

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

ARGOS USA LLC d/b/a
ARGOS READY MIX, LLC,

and

Cases 12-CA-196002
12-CA-203177

CONSTRUCTION AND CRAFT WORKERS
LOCAL UNION NO. 1652, LABORERS'
INTERNATIONAL UNION OF NORTH
AMERICA, AFL-CIO

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND RECOMMENDED ORDER**

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I. INTRODUCTION AND STATEMENT OF THE CASE

On May 14, 2019, Administrative Law Judge Kimberly R. Sorg-Graves (the ALJ) issued her Decision in this case, correctly finding that Argos USA LLC d/b/a Argos Ready Mix, LLC (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by maintaining policies that unlawfully restrict employees' rights to engage in activities protected by Section 7 of the Act, suspending and terminating employee Emmanuel Excellent (Excellent) pursuant to one of these unlawful rules, and suspending Excellent without providing prior notice to Construction and Craft Worker's Local Union No. 1652, Laborers' International Union of North America, AFL-CIO (the Union), and without giving it an opportunity to bargain when the parties have not yet reached their first collective-bargaining agreement. Respondent filed Exceptions and a supporting brief on July 12, 2019, challenging the ALJ's well-reasoned conclusion under current Board law that Respondent's policies concerning confidentiality, electronic communications, and cell phone possession are unlawfully overbroad, and that Excellent was suspended and terminated pursuant to an overly broad rule prohibiting the possession of cell phones in Respondent's ready-mix trucks. Additionally, the record and extant Board law, including *Total Security Management Illinois, LLC*., also support the ALJ's findings and conclusions that Respondent unilaterally suspended Mr. Excellent without notifying and offering to bargain with the Union, in violation of Section 8(a)(5) of the Act.¹ As explained below, Respondent's exceptions regarding the ALJ's factual conclusions run contrary to credited record testimony and documentary evidence, and the ALJ made the correct findings of fact and properly applied extant Board law.

¹ The General Counsel believes that *Total Security Management Illinois, LLC*, 364 NLRB No. 106 (2016) and *Purple Communications, Inc.*, 361 NLRB 1050 (2014) were wrongly decided for the reasons set forth in the General Counsel's Cross-Exceptions and Brief in Support of Cross-Exceptions, which are being filed simultaneously with this Answering Brief.

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 Exceptions.²

II. STATEMENT OF FACTS

a. Background

Respondent is engaged in the business of manufacturing and delivering ready-mix concrete at its place of business in Naples, Florida and at various other locations throughout the United States. [ALJD. 2, 14-15]. Respondent has approximately 300 ready-mix concrete batch facilities nationwide. [ALJD 2, 30; Tr. 59: 4-5]. In about 2011, Respondent purchased its Naples, Florida ready-mix facility from Vulcan Enterprises, which had purchased it from Florida Rock in about 2007. [ALJD. 2, 25-27; Tr. 59: 12-20]. The Union has represented the eleven ready-mix drivers employed at Respondent's Naples facility since July 2015, when the Union³ was certified as the drivers' exclusive collective-bargaining representative. [ALJD 3, 15-16; Tr. 192: 7-18]. The Naples facility is Respondent's only unionized location. [ALJD 3, 15-16]. At the time of the hearing, the Union and Respondent were negotiating, but had not yet reached, an initial collective-bargaining agreement. [ALJD 3, 17-18; Tr. 192: 19-21].

Within the State of Florida, Respondent's operations are divided into five areas: Orlando, Gainesville, Jacksonville, Tallahassee, and South Florida. [Tr. 245: 14-18]. The South Florida area is composed of 23 ready-mix facilities, including the Naples facility, and each facility is

² Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order, and its Brief in Support of Exceptions to the Administrative Law Judge's Decision and Recommended Order are referred to collectively herein as "Respondent's Exceptions." The ALJ'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, line).

