

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

**UNION TANK CAR COMPANY,**

Employer  
and

Case 12-RC-221465

**INTERNATIONAL ASSOCIATION OF  
SHEET METAL, AIR AND RAIL  
TRANSPORTATION WORKERS (SMART),**

Petitioner

**UNION TANK CAR COMPANY**

and

Cases 12-CA-210779, 12-CA-19374,  
12-CA-220822, 12-CA-222661

**INTERNATIONAL ASSOCIATION OF  
SHEET METAL, AIR AND RAIL  
TRANSPORTATION WORKERS (SMART)**

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**I. INTRODUCTION AND STATEMENT OF THE CASE**

On January 11, 2019, the Honorable Arthur J. Amchan (“the ALJ” or “ALJ Amchan”) issued his Decision in this combined representation and unfair labor practice case, concluding that Union Tank Car Company (“Respondent”) violated Section 8(a)(1) of the Act in most respects alleged in the Complaint. [ALJD 10:25-39].<sup>1</sup> The undersigned filed Exceptions to the ALJD on

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<sup>1</sup> Respondent’s Cross-Exceptions to the Decision of the Administrative Law Judge, and its Brief in Support of its Cross-Exceptions to the Decision of the Administrative Law Judge are referred to collectively herein as “Respondent’s Cross-Exceptions” and referenced as Respondent’s Cross-Exception (number) and Respondent’s Brief in Support (page number), respectively. ALJ Sandron’s Decision is referenced herein as ALJD (page:line). General Counsel’s Exhibits are referenced as GCX (number); Respondent’s Exhibits are referenced as RX (number); Charging Parties Exhibits are referenced as CPX (number). References to the Joint Stipulations, in evidence at JX 2, are noted as JS (paragraph). The hearing transcript is referenced as Tr. (page number).

February 8, 2019. On February 22, 2019, Respondent filed Cross-Exceptions and its Brief in Support, challenging ALJ Amchan’s credibility determinations and his conclusions – based on long-settled Board precedent – that Respondent’s printed handbook rule banning cell phones was unlawfully overbroad and that a supervisor’s confiscation of employees’ literature promoting International Association of Sheet Metal, Air and Rail Transportation Workers (“SMART or “the Union”) was a per se violation of the Act. Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel hereby submits this Answering Brief to Respondent’s Cross-Exceptions. For the reasons set forth herein, Respondent’s Cross-Exceptions are wholly without merit and should be denied by the Board.

## **II. STATEMENT OF FACTS**

### **A. Respondent’s Operations and Handbook**

Respondent, a national company headquartered in Chicago, Illinois, and registered as a Delaware corporation, manufactures, repairs, and maintains railroad tank cars, including at its maintenance facility located in Valdosta, Georgia (“the Valdosta plant”). [ALJD 2:28-30; GCX 1(dd), para. 2(a); GCX 1(y), para. 2(a); Tr. 29, 105, 131]. Maintenance of the tank cars entails cleaning, welding-repairs, and both coating the interior and painting the exterior of tanks. [Tr. 105, 131].

The Valdosta plant operates continuously with three shifts of workers in the repair shop. First shift is from 6:30 a.m. to 3:00 p.m.; second shift is from 2:30 p.m. to 11:00 p.m.; and third shift is 9:30 p.m. to 6:00 a.m. [Tr. 16-17, 46, 70, 86]. The first shift welding supervisor throughout 2018 was Jody James (“James”); his second shift counterpart was Graham Bridges (“Bridges”).<sup>2</sup> [ALJD 4:20-24, 5:35-36; Tr. 15, 46, 70, 87-88, 92, 110, 147-148, 154, 176, 205, 216, 225, 230].

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<sup>2</sup> No relevant events happened during third shift, and the record does not reflect the name of the third shift welding supervisor.

Respondent employs approximately 18 to 22 welders, including a non-supervisory “lead man” or “lead person,” on the first shift in its repair department. [ALJD 4:20-22; Tr. 28-29, 88-89]. James and Bridges report to Repair Manager Bill Giddens (“Giddens”), who in turn reports to Plant Manager Joe Keys (“Keys”). [Tr. 132, 154-155]. Keys and three other facilities’ Plant Managers are overseen by Director of Shop Operations John Bauer (“Bauer”), who is based in Cleveland, Texas. [Tr. 143].

