.

For the reasons set forth above, Counsel for the General Counsel urges the Board to reject Respondent's Exception II.

C. Exception III – the ALJ Did Not Err in Finding that Respondent's Confidentiality Agreement Policy #2550 Violates Section 8(A)(1) of the Act.

Respondent argues that this policy is lawful on the basis that the opening paragraph requires compliance with State and Federal laws. Respondent ignores and fails to address how this policy latches onto the expansive definition of "confidential business information," as it is

described in its Non-Disclosure/Confidentiality Policy #2500, which is discussed above. Bootstrapping the definition from Policy #2500, this mandatory agreement requires employees to “maintain the confidentiality of ALL documents, credit card information, and personal information of any type and that such information may only be used for the intended business purpose.” Respondent’s Exceptions, P. 14. Such a broad prohibition is clearly contrary to Board law. T-Mobile USA, Inc., *supra*; see also Hoot Winc, LLC, 363 NLRB No. 2 (2015) (finding employer’s “unauthorized dispersal of sensitive company materials” rule unlawful because employees would reasonably believe they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as, for example, union representatives – an activity clearly protected by Section 7 of the Act).

There is nothing in this policy agreement that narrows the definition of confidential information, and is so devoid of context that an employee would reasonably believe that by executing this mandatory agreement, would reasonably restrict them from discussing work evaluations, wages, hours and other terms and conditions of work. Thus, Counsel for the General Counsel urges the Board to reject Respondent’s Exception III.

D. Exception IV – the ALJ Did Not Err in Finding that Respondent’s Safe Workplace Environment #4500 Violates Section 8(A)(1) of the Act.

Respondent claims that its Safe Workplace Environment Policy #4500 is sufficiently particular and not overbroad. The rule prohibits employees from “violating others’ expectation of privacy” and prohibits employees from “loitering or [their] presence on the jobsite without authorization before or after assigned shift is completed.” Respondent’s Exceptions, P. 17.

Respondent contends that the rule prohibiting employees from violating others’ expectation of privacy is intended to guard against “someone using a digital device to bully or harass another employee.” Respondent’s Exceptions, P. 18. However, Respondent’s self-serving claims that the intent of this rule is, in fact, altruistic, the rule as presented to employees lacks any limiting language and does nothing to explain how this rule is to be read as an anti-harassment/anti-bullying rule. “Where a rule is ambiguous regarding its application to Section 7 activity and no examples of violative conduct or limitation language is set forth that would clarify to employees the rule does not restrict Section 7 rights, such a rule is unlawful under the Act.” Hoot Winc, LLC, *supra*. The portion of Rule #4500 that prohibits violating “others’ expectation of privacy” does not contain any examples or limiting language; it provides no

context for employees to understand the Respondent's claimed intent behind this rule. In their absence, the rule is overbroad and an employee would reasonably read the rule to prohibit activities protected by Section 7.

Respondent also argues that the portion of the rule prohibiting employees from loitering or their presence on the jobsite outside of working hours is lawful under Tri-Cty. Med. Ctr., 222 NLRB 1089 (1976), *citing* GTE Lenkurt, Inc., 204 NLRB 921 (1973). Respondent circuitously explains in its Exceptions that the reader of the rule should automatically understand that "jobsite" means "the area necessarily inside the gates." Respondent's Exceptions, P. 20. However, the rule is not direct, nor detailed as asserted by Respondent. The rule simply prohibits presence at the "jobsite." It is well-settled that "ambiguities in work rules are construed against the party which promulgated them." Burndy, LLC, 364 NLRB No. 77 (2016), *citing* Lafayette Park Hotel, 326 NLRB 824, 828 (1998). The Respondent's facility encompasses approximately 110 acres. It is a secured area requiring that employees pass a background check to obtain passes to work at the site. Employees could violate this rule, which prohibits "loitering," a term found to chill employees in the exercise of their Section 7 rights, simply by discussing protected activity at the jobsite by walking from one end of the jobsite to the other, prior to or at the conclusion of their shift. As the ALJ correctly noted, maintenance of such a rule makes it impossible for off-duty employees to engage in protected activity inside and outside the Respondent's entire jobsite, including non-work areas. Lutheran Heritage Village – Livonia, 343 NLRB 646, 655 (2004).