³ The ALJ found that the Union is a labor organization within the meaning of Section 2(5) of the Act. [ALJD 2, 20-22].

headed by a plant manager or supervisor. [ALJD 3, 3; Tr. 243: 20-25; 244: 1-3]. Respondent employs approximately 220 employees in the South Florida area, 150 of which are drivers. [ALJD 3, 4; Tr. 244: 13-18].

Michael Beer (Beer) is the Director of Human Resources for Respondent's ready-mix operations in the entire United States and oversees human resource managers who cover various geographical areas. [ALJD 3, 6-8; Tr. 55, 12-16]. Robert Marion (Marion)⁴ is the Division Manager responsible for overseeing all the facilities in the South Florida area, which spans from Tampa to Miami, including Naples. [ALJD 3, 9-10; Tr. 242: 3-7]. Marion is generally involved in employee relations matters, including personnel matters involving accidents or safety issues. [Tr. 245: 1-9]. Chad Kennedy (Kennedy) is the District Manager for the 15 facilities between Port Charlotte and Naples employing about 40 drivers and he visits the Naples facility at least once per week. [ALJD 3, 11-13; Tr. 333: 19-24]. The Plant Supervisor for the Naples facility is Spencer Johnson (Johnson). [Tr. 246: 4-7]. Johnson is responsible for running the facility, batching the concrete, and ensuring the correct product leaves the facility. [Tr. 335: 20-24; Tr. 246: 13-20]. The ready-mix drivers at the Naples facility report directly to Johnson. [Tr. 91: 10-13; 157: 23-24].

The Naples facility is a large rectangular lot. [ALJD 3, 21]. The batch plant, which stores the materials necessary to create concrete is located near the middle of the facility. [ALJD 3, 21-24; GCX 7, Letter D; RX1, Page 5]. A two-story building known as the batch tower is located parallel to the batch plant but closer to the front of the property. [ALJD 3, 24-26; GCX 7, Letter A; RX1, page 9]. The first floor of the batch plant contains the driver break room and the second

⁴ Respondent entered into a stipulation that Marion held the position of Sales Manager for Major Markets from approximately 2015 to about April 2017, and that during this time frame he was a supervisor as defined in Section 2(11) of the Act. [Tr. 61: 14-22].

floor contains the batch plant control center and office, which is used by managers and supervisors. [ALJD 3, 24-26; Tr. 93; 159]. The batch plant includes a load out point where the ready-mix trucks are filled with concrete. [ALJD 4, 8-10; RX. 6]. After a ready-mix truck is loaded by a supervisor, the ready-mix driver will drive their vehicle to the slump rack. [ALJD 4, 10-11; GCX 7, letter C; RX1, pages 10 and 11]. Before leaving the facility to transport the concrete to the jobsite, ready-mix drivers park their ready-mix truck by the slump rack and use it to reach the top of their ready-mix truck to inspect the concrete material inside the drum. [ALJD 4, 15-17].

Two ready-mix drivers testified at the hearing: Emmanuel Excellent (Excellent) and Jose Perez (Perez). Excellent was employed by Respondent as a ready-mix driver at its Naples facility beginning in June 2015 and, as discussed below, was unlawfully suspended on March 3, 2017, and unlawfully discharged on April 28, 2017. [ALJD 10, 6-8; GCX 6; Tr. 90: 3-4; 272: 22-23; 349: 10-12]. Perez has been a ready-mix driver at the Naples facility since May 19, 2008. [Tr. 156: 9-10]. Perez currently holds the title of Driver/Trainer and is a member of the Union's bargaining committee. [Tr. 156: 11-12; 157:12-16]. Aside from his duties as a ready-mix driver, Perez also trains and teaches new hires about their duties and responsibilities, company policies, and aspects of the ready-mix business. [Tr. 157]. Driver/Trainers go through a one-week training course. [Tr. 179: 22-23]. Trainers must accompany trainees on their first 50 loads, and then must conduct a final road evaluation to approve the trainees as drivers. [Tr. 180: 6-13].