Respondent’s printed employee handbook remained the same from March 17, 2010, until approximately October 5, 2018. [ALJD 3:22-41; JX 1; Tr. 80, 84-85, 140, 144, 150-151]. It includes the following text:

**SHOP RULES AND PENALTIES**

The following are rules and regulations covering offenses for which an employee can be dismissed or suspended without further notice. Suspension means lay-off without pay and may be submitted with a Record Suspension at the company’s discretion. Each warning or penalty will remain active for a period of 12 months (5 years for violations of Confined Space Discipline Policy). A total of any four active offenses regardless of their classification shall result in the discharge of employees, except that if all offenses consist of only warnings, a total of five shall result in discharge. The following list is not intended to be exhaustive. It is merely intended to provide you with examples of the types of conduct that may result in disciplinary action. Misconduct not specifically described in these guidelines will be handled as warranted by the circumstances of the case involved. Also, flagrant or especially serious infractions of the rules may result in action of greater severity than shown below.

RULE NO.	NATURE OF OFFENSE	NUMERALS IN THESE COLUMNS DENOTE DAYS EMPLOYEE WILL BE SUSPENDED		
		1 <sup>ST</sup> OFFENSE	2 <sup>ND</sup> OFFENSE	3 <sup>RD</sup> OFFENSE
1	[...]	[...]	[...]	[...]
[...]	[...]	[...]	[...]	[...]

32	Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees <sup>3</sup>	Discharge
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[...]

### USE OF TELEPHONE

Our telephone system needs to be able to handle the heavy load of business calls. For this reason, we ask you to limit incoming and outgoing personal calls to those that are truly necessary. Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.<sup>4</sup>

On October 5, 2018, employees were brought into meetings, instructed that these rules had been rescinded effective December 2017, and were required to sign a form acknowledging the same and receipt of revised handbooks. [ALJD 3:39-41; Tr. 80, 84-85, 150-151].<sup>5</sup>

#### **B. The First Representation Election and Respondent’s Withdrawal of Recognition of the Union**

The first representation election involving Respondent and the Union was held on February 23, 2017, and the Board certified the Union as the exclusive bargaining representative of a unit of Respondent’s production and maintenance employees at the Valdosta facility on March 6, 2017. [ALJD 3:6-8; JS 1-2; Tr. 30, 81, 132, 136-137, 140].

In around February 2018,<sup>6</sup> certain employees of Respondent began circulating a petition for employees to sign to signal their disaffection with the Union as their collective-bargaining representative. [ALJD 3:8; JS 4; Tr. 87-88, 156-157]. As a result of this petition, on March 9, Respondent withdrew its recognition of the Union as the exclusive bargaining representative of the unit employees. [ALJD 3:9, JS 3].

<sup>3</sup> For purposes of brevity, this rule will be referred to herein as “Rule 32” or “the non-disparagement rule.”

<sup>4</sup> For purposes of brevity, this rule will be referred to herein as the “no cell phones” rule.

<sup>5</sup> Because October 5, 2018, is after the material events of this proceeding, a copy of the revised handbook was not introduced at the hearing and is not part of the record.

<sup>6</sup> Unless otherwise noted, all subsequent dates referenced herein are in 2018.

### **C. Supervisor Bridges' Unlawful Statements to Employees**

Contemporaneously with the circulation of the disaffection petition, second-shift supervisor Bridges conversed with at least two repair welders on the subject of the Union's presence at the facility.

One afternoon in late February or early March, after a lead person urged him to sign the disaffection petition lest he lose his job, welder-repairman Quinn Sowell ("Sowell") approached Bridges, his immediate supervisor, in Bridges' office to ask whether it was true or not that he could lose his job if he did not sign the petition. [ALJD 5:34-38; JS 4; Tr. 88-91]. Bridges said that Respondent could not "technically" fire him for not signing, but that they would find reasons to fire him. [ALJD 6:1-15; Tr. 89]. Bridges then explained that if Sowell did sign the petition, it was more likely that there would be additional opportunities for him within the company. [ALJD 6:1-15; Tr. 90, 95]. A different lead person, Michael Weeks ("Weeks"), was also in Bridges' office during the conversation, and agreed with what Bridges said. [ALJD 6:1-27; Tr. 90, 93].