On the basis of the above, Counsel for the General Counsel urges the Board to dismiss Respondent's Exception IV.

E. Exception V – the ALJ Did Not Err in Finding That Portions of Respondent's Driver Safety Requirements and Visitor Safety Requirements Violate Section 8(a)(1) of the Act.

Respondent contends that the Driver Safety Requirements and Visitor Safety Requirements prohibiting photography and recording "at all times" cannot be read as being unlawfully overbroad because the title of the rule sufficiently describes the intent to employees and employees would not reasonably construe the rule to prohibit protected activities. Respondent's Exceptions, P. 22-23.

Established precedent teaches that rule ambiguities are construed against the rule's promulgator. Burndy, LLC, *supra*. A rule lacking in sufficient descriptors, limiting language,

examples or context, will likely be found to be overbroad. Here, the sweeping prohibition against photography and recordings is overbroad. An employee would clearly read the rule to prohibit photography or recording during non-work times in non-work areas. The rule provides no explanation for its foundation; there is no context; there is no limiting language.

On the basis of the above, Counsel for the General Counsel urges the Board to reject Respondent's Exception V.

F. Exception VI – ALJ Fine Did Not Err in Finding that Respondent's Camera, Digital Device Policy #3100 Violates Section 8(a)(1) of the Act.

Respondent argues that this rule is lawful because it addresses Respondent's legitimate security concerns. Respondent's Exceptions, P. 27. Respondent also recycles its argument that the rule is lawful because it does not altogether prohibit photography and recording, it merely restricts them.² Respondent's Exceptions, P. 28.

Respondent's policy overview announces that the purpose of the policy is to "regulate the use of company issued and personal cell phones...in order to prevent distractions in the workplace and to help ensure the privacy, safety and security of all...employees and visitors as well as prevent the improper disclosure of company trade secrets and confidential business information." Use of the terms "confidential business information" would be construed by employees restrict discussion of wages and other terms and conditions of employment with their fellow employees, and is unlawfully overbroad under Board law. Cintas Corp., supra; Lily Transportation Corp., supra.

The rule's prohibitions with respect to the use of company-issued cell phones and personal digital equipment, such as cell phones, cameras, smartphones and tablets, apply both to employees while on duty *and* while on Respondent's premises. Respondent's Exceptions, P. 26. While the policy's language explicitly prohibits photography and recording when employees are on Respondent's property, Respondent claims that the rule is limited to working time, even in the absence of words in the policy to that effect. Respondent's Exceptions, P. 26. The ALJ correctly noted in his decision that the broad prohibitions "preclude photography and recording without limitation, and do not provide for protection for such conduct that constitutes protected activity by employees; and/or for visitors such as union officials who may be lawfully investigation matters pertaining to employee safety and/or working conditions in general."

² Respondent made the exact same argument in support of Exception II, at P. 11 of its Exceptions.

ALJD P. 34, Ln 47-50. The references in Respondent's policy that restrict employees both when on duty and while on the premise are overbroad and ambiguous. The rule also inhibits protected activity by requiring clearance from Respondent's personnel, limit recordings only to investigatory purposes and grant ownership of certain recordings to Respondent. ALJD, P. 35, Ln. 29-34.

On the basis of the above, Counsel for the General Counsel urges the Board to reject Respondent's Exception VI.

G. Exception VII – ALJ Fine Did Not Err in Finding that Respondent's Incident Reporting Policy #1600 Violates Section 8(a)(1) of the Act.

Respondent's Incident Reporting Policy #1600, at Section 3.1, contains language instructing employees with information and or documentation, including photographs, that "...all reports and related documentation, including photographs, shall be prepared for review by legal counsel, so that legal counsel may provide the company with advice..." Section 3.2 further restricts employees, stating that "no incident reports or related documents shall be disclosed to anyone outside MWTTI unless authorized to do so by Alex Johnson, President and CEO."

Respondent argues that the language of this policy is lawful on the grounds that it specifically limits disclosures related to fatalities or hospitalizations. Respondent's Exceptions, P. 32. Respondent misrepresents the actual language of its own policy and ignores that the policy is applied to "all reports and related documentation." Employees would reasonably read the policy to prohibit their reporting of unsafe working conditions to their Union representatives. As such, the rule is overbroad and restricts employees' Section 7 rights.