b. Respondent's Vehicles

A ready-mix truck is a heavy-duty truck that contains a large drum used to mix and haul concrete. [Tr. 91: 1-2; 157: 20-22]. Ready-mix trucks are considered commercial motor vehicles. [Tr. 309: 12-14]. Respondent's ready-mix trucks are equipped with disposable cameras owned by Respondent, which are used to take photos of accidents. [ALJD 19, 14-16; Tr. 263: 7-9; 296: 6-11]. Respondent has never informed employees that they are free to use the cameras for other

purposes without repercussions or questions. [ALJD 19, 16-19]. Furthermore, the cameras are monitored by Respondent, and if the cameras are used by an employee they must be turned over to Respondent. [Tr. 296: 14-17; 297: 6-12].

Respondent also owns and operates a variety of other vehicles, including service trucks, front-end loaders, and light duty trucks. [Tr. 81: 8-11]. Service trucks are heavy-duty vehicles, such as Ford F350s or 450s, with a large chassis and utility boxes on their side. [ALJD 6, 7-11; Tr. 81: 18-23]. The service trucks are primarily driven by Respondent's maintenance employees, who use the trucks to carry tools and equipment to repair vehicles away from the facility. [ALJD 7-9; Tr. 81: 12-23]. The service trucks can be driven as far as 30 miles away from the facility. [Tr. 82: 14-17]. Maintenance employees operating service trucks are allowed to possess cell phones in their work vehicles, provided the rules for hands free operations are followed. [ALJD 6, 9-11; Tr. 81: 24-25; 82: 1-2]. Front-end loaders are motorized four-wheel vehicles with a cab in the middle and a bucket in the front used to pick up and dump gravel or other large material. [Tr. 82: 19-24]. These vehicles generally do not leave the yard, and are driven by Respondent's supervisors, or a yard person. [Tr. 82: 5-8]. Front-end loaders are considered heavy equipment. [Tr. 397: 15-22]. Beer testified that employees driving the front-loaders are allowed to possess cell phones in the vehicles. [Tr. 83: 4-6]. Light-duty vehicles are assigned to and driven by Respondent's managers and supervisors. [Tr. 83: 10-11]. Managers drive light duty trucks from one facility to another. [Tr. 83: 11-12]. For example, the operations manager at Respondent's Naples facility will generally drive between Fort Myers and Naples, but may drive as far as Tampa. [Tr. 83: 19-25; 84: 1-6]. Thus, on a daily basis, the Naples operations manager may drive about hundred miles. [Tr. 84: 7-11]. Beer testified that operations managers are allowed to possess cell phones in their light duty trucks. [Tr. 84: 12-14].

Until the end of 2017, the Naples facility also delivered cement blocks to customers. [ALJD 5, 35; Tr. 84: 15-22]. The blocks were delivered on a shortened semi-tractor and flatbed trailer or on a straight truck with a flatbed. [ALJD 5, 36-37; Tr. 85: 12-18]. These trucks are considered commercial vehicles, like ready-mix trucks, and weigh over 10,000 pounds. [ALJD 5, 37-38; 6, 1; Tr. 86: 2-5]. Straight trucks are trucks that have large cabs and flatbeds on the back but are shorter than semi-trucks. [Tr. 84: 12-16]. Straight trucks are about the same size as ready-mix trucks but have a tractor-trailer. [Tr. 174: 12-15]. Semi-trucks are heavy-duty trucks with flat beds. [Tr. 85: 16-18]. The flatbed truckdrivers used Nextel flip phones to communicate. [ALJD 6, 2; Tr. 175: 15-25; 176: 1-8]. A Nextel phone can be used like a cell phone and have preprogrammed contacts. [ALJD 6, 2-3; Tr. 175: 23-15; 176: 1]. Once the pre-programmed contact is selected, the phone functions like a walkie-talkie in that you push a button to talk and release it to receive communication. [ALJD 6, 3-5; Tr. 176: 7-8].