In early 2018, second shift employee Ridge Wallace ("Wallace") was issued a 10-week suspension for committing a safety infraction. [Tr. 100-01]. In early March, most likely on Monday, March 5, or Monday, March 12, Bridges told Wallace that he had received a stiffer disciplinary penalty for a safety violation than he would have without the Union at the facility. [ALJD 5:26-30; JS 4; Tr. 100-104]. On March 5 or 12, Wallace decided not to go to lunch with the rest of the shift, and Bridges approached him on the work floor and mentioned how the suspension "kind of sucks." [Tr. 102]. When Wallace agreed, Bridges then volunteered that if it weren't for the Union, Wallace would have only received a written training instead of a full 30-day suspension for failing to sign a "hot work" permit for work inside a tank car. [Tr. 102-103]. Taken aback, Wallace said, "Really?" [Tr. 103]. Bridges replied that yes, the Union wasn't letting the company do its job. [Tr. 103]. Lead person Weeks passed by Bridges and Wallace during this

conversation, and agreed with Bridges, telling Wallace that if it wasn't for the Union, he would only have received a written training. [Tr. 103-104].

**D. The Second Representation Election and Supervisor Jody James' Confiscation of Union Literature**

On June 5, the Union filed a new petition seeking to once again represent Respondent's production and maintenance employees at the Valdosta plant. [ALJD 3:9-11; BX 1(a)]. On June 8, the Regional Director approved a Stipulated Election Agreement between the parties, setting the date of the representation election as Friday, June 22, and the location as the hourly employees' break room on the second floor. [ALJD 3:11-14; BX 1(c)].

A few days before the election, Union representative Tommy Fisher ("Fisher"), employee TJ Daugherty ("Daugherty"), and an individual named Andy Moudy designed a pro-Union flyer for distribution at the Valdosta plant. [Tr. 15-16; GCX 2]. Daugherty brought the flyers to work on the morning of Thursday, June 21, and during the scheduled first-shift break from 8:30 a.m. to 8:45 a.m., distributed several – up to 20 or 30 – in the second floor break room and an adjoining restroom. [ALJD 4:18-20 and fn. 3; ALJD 5:2; Tr. 16-17, 20-21, 32, 47, 72, 110-112, 184-185, 201, 226-227, 233]. As found by the ALJ, between 18 and 22 first-shift employees from both the repair shop and other departments were present for the fifteen-minute break. [ALJD 4:18-22; Tr. 20, 38-39, 48, 225, 230]. Employees typically sit in the same groups from day to day; Daugherty was at a table with several repair shop coworkers including Chad Morgan ("Morgan"), Joe Queen ("Queen"), and Darrell Stone ("Stone"). [Tr. 18-19, 48-49, 72, 178-180, 195-198, 211, 217; GCX 3]. Lead person Tim McEady ("McEady") and welder Clint Selph were at a different table near the back of the room. [Tr. 73-75, 113, 180, 198, 207-208, 217; GCX 3, CX 1].

As Daugherty sat in the break room and began to eat his breakfast, some employees began to take flyers and look at them. [Tr. 20, 73 184, 199, 218, 232]. At about 8:35 a.m. or 8:40 a.m.,

first-shift supervisor James entered the break room. [ALJD 4:24; Tr. 17, 48, 72, 178, 195]. James does not typically take breaks with the employees under his supervision, and generally only appears in the hourly employees' break room to conduct a weekly safety meeting for the repair shop employees on Thursdays at the end of the break, 8:45 a.m. [ALJD 4:24-25; Tr. 17, 48, 72, 112, 195, 216, 237]. James sat down next to McEady, where he usually conducts the safety meetings at the back of the room. [Tr. 19-20, 48, 72-73, 112, 179-180, 195, 207; GCX 3; CX 1].

Within a few minutes of James' arrival, and still before 8:45 a.m., McEady slid one of Daugherty's pro-Union flyers along the table to James, who read or skimmed the document. [Tr. 20, 73, 113, 184, 211]. Without saying anything, James rose, walked around the table where he and McEady were seated towards the table where Daugherty and the others were, approaching Queen and Morgan from behind. [Tr. 20, 49-50, 73, 113, 185; GCX 3; CX1]. James picked up a flyer that Queen was reading on the table in front of him, and took a flyer that Morgan was reading directly out of his hands. [Tr. 20, 50, 73, 113]. As the ALJ found, James proceeded to walk around the rest of the table and picked up the other flyers still stacked there. [ALJD 4:24-26; Tr. 20, 49-50, 73, 113, 185, 199, 211].