While the Board will balance employees' Section 7 rights against an employer's business justification when examining rules that prohibit certain types of discussions or disclosures, Respondent's policy is not sufficiently limited. An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right. *Banner Health System*, 358 NLRB No. 93, slip op. at 2 (2012). *See Also Caesar's Palace*, 336 NLRB 271, 272 (2001). The instant rule does not demonstrate that the Respondent has demonstrated a particularized need for confidentiality in any given situation. More than a generalized concern for protecting the integrity of an investigation of an incident is required. Here, Respondent's policy is not that

narrow and instead applies to all reports and related documentation, thus making it unlawfully overbroad.

On the basis of the above, Counsel for the General Counsel urges the Board to dismiss Respondent's Exception VII.

H. Exception VIII – ALJ Did Not Err in Finding that there Was No Waiver over the Union's Right to Bargain Over the Policy and Safety Handbooks.

Respondent argues that the Union waived its right to bargain over its employee handbook due to past practice and the management's rights clause. Respondent's Exceptions, P. 34-36. Respondent further argues that its inclusion of union member Juan Rizzo in the review process of the standard operating procedure also operates as a waiver. Respondent's Exceptions, P. 39.

The Management Rights clause, at Section 20 of the parties' collective bargaining agreement, reads, in part, as follows:

20.1 The right to have and maintain order and efficiency is the sole responsibility of the management, subject to the limitations contained in this Collective Bargaining Agreement and provided that these rights will not be used for the purpose of discrimination for or against any employee or in violation of this Agreement.

20.3 The management of the Company has established certain reasonable rules and policies for all its employees. There are attached hereto and the Company shall have the right at any time to add further rules or subtract or change or otherwise existing rules, as long as these rules are reasonable and not contrary to specifications set forth in this labor agreement. Such rules must be posted on bulletin boards or in such locations as to be readily accessible to the employees of the Company.

Respondent ignores that any waiver of a statutory right by the Union must be clear and unmistakable. Weavexx, LLC & Teamsters Local Union 984, 364 NLRB No. 141 (2016). Respondent fails to acknowledge the fact that, on multiple occasions, the Union clearly communicated its opposition to Respondent's changes to the employee handbook. Tr. 173-174, 176. Contrary to Respondent's assertions, the Union did not stand silent in the face of Respondent's unlawful unilateral changes. Even if it had, such silence would not be a waiver. Burrows Paper Corp., 1999 WL 33452980 (1999) ("For the waiver of a statutory right, silence does not give consent, and neither does ambiguity."); Robbins Door & Sash Co., Inc., 260 NLRB 659, 663 (1982) *citing* Bierl Supply Co., 179 NLRB 741 (1969) ("Even silence--not that it happened here-- does not constitute a waiver.")

The record is devoid of any evidence of any overt act, statement or other action that supports the Respondent's claim that the Union chose not to bargain over these issues. Furthermore, in order for Respondent to prevail on its management's rights clause argument, Respondent must show the management's rights clause clearly and specifically encompassed the Union's waiver of its right to bargain over work rules and policies. *See Allison Corp.*, 330 NLRB 1363, 1365 (2000) ("To meet the clear and unmistakable standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter.") Respondent cannot meet its threshold level of evidence to support its waiver claim or that the management rights' clause privileged its unilateral changes.

Respondent's argument that its inclusion of union member and employee Rizo in the review of the standard operating procedures acts as a waiver is a non-starter. The record evidence is clear that Rizo did not have any authority to act on behalf of the Union and waive any statutory rights. ALJD P. 8, Ln. 23-25. Respondent's own witnesses could only identify Rizo as a foreman. ALJD P. 25, Ln. 29-32; P. 39, Ln. 29-31. In order to act as an agent of the Union with apparent authority, an individual must be more than a member, or at times, even more than a steward. *See California Portland Cement Co.*, 330 NLRB 144, 150 (1999); *and Paragon Sys., Inc.*, 364 NLRB No. 75 (2016) (finding that although an individual was a steward, he still did not have any role related to bargaining, and the employer could reasonably believe otherwise).