c. Ready-Mix Driver's Duties and Work Day

Ready-mix drivers are responsible for delivering concrete from the Naples facility to their assigned jobsite, ensuring the concrete is of good quality, and conducting an inspection of their ready-mix trucks before and after their work shifts to ensure that the truck is in good working order. [Tr. 90: 13-16; 156: 17-25]. Ready mix drivers do not have fixed work schedules, and generally contact Respondent in the evening to find out what time they are scheduled to report to work the next day. [ALJD 3, 30; Tr. 92: 2-13; 158: 11-12]. Because delivery times are based on customer needs, the drivers' start and end time can vary significantly from day to day. [ALJD 3, 31-32; Tr. 341: 14-23]. On a typical day, the drivers report between 5 and 6 a.m. for their first load of the day. [ALJD 3, 33-34]. A work load or ticket is generated when customers place orders through Respondent's central dispatch, which is in Sarasota and Fort Myers, and a computerized system sets the schedule for deliveries the next day. [ALJD 3, 28-29; Tr. 247: 4-24]. On average,

employees are assigned anywhere between three to five loads per day. [ALJD 4, 34-35; Tr. 93: 4-5; 159:1-3].

When employees arrive at the facility, they go to the break room and clock-in and then perform the pre-check inspection of their work truck, and then take the inspection form to Supervisor Johnson for signature. [ALJD 4, 1-4]. The driver then waits in the break room for a ticket. [ALJD 4, 4]. Johnson notifies ready-mix drivers of their loads by dropping a work ticket through a hole in the floor of the office located on the second floor of the batch tower to the drivers' room located on the first floor of the building. [ALD 4, 6-7; Tr. 93: 8-20; 159: 4-15]. Once a ready-mix driver receives their work ticket, they review it for accuracy and proceed to their ready-mix truck to get it loaded with concrete at the batch plant. [ALJD 4, 7-8; Tr. 159: 17-25; 160: 1-2]. Johnson activates the computerized system and the batch plant loads the truck drum with the materials to fill the customer's order specifications. [ALJD 4, 9-10]. After the ready-mix truck is loaded, the ready-mix driver drives their vehicle over to the slump rack. [ALJD 4, 10-11; Tr. 160: 6-10]. Before leaving the facility to drive the jobsite, ready mix drivers park their ready-mix truck by the slump rack in order to climb the ladder and inspect the concrete material inside the drum. [ALJD 4, 10-18; Tr. 94: 8-13; 160: 6-10].

Ready-mix drivers spend around 85 percent of their work day away from the facility either on the road or at jobsites. [ALJD 19, 37-40; Tr. 160: 23-25]. When the ready-mix driver arrives at the jobsite, they park their truck in a safe place, walk the jobsite, and ask the customer where they want the truck positioned to pour the concrete. [ALJD 4, 18-20; Tr. 161: 1-16]. A driver may spend anywhere between 15 minutes to 4 hours at any given jobsite. [Tr. 94: 16-18; 161: 17-25; 162: 1-13]. The amount of time it takes a driver to deliver a load depends on a variety of factors including the type and size of job, whether the customer is ready to use the concrete when the

driver arrives, waiting on inspections, the weather, traffic, or other delays. [ALJD 4, 20-23; Tr. 95:4-6; 160:15-25; 164:1-24]. Furthermore, Ready-mix drivers frequently have down time at jobsites when customers are not yet ready to use the concrete or while waiting for inspections, or other reasons. [Tr. 95:4-6; 160:15-25; 163: 18-19; 164: 1-24]. Delays at jobsites can last a couple of minutes to 90 minutes or more. [ALJD 4, 24-25; Tr. 163: 22-25; 164: 1-8]. Respondent does not assign ready mix drivers any specific tasks to perform while they are at a jobsite waiting to unload the concrete. [Tr. 162: 4-7]. Generally, during this waiting period, employees eat their lunch or do nothing at all. [Tr. 162: 25; 163:1-2].