James returned to his seat with all the collected flyers in a single stack and sat down, stating "that's a federal violation." [ALJD 4:26-28; Tr. 21, 50, 73, 113]. Stone asked James, "A federal violation?" [Tr. 21, 73, 113]. James, who later claimed to be under the mistaken impression that no campaigning is permitted at the election site within 24 hours of the polls opening, repeated, "Yes, that's a federal violation right there." [ALJD 4:fn. 4; Tr. 21, 73, 113, 187]. No one else spoke about what had just happened; everyone sat in stunned silence until James began the safety meeting a few moments later, at 8:45 a.m. [Tr. 21-22, 50, 73-74, 113, 186]. The ALJ correctly

found no evidence of James replacing the confiscated flyers after the safety meeting ended. [ALJD 4:28-29].

### **III. ARGUMENT AND CITATION TO AUTHORITY**

#### **A. The ALJ correctly concluded that Respondent’s Maintenance of the No Cell Phones Rule Violated Section 8(a)(1) of the Act. Respondent’s Cross-Exceptions 1 through 3 are without merit.**

Respondent’s Hourly Employee Handbook dated March 17, 2010, was in effect at the Valdosta plant throughout the material events of this case. [ALJD 3:22-23]. Rejecting Respondent’s contention that it rescinded both the non-disparagement and no-cell phones rules in December 2017 (in apparent response to the filing of the charge in Case 12-CA-210779), the ALJ appropriately found that the purported rescission was meaningless because employees were not notified of it until about October 5, 2018, and that the March 17, 2010 version of the handbook was in effect from employees’ perspective through that date. [ALJD 3:22-41]. The ALJ appropriately analyzed Respondent’s no cell phones rule printed in that handbook and correctly concluded that it was overbroad in violation of Section 8(a)(1) of the Act.<sup>7</sup> [ALJD 6:33-7:3, 7:30-8:3, 10:29-30].

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board “reassessed” the standards by which it will adjudicate the lawfulness of employer work rules, ending the use of the first prong of the inquiry set forth in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), i.e., that the Board will no longer find unlawful all employer rules that employees may reasonably read to impact protected Section 7 rights. Instead,

[w]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.

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<sup>7</sup> Counsel for the General Counsel has filed its own exception regarding the ALJ’s failure to likewise find that maintenance of the non-disparagement rule violated Section 8(a)(1) of the Act.

365 NLRB No. 154, slip op. at 3.

Thus, under the *Boeing* framework, the threshold inquiry is whether a reasonable interpretation of the rule in question shows the ability to potentially interfere with, i.e., a chilling effect on, employees' exercise of NLRA-protected rights. 365 NLRB No. 154, slip op. at 15-16 (“when the Board interprets any rule’s impact on employees, the focus should rightly be on the employees’ perspective”). Assuming that it does show that chilling effect, the amount of that potential interference is then balanced against the merit of the employer’s stated rationale for maintaining the rule. ALJ Amchan correctly applied the *Boeing* framework and other Board precedent in his analysis of the no cell phones rule.

Respondent’s no cell phones rule states, in relevant part, that “Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.” [JX 1, page 27]. In *T.R.W. Bearings*, the Board held that:

Inasmuch as employees may rightfully engage in organizational activities during breacktime and mealtime, rules which restrain, or which, because of their ambiguity, tend to restrain employees from engaging in such activity constitute unlawful restrictions against and interference with the exercise by employees of the self-organizational rights guaranteed them by Section 7 of the Act.