On the basis of the above, Counsel for the General Counsel urges the Board to dismiss Respondent's Exception VIII.

CONCLUSION

For the reasons outlined above and in accordance with the evidence, Counsel for the General Counsel respectfully requests that the Board reject Respondent's Exceptions in their entirety, and uphold the ALJ's rulings, findings, conclusions and the recommended Order as outlined in the ALJD.

Dated at Cleveland, Ohio this 5th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Office of the Executive Secretary, and served by U.S. mail and electronic mail, where known, on the following Parties, this 5th day of December, 2016:

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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

MIDWEST TERMINALS OF
TOLEDO INTERNATIONAL, INC.

Respondent,

and

LOCAL 1982, INTERNATIONAL
LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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Case No.: 8-CA-152192

**RESPONDENT MIDWEST TERMINALS OF TOLEDO INTERNATIONAL, INC.'S
REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF
IN RESPONSE TO RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE FINE'S DECISION**

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Counsel for the General Counsel

I. INTRODUCTION

Respondent Midwest Terminals of Toledo International, Inc. (“Midwest,” “Company” or “Respondent”) incorporates herein the arguments set forth in its initial Brief, and otherwise replies herein below to the positions taken within Counsel for the General Counsel’s (“General Counsel”) Answering Brief. The general premise of General Counsel’s Answering Brief is twofold: (1) the union’s members are not mentally capable of comprehending the limiting language or the limiting nature of the title of the work rule where the language at issue is set forth and (2) please ignore the fact that union filed a similar, if not identical, ulp charge one year earlier and we (the General Counsel) not only deemed the Employer’s unilateral actions to be lawful, it also deemed that virtually all of the work rules at issue herein did not violate the Act.

II. LAW AND ARGUMENT

A. Exception I – Credibility

Respondent is well aware that the Board rarely, if ever, overrules an administrative judge’s credibility findings, especially if the credibility determination favors the union and General Counsel. Notwithstanding, Respondent is equally aware that administrative law judges resort to self-serving credibility determinations when the tangible record evidence does not otherwise support their findings and/or General Counsel’s theory of the case. Credibility findings are to be overruled if the clear preponderance of the evidence establishes that those findings are incorrect. See, *See, Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d (3rd Cir. 1951). A preponderance of evidence means that a party has shown that its version of facts, is more likely than not the correct version. See, <http://courts.uslegal.com/burden-of-proof/preponderance-of-the-evidence/>.

Otis Brown is not a credible witness. As detailed more fully in its initial Brief, Brown fabricated testimony in great detail in regards to a meeting he did not even attend. Thus, ALJ

Fine erred in crediting Brown's testimony over Leach and Blakely in regards to the OSHA Settlement Agreement and the absurd purported agreement to negotiate the Handbook after the party had reached an agreement on a successor CBA.

ALJ Fine credited Brown's testimony that the parties had an agreement to negotiate the Handbook last. (Decision, p. 7 and 41, FN 12.) Notably, neither Brown nor Joseph presented a document outlining the Agreement nor did they present bargaining notes to support their fabricated claims. Further, contrary to ALJ Fine's findings noted on page 41, FN 12, (and the assertions of the General Counsel) Joseph did not testify that the parties had agreed to a bargaining procedure in which they had not yet reached the work rules. Joseph simply testified that the union (over 3-4 year period) had not yet had the opportunity to make any proposals related to the handbook. (Decision, p. 7.) The record evidence established that Midwest has not and does not bargain with the union over its Handbooks. (Tr. 362.) As of the date of the hearing, no member of the union's bargaining committee (Brown, Hubbard, Joseph) has ever requested that the Company bargain over to policies set forth in the Policy Handbook or the Safety Handbook. (Tr. 363.) Joseph testified that since 2012 he has not requested any changes to the Midwest's Handbooks. (Tr. 150-151.) Hubbard testified that he has attended numerous bargaining sessions since October 2012 and the union has never requested that the Company bargain over the Policy Handbook and/or the Safety Handbook. (Tr. 194 & 196.) Brown testified that since the time he took office in 2012 the parties have participated in over 24 bargaining sessions and the union has not proposed a Handbook nor has the union requested that Midwest bargain over its Policy Handbook and/or Safety Handbook. (Tr. 250, 271-273.) The union's own witnesses corroborated the testimony elicited by the Company, i.e., Midwest has never bargained with the union over the policies set forth in its formal Handbooks or the various individual policies in place prior to 2012. Nevertheless, ALJ Fine had no choice but to credit

Brown's fabricated testimony. He had to in order to support his decision that the union had not waived its right to bargain over the Handbook (over a 4 year period) even though the union admitted to never having requested to bargain over the Company's Handbooks or ever having made any proposals related to the Company's Handbooks.