Employees are required to stay at a jobsite until their truck is emptied. [Tr. 162: 23-24]. Although the ready-mix truck remains operational during an employee's down time, the drum automatically rotates. [Tr. 165, 10-25]. During longer periods of down time, a driver may need to check the condition of the concrete every 15 to 20 minutes to ensure that it is not drying and may need to add water prior to discharging the concrete. [Tr. 165: 23-25; 166: 7-18]. When the customer does not need any more concrete, the ready- mix driver proceeds to wash the truck of any excess concrete and heads back to the facility. [Tr. 161:13-16]. The average round trip for a load is about 2 hours. [ALJD 4, 37-38]. The time at the jobsite usually ranges between 20 to 80 minutes. [ALJD 4, 38-39; Tr. 161]. Employees spend between 15 and 20 percent of the workweek at the facility. [ALJD 5. 8-9]. Pursuant to the cell phone policy described below, employees are generally not allowed to possess or use their cell phones while at the facility because they are in and out of the truck cab performing work such as pre-trip check, fueling, loading, inspecting the load, and washing and parking the truck. [ALJD 19, 40-44].

While on the road, Respondent communicates with ready-mix drivers using a CB radio, also referred to as a two-way radio. [ALJD 5, 15-16; Tr. 167: 13-14]. A CB radio is a small box

with a cord that connects to a microphone and is used as a method of communication between individuals that share a radio frequency within a specific geographical area. [ALJD 5, 18-20; Tr. 167:13-18]. Respondent has a centralized dispatch and a radio frequency assigned to its delivery area. [Tr. 167:13-14]. In order to use the radio, a driver must reach to grab the microphone, push a button on its side to speak, and release the button to listen. [ALJD 5, 20-21; Tr. 99:18-19; 167: 20-24]. The CB radio cannot be used as a hands-free device. [Tr. 100: 1-2; Tr. 167-168: 25-1]. Thus, a driver must reach over and grab the microphone. Dispatch and Respondent's supervisors or managers use the CB radio to communicate with ready-mix drivers to determine their location and status, update the driver on their job assignments, and provide directions. [ALJD 5, 16-18; Tr. 168:7-16; 100: 10-18]. Respondent has communicated with drivers while they are operating and driving their ready mix-trucks. [Tr. 100: 19-23; 169:6-10].

Respondent has periodically advised employees that the CB radios are for work purposes only. [ALJD 5, 23-25; Tr. 169: 14-22; Tr. 169:14-25; 170: 1-9; RX 2, page 18].⁵ Respondent has announced at its meetings that ready-mix drivers should only use the CB radio for work purposes and communications should be short and to the point. [ALJD 5, 23-25; Tr. 169: 14-22]. If there is excessive chatter Respondent will tell employees to keep it brief. [ALJD 5, 24-25; Tr. 293:7-8]. Thus, Respondent monitors the CB radio. Because they are on the same frequency, private conversations are not possible and dispatch, supervisors, and managers can hear any conversations between employees on the CB radio. [Tr. 101: 17-25; 102: 1-2; 170:10-19]. Kennedy testified that he can hear the CB radio communications from his office. [Tr. 393: 1-9]

⁵ RX2, a PowerPoint presentation, outlines the Respondent's radio protocol, including its transmission rules, which state, in pertinent part: "Use only for business purposes- not personal messages." On May 19, 2015, Kennedy, sent an e-mail to three of Respondent's supervisors, including Naples Plant Manager Spencer Johnson, reminding them that "the radios are for business purposes only." [See GCX 14]. Perez testified that around January 2018 Respondent placed a written reminder in the driver's room advising employees that the CB radios are for work purposes only. [Tr. 169:14-25; 170: 1-9].