257 NLRB 442, 443 (1981). “Organizational activities” can include traditional organizing activities like solicitation of authorization cards or leafleting, or more inchoate activities like discussions of terms and conditions of employment. Terms such as “work hours” and “company time,” have long been found to be invalidly overbroad unless clarified that such time does not include nonworking time, such as breaks and lunch periods. See, e.g., *id.*; *North Hills Office Services, Inc.*, 346 NLRB 1099, 1113 (2006) (“prohibitions restricting solicitation during working hours are facially unlawful because they imply a prohibition from the beginning to the end of the shift”), citing *Our Way*, 268 NLRB 394 (1983); see also *Plastic Film Products Corp.*, 238 NLRB 135, 135 (1978); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 617 (1962). ALJ Amchan cited appropriate authority to support his conclusion that

Respondent's no cell phones rule *as written* is presumptively invalid under the Act because of its potential to interfere with employees' ability to make personal communications by telephone "in non-work areas at any time during the workday." [ALJD 7:33-35, citing *Our Way*, 268 NLRB 394 (1983); *Whole Foods*, 363 NLRB No. 83, slip op. at 3 (2015)].

Respondent's attempts to contort the reading of the text of its no cell phones rule to avoid this outcome are not persuasive. In the same handbook, its "No Solicitation Rule" includes the following limitation "'Working time' means the time when you are actually scheduled to work, and does not include mealtime, breaks, etc." [JX 1, p. 26]. In contrast, the no cell phones rule dictates that the devices "will not be allowed in use during work hours or in work areas at any time," without the limitation that appears on the page before in the No Solicitation Rule. Because the no cell phone rule includes instead the phrase "work hours," which is reasonably understood by employees as being from the beginning of their shift to the end of their shift, it impacts employees' Section 7 rights. Cell phones – in particular, the nearly ubiquitous smart phones – are self-evidently important to an organizing campaign. Employees must be free to call, text, email, and use other forms of electronic communication to reach each other, union organizers, or relevant third parties, when on breaks and mealtimes, just as much as they must be permitted to talk freely aloud amongst themselves in the same time and space. The potential impact on organizing activities if cell phone usage is banned during all working hours and in all work areas is therefore significant, particularly in a facility like Respondent's that operates around the clock with three separate shifts.

Per *Boeing*, this unquantifiable but undeniable potential impact must be measured against Respondent's stated justification for implementing the no-cell phones rule. Respondent's witnesses at the hearing stated that the ban was intended to protect employees, working in the dangerous environment of the railroad tank car repair and maintenance facility, from being distracted while having non-work-related conversations or otherwise using cell phones on the work floor. However,

Respondent's rule is facially overly broad for achieving that purpose, as it prohibits use of cell phones during work hours, which includes break time and lunch time, regardless of location.

Moreover, Respondent's evidence that the rule *as written* was not actually enforced by Respondent's supervisors and managers, such that employees were effectively unaware of the rule, is irrelevant to this inquiry and was rightly disregarded by ALJ Amchan in his unfair labor practice analysis. Respondent's attempts to reverse this long-standing cornerstone of "mere maintenance" rules analysis would invariably lead to impunity for employers who maintain more abjectly violative rules, such as unlawful prohibitions on employee discussions of compensation, in the absence of proof that the rule had ever been applied to an employee. The Board has rejected this notion. See, e.g., *Farah Manufacturing Co.*, 187 NLRB 601, 602 (1970) ("As the mere maintenance of the rule itself serves to inhibit the employees' engaging in otherwise protected organizational activity, the finding of a violation is not precluded by the absence of specific evidence that the rule was invoked as of any particular date against any particular employee" (internal citations omitted)); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *Continental Group, Inc.*, 357 NLRB 409, 411 (2011); *UPMC, UPMC Presbyterian Shadyside, d/b/a UPMC Presbyterian Hospital and d/b/a UPMC Shadyside Hospital*, 366 NLRB No. 142, slip op. at 1, 13; see also *NLRB v. Beverage-Air Co.*, 402 F.2d 411, 419 (4th Cir. 1968). *Boeing* did not upset the well-established and important aspect of the Board's duty in enforcing the Act when employers' "mere maintenance" of published rules could, on their face, chill employees' exercise of Section 7 rights.