In regards to the OSHA Settlement Agreement, Leach credibly testified that that standard operating procedures put in writing per the OSHA settlement were already being used by Midwest. Leach's testimony was corroborated by Blakely, who was questioned at length on this issue by ALJ Fine (Tr. 376-378). Conversely, Brown offered testimony that the procedures put into writing per the OSHA settlement were not being *followed* prior to the OSHA settlement. Accordingly, Brown did not testify that the procedures were not in place prior to the settlement, only that some of the union employees were not following the already established procedures.

Brown's testimony is not supported by the record evidence, necessarily meaning that ALJ Fine's credibility determinations related to Otis Brown are not correct and must be overturned.

B. Exception II – ALJ Fine Erred in Finding Respondent's Non-Disclosure/Confidentiality Policy 32500 Violates Section 8(a)(1) of the Act

Midwest maintains this policy should be determined lawful under the parameters of *Flagstaff Medical Center*, 357 NLRB 659 (2011), *enfd.* in relevant part 715 F.3d 928, 404 U.S. App. D.C. 453 (D.C. Cir. 2013), where a Board majority found that an employer policy that prohibited the use of cameras for recording images in a hospital setting did not violate the Act. The *Flagstaff* policy provided as follows: "The use of portable electronic equipment including, but not limited to CD players, iPods, MP3 players, or cameras during worktime is not authorized. The use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." *Id.* at 683. Based upon the express language of the rule, General Counsel is either mistaken or being disingenuous in maintaining that the entire rule in *Flagstaff*

was limited to worktime and therefore distinguishable from the rule at issue herein. Answering Brief, p. 3.

The *Flagstaff* majority determined that patient privacy interests and the employer's HIPAA obligation to prevent the wrongful disclosure of individually identifiable health information outweighed the Section 7 rights of employees, i.e., employees would reasonably interpret the rule to protect those privacy interests, not as a prohibition of Section 7 rights. *Id.* at 663. Here, Midwest's responsibility to maintain secure facility pursuant to 33 C.F.R. §105 et seq. outweighs the Section 7 rights of employees, i.e., employees would reasonably interpret the rule to protect those security interests, not as a prohibition of Section 7 rights. Nevertheless, ALJ Fine condescendingly marginalized Midwest's facility security plan mandated by the U.S. Coast Guard and U.S. Dept. of Homeland Security (R. Ex. U and W) and determined that the mere possibility that the rule could have a chilling effect on employees' Section 7 rights is more important than preventing a possible terrorist attack using the various cargo stored at the Port.

C. Exception IV – ALJ Fine Erred in Finding Respondent's Safe Workplace Environment #4500 Violates Section 8(a)(1) of the Act.

ALJ Fine determined that the phrase "violating others' expectation of privacy" was overly broad. "[I]n determining whether a challenged rule is unlawful, the Board must . . . give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." See, *Lutheran Heritage*, 343 NLRB 646, 646 (2004). ALJ Fine did exactly what the Board in *Lutheran Heritage* said *not* to do – read particular phrases in isolation and presume improper interference with employee rights.

The phrase at issues herein (prohibition on the violation others' expectation of privacy) is found in the Section entitled Safe Workplace Environment Policy #4500. Clearly, "employees have a right to a workplace free of unlawful harassment." *Id.* at 646. The second page of the

policy states: “The Safe Workplace Environment Policy established clear guidelines that address prohibiting weapons, fighting harassment and violence in the workplace to ensure a safe work environment.” A reasonable reading of the rule, in its entire context (Safe Workplace Environment Policy), precludes a finding that employees would construe the rule to prohibit Section 7 activity.