Ready-mix drivers generally use 10-codes to communicate over the CB radio in order to reduce radio traffic. [ALJD 5, 26-27; Tr. 168:20]. The 10-codes are numerical codes that represent specific actions throughout a delivery. [Tr. 168-169: 20-3]. For example, 10-7 is used to request permission to stop on the road or to take a break. [ALJD 5, 32-34; Tr. 170: 20-23; 102: 12-17]. Generally, drivers request a 10-7 to eat, drink, or use the restroom, and the break lasts approximately 5 to 10 minutes. [Tr. 170: 22-23; 171: 3-5; 102: 20-15]. Drivers request a 10-7 on a daily basis when they are away from the facility. [Tr. 171: 8-14; 103: 13-17]. This is a well-known practice since drivers share the CB frequency and can hear other requesting a 10-7. [Tr. 103:10-17; 171: 11-13]. Ready-mix drivers do not have scheduled meal breaks. [Tr. 172: 7-8; 104; 2-3].

d. Respondent's Policies

Dating back to at least June 1, 2014, Respondent has maintained and enforced a cell phone policy at all its facilities prohibiting employees from possessing or using cellular phones in its ready-mix trucks. [ALJD 7, 15-40; GCX 5: pages 6-7 titled Cell Phone Policy While Operating a Vehicle]. The policy provides, in relevant part:

Commercial Vehicles and Heavy Equipment

It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle; (i.e. “commercial vehicles” are defined as having a gross vehicle weight of 10,000lbs. or more including any heavy equipment used on the plant yard). This prohibition also extends to the use of any accompanying equipment (e.g. earpieces or hands-free devices) and applies regardless of where the commercial vehicle is being operated. Employees are encouraged to leave their cell phones in personal vehicles at all times. If a driver in a commercial vehicle is involved in an accident, the company reserves the right to look at the driver’s cell phone call history (including their personal cell phone), to determine if the driver was using his/her phone at or around the time of the accident.

The policy further states:

Medium Duty Trucks, Small Trucks, and Light duty Passenger vehicles

Cell phone use is not permitted in a light duty (passenger) vehicle that is in motion,

at any time, unless the employee is using a completely hands free device. When using a hands free device the driver must be able to operate, place and receive calls from the phone without distraction. The driver must not attempt to make notes or write while driving. If the driver finds it necessary to do so, they may have to pull the vehicle over and park in a safe manner and place before continuing the call.

...

Disciplinary Action

Failure to follow any aspect of the cell phone policy will result in a minimum of a three (3) day suspension and final written warning for the first offense and could result in Termination depending on other disciplinary write-ups in the employee's file under the progressive discipline guidelines.

Excellent's personnel file contains a "Cellular Telephone Acknowledgement" form signed on June 11, 2014, acknowledging that he understood that his "possession of any cell phone while driving and/or on any job site ... can lead to immediate termination." [ALJD 8, 5-13; RX 4]. The acknowledgement form further states that Respondent has "a zero tolerance for the use of cellular telephones while operating an Argos, USA commercial motor vehicle;" and that "use or possession of a cellular telephones are (sic) prohibited while operating any Argos, USA commercial motor vehicles." Excellent signed another copy of the Cellular Telephone Acknowledgement on November 7, 2016. [GCX 2]. Like the June 2014 acknowledgement, the November 2016 acknowledgement states, in relevant part, "The use or possession of cellular telephones is prohibited while operating any Argos, USA commercial motor vehicles." The Cellular Telephone Acknowledgement form is in effect at approximately 110 of Respondent's locations in Texas, Arkansas, and Florida. [ALJD 8, 1-5; Tr. 65: 3-6].