Finally, ALJ Amchan reasonably inferred that Respondent's "justification" for its printed handbook rule on cell phone use was undermined by its purported rescission of the rule in December 2017 and further, reasonably inferred based on the timing of the rescission that the directive was issued as a result of the Union's charge in Case 12-CA-210779. Respondent's

contention that it was error for him to make this logical inference is not supported by the actual available evidence: the Union filed the charge in Case 12-CA-210779 on November 30, 2017. Respondent's supervisors and managers were specifically instructed not to enforce the no-cell phone rule and the non-disparagement rule *in the handbook* as of an unspecified date in December 2017. Respondent did not tell managers not to enforce the handbook writ large pending its revision – only those two rules. Employees themselves were told nothing of the purported rescission. The record shows no evidence that any other rules replaced them in the interim until October 2018, when Respondent's new handbook issued. Thus, an inference that the cause of the rescission was the filing of the charge alleging their unlawfulness was entirely appropriate; likewise, the concomitant inference that the rules *as written* were not justified by the purported intent behind them was also entirely appropriate for ALJ Amchan to make.

Respondent's Cross-Exceptions fail to demonstrate that its no cell phones rule printed in its employee handbook that was in effect for employees until about October 2018 was lawful. Its safety justifications, while a rational basis for prohibiting cell phones on the work floor, are insufficiently tailored to that narrow purpose and cannot outweigh the obvious chilling effect that such a rule, as written, would have on a reasonable employee. Respondent's Cross-Exceptions 1 through 3 should therefore be rejected, and ALJ Amchan's cogent analysis of the no cell phones rule should be adopted by the Board.

**B. ALJ Amchan properly resolved credibility disputes between witnesses' testimony and correctly found that Supervisor Bridges told employee Wallace that, but for the Union, he would not have been suspended. Respondent's Cross-Exceptions 4 through 6 are without merit.**

As set forth in greater detail above, ALJ Amchan correctly determined as a factual matter that supervisor Bridges had two separate conversations with employees during roughly the same timeframe wherein he spoke negatively about the Union. [ALJD 5:23-6:27]. First, in early March,

supervisor Bridges told employee Wallace that if it were not for the Union, Wallace would have received a written warning instead of a 30-day suspension. [ALJD 5:23-30]. Second, also in early March, employee Sowell approached Bridges to ask whether it was true that he could be fired for refusing to sign the disaffection petition that employees were circulating. [ALJD 5:34-6:4]. Bridges told him no, not “technically,” but that Respondent would start looking for reasons that could be used to fire him, and that if Sowell did sign the petition, he was more likely to have better opportunities within the company. [ALJD 6:5-27].

Respondent’s Cross-Exceptions 4 through 6 challenge only the credibility resolutions and the factual finding with respect to Bridges’ conversation with Wallace.<sup>8</sup> The record evidence does not and cannot show that ALJ Amchan’s credibility resolutions with respect to the Wallace conversation are incorrect, and Respondent’s Cross-Exceptions on this point should be denied.

The Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence convincingly demonstrates that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In making credibility determinations, administrative law judges may rely on a number of factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014).

All credibility considerations were appropriately tipped in Wallace’s favor. As correctly considered by the ALJ, Wallace “had less motive to make up his story than Bridges had to deny

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<sup>8</sup> None of Respondent’s Cross-Exceptions – or its argument in the Brief in Support – seek to reverse ALJ Amchan with respect to Bridges’ conversation with Sowell. Therefore, it is the law of the case that Bridges and Sowell had the above-described unlawful conversation.

it” because he had voluntarily left his employment with Respondent to take another job two months prior to the hearing, whereas Bridges remains employed by Respondent as a welding supervisor. [ALJD 5:26-30]. Meanwhile, Bridges admitted that his memory of conversations during that timeframe was incomplete, so his generalized denials of such conversations with Sowell were appropriately discredited by the ALJ and presumably factored into the ALJ’s decision to credit Wallace over Bridges as well. [Tr. 163; ALJD 5:28, 6:23-25]. Furthermore, there is no financial remedy at stake in this case for Wallace.

Respondent’s argument on Cross-Exception, also advanced at the hearing, that Bridges could not (and thus would not) tell Wallace his infraction had been treated more harshly because of the Union’s presence, fails for several reasons. First, Bridges *did* have a conversation of a similar tenor with another employee, Sowell, in the same timeframe, negating Respondent’s essential contention that Bridges is not the kind of person who would do such a thing. During the hearing, although Bridges attempted to paint himself as an aloof supervisor, keeping his distance from all Union-related conversations, Bridges ultimately admitted that he would hear out employees who came to him about the Union and advise them to use their best judgment about what would be best for them. [Tr. 156, 160, 166-167]. Second, it is wholly irrelevant whether Bridges himself had the authority to make the employment decisions he was discussing with either Wallace or Sowell. Neither Wallace nor Sowell testified that Bridges claimed personal responsibility for such decisions, while Bridges, an admitted agent of Respondent, would be perceived by a reasonable employee as a mouthpiece for company policy and the conduit between decision-makers in “the office” and employees on the shop floor.