ALJ also determined the following language to be unlawful: “loitering or presence on the jobsite without authorization before or after assigned shift is completed.” ALJ Fine reasoned in part:

This clearly eradicates the possibility of off duty employees participating in protected conduct inside and outside Respondent’s facility for the entire jobsite which would encompass work and nonwork areas and I find the maintenance of said rule violates Section 8(a)(1) of the Act. I do not find Respondent’s argument that since the facility is a secure facility, that employees need a TWIC to enter it through secure gates, allows Respondent to limit access to the entire jobsite for participation in off duty protected communications. Respondent has a 110 acre facility, which could be interpreted to include the whole jobsite.

Midwest is a secure facility and employees must enter and exit through a gate maintained by third party security guards. In order to gain entry, persons must have a TWIC and/or be escorted into the facility by someone who does. Midwest’s policy is specifically limited to the “jobsite,” i.e. the area necessarily inside the gates. In *Tri-County Medical Center*, 222 NLRB 1089 (1976) the Board stated that a no-access rule concerning off duty employees is valid if:

(1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity.

Midwest’s policy meets all of the above criteria.

Similar to ALJ Fine, the General Counsel seemingly fails to comprehend that the Midwest is a gated facility – the entire 110 acres is a secure facility. (Tr. 400.) The General Counsel states that the employees are required to pass a background check (from the federal

government) to work at the site. That is partially true. The General Counsel omitted that the employees cannot *enter the facility* without a TWIC card. Further, employees are not permitted inside the gate unless there is work available for them to perform based upon their seniority and qualifications. If work is not available to them they are not permitted entry. See, e.g., *Midwest Terminals of Toledo Int'l, Inc.*, 2015 NLRB LEXIS 231, *27-30 (2015) [Section entitled “Order of Call Procedure”] and *Midwest Terminals of Toledo Int'l, Inc.*, JD-04-16, p. 31, line 7 – p. 32, line 6 and p. 35, lines 21-35. The General Counsel declares that employees could violate this rule “simply by discussing protected activity at the jobsite by walking from one end of the jobsite to the other, prior to or at the conclusion of their shift.” Such a trivial example illustrates just how illogical this Agency’s war on Handbooks has become. More importantly, under the General Counsel’s example, the employees in question would not be in violation of the rule because their presence on the jobsite was *authorized*. As noted above, employees are only permitted inside the gated facility if there is work available for them to perform based upon their seniority and qualifications. If work is not available to them they are not permitted entry.

D. Exception V – ALJ Fine Erred in Finding Respondent’s Driver Safety Requirements and Visitor Safety Requirements Violate Section 8(a)(1) of the Act.

Both ALJ Fine and the General Counsel maintain that rules related to truck drivers and visitors, i.e., non-Midwest employees violate the Act. ALJ Fine and the General Counsel maintain this rule violates the Act because employees would read the rule to prohibit photography or recording during non-worktimes in non-work areas. Further, the General Counsel maintains there is no context to the rule and/or no limiting language. Midwest maintains that the context and limiting language to the rule is that the rule only applies to truck drivers and visitors, not employees. Thus, employees would not reasonably construe the rule to prohibit Section 7 activity because the rule does not apply to them. Secondly, the rule does not

prohibit pictures or recordings, it restricts them. Both ALJ Fine and the General Counsel read these phrases in isolation and presume improper interference with employee rights in violation of the teachings of *Lutheran Heritage, supra*, at 646.

E. Exception VII – ALJ Fine Erred in Finding Respondent’s Incident Reporting Policy #1600 Violates Section 8(a)(1) of the Act

ALJ fine determined that this policy “*appears to be overbroad.*” (emphasis added.) Board precedent is clear that the test is whether a rule reasonably “would” be construed as curtailing Section 7 activity, not whether it “can,” “could,” or “appears” to be so construed. *See, e.g., Lutheran Heritage, supra*, at 647 (“Where, as here, the rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule *could* be interpreted that way.”) (Emphasis in original.) ALJ Fine will not be deterred in finding Midwest violated the Act, even if it means creating his own standard.