Third, although Respondent sought to demonstrate that the 30-day suspension of Wallace was entirely appropriate, that has no bearing on the probity of Bridges *telling* Wallace that it was not, and blaming the Union’s presence for it; the Complaint does not allege that the suspension was a violation of Section 8(a)(3). Bridges could have been ribbing Wallace, or even intentionally seeking to poison

him against the Union by implying that standards would be more lax if Respondent no longer had to deal with the Union.<sup>9</sup> Finally, although not specifically addressed by the ALJD, it was not error for ALJ Amchan to dismiss Respondent’s argument that Bridges, having received training on permissible and impermissible conduct during a union campaign, was entitled to a favorable inference in denying making unlawful statements. See, e.g., *Nu-Skin International, Inc.*, 320 NLRB 385, 391 (1995) (“the fact that one knows certain conduct should not be engaged in is simply not particularly probative of whether that person actually engaged in the conduct at issue”).

For these reasons, Bridges’ denials were simply not credible, while Wallace testified forthrightly and consistently. Accordingly, the ALJ correctly found that Respondent, via Bridges, told Wallace that he received more severe discipline due to the Union presence at the facility. Respondent’s Cross-Exceptions 4 through 6 should therefore be rejected as they are without merit.

**C. The ALJ correctly found that supervisor James’ conduct in the breakroom on June 21, 2018, violated Section 8(a)(1) of the Act. Respondent’s Cross-Exception 7 is without merit.**

The parties do not dispute that supervisor James removed Daugherty’s pro-Union flyers from the break room tables during the morning break on June 21, 2018, the day before the representation election. James admitted to the essential facts of picking up employees’ pro-Union flyers from the break room during their break time. Minor discrepancies about the details exist, such as whether James removed three flyers or three stacks of flyers; whether a flyer was pulled directly out of an employee’s hands, or from the table in front of him; and what the precise configuration of the tables was on the day in question, but ALJ Amchan correctly found that the resolution of such discrepancies is largely irrelevant to the core of the matter: in clear view of a group of employees, a front-line supervisor methodically collected all visible pro-Union flyers from a non-working area during non-working time,

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<sup>9</sup> The ALJ failed to find that this statement violated Section 8(a)(1) of the Act due to insufficient evidence that it occurred before Respondent’s withdrawal of recognition from the Union, i.e., while the disaffection petition was circulating; Counsel for the General Counsel excepted to this conclusion in its own Exceptions.

and, by all credible accounts, called it a “federal violation” as he did so. James’ break room conduct on the morning of June 21, 2018, is a per se violation of Section 8(a)(1) of the Act. See, e.g., *VT Hackney, Inc.*, 367 NLRB No. 15, slip op. at 1, fn. 2 (2018) (Board found unlawful disparate enforcement of a rule when supervisor confiscated only pro-union materials from employees’ lockers); *Intertape Polymer Corp.*, 363 NLRB No. 187, slip op. at 1-2 (2016) (union flyer confiscation from break room by supervisors, after break had ended, constituted a violation); *Venture Industries*, 330 NLRB 1133, 1134 (2000) (violation found when supervisor confiscated union literature from break room tables in view of single employee).

Citing to unpersuasive authority, Respondent’s Cross-Exception 7 asks the Board the reverse the legal conclusion of ALJ Amchan on the basis of purported facts not actually found by him. Respondent emphasizes repeatedly that James removed “three” flyers, that the break was ending, and that “every employee” in the room had had the opportunity to review the flyers. [Respondent’s Brief in Support at 16-18]. The ALJ declined to resolve the factual dispute presented by the parties’ 14 witnesses as to the specific number of flyers, correctly finding that it was irrelevant to do so in light of the extant Board law on the subject. [ALJD 4 at note 3]. Respondent’s Cross-Exceptions do not except to this, only to the legal conclusion reached by ALJ Amchan. Likewise, Respondent did not take exception to ALJ Amchan’s failure to find that every employee had an opportunity to review the flyers, despite asserting that to be true in its brief in support of exceptions. [ALJD 4:18-28].

Nor did Respondent actually except to ALJ Amchan’s factual finding that James said that the Union had committed a “federal violation” by distributing the flyers. Such a challenge, even if advanced, would fail, because the sum of the record evidence does not show that the ALJ was incorrect in resolving the credibility dispute between James and the employee witnesses presented by the General Counsel in favor of those several employees who stated that they heard James use

those words. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). The Board has cited with approval an ALJ's discrediting of current employees who testify on behalf of the employer, in part because of a reasonable inference that the employee may be reluctant "to incur the Respondent's disfavor." *Classic Sofa, Inc.*, 346 NLRB 219, 220 at n. 2 (2006). Conversely, "the testimony of current employees which contradicts the statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests." *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995).

Respondent's witnesses presented at the hearing failed to offer a consistent, coherent version of the events of June 21, 2018 – it is questionable whether they were even recounting actual memories of a particular day or merely saying what they thought Respondent's counsel wanted to hear. Employee Chad Morgan ("Morgan") would not say that James picked up the flyers at all until prompted pointedly by questioning from Respondent's counsel. [Tr. 195-199]. Morgan's denial that James took the paper directly from his hands is therefore not credible. [Tr. 199-200]. Lead person Tim McEady ("McEady"), who by other credible accounts was in the break room prior to James that day, testified rather that when he came into the room, James "was just sitting reading over – yeah, just sitting. Yes ma'am." [Tr. 206]. McEady was also reluctant to describe James' actions in full absent leading questions. [Tr. 206-212]. Clint Selph, another welder sitting near McEady and James that day, and Zachary Timpson, George Padgett, employees in a different department on break at the same time, were not even offered the opportunity to state narratively what James did with the Union flyers. [Tr. 217-219, 224-226]. Welder Dalton Castleberry denied – again in response to a leading question – seeing James even "pick up any papers in the break room." [Tr. 237]. None of Respondent's witnesses were asked even a leading question about whether James called the flyers a federal violation, besides James himself, who predictably denied the allegation. [Tr. 186].

Furthermore, Respondent’s argument – advanced both here and in its Answering brief to the General Counsel’s Exceptions – that James’ conduct, in the totality of the circumstances, does not rise to the level of a violation of the Act, is also unsupported by the case law on this subject, including that cited in General Counsel’s Brief in Support of its Exceptions. Despite Respondent’s contention, the Board does not require discriminatory treatment of employees’ pro-union materials to find a violation when a supervisor confiscates or removes them from non-work areas. Respondent’s arguably best authority on this point, *North American Refractories Co.*, 331 NLRB 1640 (2000), is a case where the employer “acted with equal zeal” in enforcing its breakroom housekeeping rule with respect to both pro- and anti-union literature left by employees, and the employer had unequivocally told employees they could distribute such materials during breaks but that they would be removed from the break room at the end of each break, such that the Board found no violation in the absence of evidence of such discrimination. *Id.* at 1642,1643.

The instant case is distinguishable because there is no evidence that Respondent maintains, or has ever maintained, a housekeeping rule that prohibits employees from leaving materials for each other (i.e., from shift to shift) in the break room. Additionally, prior to filing its cross-exceptions, Respondent had never even argued that it maintained such a rule, and there is no authority in which the Board has ever assumed such a rule to be in place. Moreover, James was undisputedly not removing “abandoned” material from the breakroom; by several accounts, he in fact took one of the pro-Union flyers directly out of the hands of one employee and from the table directly in front of another. [Tr. 20, 50, 73, 113].

The ALJ’s appropriate credibility resolutions, factual findings, and legal conclusions surrounding James’ breakroom conduct should therefore not be disturbed. The Board should deny Respondent’s Cross-Exception 7.

**IV. CONCLUSION**

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Board to deny Respondent's Cross-Exceptions in their entirety and modify the ALJ's findings, conclusions of law, and recommended Order as sought by Counsel for the General Counsel's Exceptions to provide complete remedies for all of Respondent's violations of Section 8(a)(1) of the Act, as described above.

Dated: March 15, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document, Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge, was served on March 15, 2019 as follows:

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