Remarkably, the General Counsel maintains that Respondent “misrepresents the actual language of its own policy and ignores that the policy is applied to ‘all reports and related hospitalization.’” Answering Brief, pp. 8-9. It could not be clearer that the rule at issue is narrowly tailored to only those incidents involving hospitalization and fatalities. The rule states as follows:

3. Incidents Involving Hospitalization or a Fatality

3.1 Because it is likely that incidents involving a hospitalization or a fatality will result in litigation, all reports and related documentation, including photographs, shall be prepared for review by legal counsel, so that legal counsel may provide the company with advice. Accordingly, all reports and related documents shall be marked as follows:

PRIVILEGED AND CONFIDENTIAL - ATTORNEY WORK
PRODUCT PREPARED IN ANTICIPATION OF LITIGATION

This legend is included on the MWTTI Incident Report Forms and is to be checked when reporting these types of incidents.

- 3.2 No incident reports or related documents shall be disclosed to anyone outside of MWTTI unless authorized to do so by Alex Johnson, President and CEO.

(See, J. Ex. C, pp. 44-46.) The General Counsel assertion is untrue.

Under the Board's balancing test, the employer would have a legitimate business interest in certain circumstances involving hospitalization and most especially with fatalities. See, *Hyundai America Shipping Agency*, 2011 NLRB LEXIS 498 (2011) (to justify a prohibition on employee discussions concerning ongoing investigations, an employer has to establish a legitimate business justification that outweighs employees section 7 rights; a generalized concern with protecting the integrity of investigations is not enough.) Again, despite the General Counsel's extraordinary assertions otherwise, Midwest's policy is limited to only to those incidents involving hospitalization and fatalities and is not a blanket restriction on all incident reports and/or investigations.

F. Exception VIII – ALJ Fine Erred in Finding that the Union Did Not Waive its Right to Bargain Over the Policy and Safety Handbooks

In order to establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment of that right. See, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). Waiver can occur in any of three ways: by express contract language, by the parties' conduct (including past practice, bargaining history, action or inaction) or by a combination of the two. See, *American Diamond Tool*, 306 NLRB 570 (1992). Here, past practice, bargaining history and the union's inaction clearly establish waiver. The General maintains that record is devoid of any evidence that supports Midwest's claim that the union chose not to bargain over these issues. Nonetheless, the record is replete with examples wherein the union voluntarily chose not to bargain over the Policy and Safety Handbooks.

As of the date of the hearing, no member of the union's bargaining committee (Brown, Hubbard and Joseph) had ever requested that the Company bargain over to policies set forth in the Policy Handbook or the Safety Handbook. (Tr. 363.) Specifically, Joseph testified that since 2012 he has not requested any changes to Midwest's Handbooks. (Tr. 150-151.) Hubbard testified that he has attended numerous bargaining sessions since October 2012 and the union has never requested that the Company bargain over the Policy Handbook and/or the Safety Handbook. (Tr. 194 & 196.) Brown testified that since the time he took office in 2012 the parties have participated in over 24 bargaining sessions and the union has not proposed a Handbook nor has the union requested that Midwest bargain over its Policy Handbook and/or Safety Handbook. (Tr. 250, 271-273.) The union's own witnesses corroborated the testimony elicited by the Company, i.e., Midwest has never bargained with the union over the policies set forth in its formal Handbooks or the various individual policies in place prior to 2012.

Secondly, the union, through past practice, is well aware that Midwest conducts mandatory pre-season training/meetings *every* March prior to the beginning of *each* shipping season. Nonetheless, the union has never requested that Midwest bargain over the Handbooks both prior to or subsequent to any of these meetings. Nevertheless, ALJ Fine determined that the union had not waived its right to bargain over the Handbook even though the union admitted to never having requested to bargain over the Company's Handbooks or ever having made any proposals related to the Company's Handbooks,

ALJ Fine ultimately concluded as follows:

[T]he evidence shows the parties had a history of bargaining over work rules, some of which were attached as an exhibit in the expired CBA, and in negotiations that took place in 2011 following the CBA's expiration. Moreover, the Union lodged strong protests in 2014 and 2015 against Respondent's unilateral changes in its handbooks. Thus, I reject Respondent's claim that there was a waiver by past practice.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 19, 2016, an electronic original of Respondent Midwest Terminals of Toledo International, Inc.'s Reply brief was filed via the Department Of Labor, National Labor Relations Board electronic filing system, Office of the Executive Secretary and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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