In response to Counsel for the General Counsel's subpoena duces tecum request for "Documents Respondent relied upon in creating its cell phone policies, including Respondent's 'Cell Phone Policy while operating a Vehicle' and 'Cellular Telephone Acknowledgement' policies, at Respondent's facility," Respondent produced a report from the United States Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA). [GCX

11]. Beer testified that this was the only document responsive to the request for documents relied upon in creating Respondent's cell phone policies. [Tr. 233: 6-14; 243: 3-7]. The FMCSA report discusses its rule restricting *the use* of handheld devices *while driving* a commercial motor vehicle. [GCX 11]. FMCSA indicates that its rule will reduce the "prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles." [GCX 11, page 4]. FMCSA allows, in part, "hand-held use of a cellular phone in a [commercial motor vehicle] while the truck is idling, parked, or otherwise stationary but not in the roadway," "speaker phone function of a cellular phone while operating a [commercial motor vehicle]," "hands-free cellular phones or functions," and "single button touching on cellular phone to initiate, answer, or terminate a call." [GCX 11, page 1]. The report explains that "using a hand-held mobile phone is risky because it requires the driver to reach for and dial the phone to make a call." [GCX 11, page 3]. FMCSA does not prohibit the possession of cellular phones in the cabs of commercial vehicles. [ALJD 8, 27-31].

Beer testified that two incidents involving work-related accidents in 2014 and 2016 contributed to Respondent's initiation and maintenance of the cell phone policies. [ALJD 8, 32-34; Tr. 432-434; 439:13-21]. Respondent did not produce accident reports, insurance claims, newspaper clippings, or employee files related to these incidents at the hearing. The ALJ properly discredited Beer's testimony regarding these accidents because he failed to adequately explain through his testimony or documentary evidence the basis for his assertion that cell phone use contributed to the cause of these accidents or how he learned of the details and circumstances relating to the cause of the accident. [ALJD 8, 38-44].

Respondent has a progressive discipline policy that is used nationwide. [GCX 10]. Respondent's managers and supervisors, in conjunction with human resource managers, use the

“Progressive Discipline Table- A Guideline” as a guideline to determine an employee’s discipline [Tr. 229:13-21, 22-25]. The guideline is split into different disciplinary steps and a list of violations are included below each step. [See GCX 10]. “Using radios, tape recorders, cameras, cell phones, or other appliances and electronic devices, except as authorized by the Company” is listed under “Step 2: Written Warning- Document to file.” [ALJD 8, 21-25]

Since at least June 11, 2014, Respondent has maintained a confidentiality agreement that employees are required to sign at all of its locations nationwide. [ALJD 6, 17-25; Tr. 68: 13-15; GCX 3]. The agreement states that during the course of their employment, employees understand that they may receive and obtain access to confidential company information, and that they may “only use such confidential information for purposes of carrying out Argos’ business, and [they] may not use of or disclose any such confidential information during or after termination of [their] employment with Argos without the express written consent of the General Counsel of Argos.” [See GCX 3]. The policy, in relevant part, defines “confidential information” to as “all private information not generally known in the industry, and not readily available, written or otherwise, including. . . earnings. . .[and]. . .employee information. . . .” [See GCX 3].

All of Respondent’s employees are required to sign its electronic communication policy, which is in effect at all its locations nationwide. [ALJD 6, 40-41; Tr. 69; GCX 4]. Excellent’s personnel file contains the “Electronic Communication Policy” signed on June 11, 2014, acknowledging that he understood that Respondent’s e-mail system “is to be used for business purposes and not for personal purposes.” [See GCX 4].

e. Suspension and Ultimate Discharge of Emmanuel Excellent

On March 3, 2017, Respondent suspended Excellent after another driver found Excellent's phone close to the slump rack. [ALJD 10, 17-18].⁶ It is undisputed that Excellent's cellular phone was not found inside of the cab of his ready-mix truck. [ALJD 23, 1-3; Tr. 80: 12-14]. It is also undisputed that Respondent did not observe Excellent in possession of his cellular phone inside the cab of his ready-mix truck, and did not observe or have evidence of Excellent using his cellular phone in the cab of his ready-mix truck, on the road, or at a jobsite on March 3. [ALJD 23, 1-3; Tr. 79: 14-16].

Later that day, after Respondent found Excellent's phone at the facility, Marion, Kennedy, and Johnson met with Excellent. [ALJD 10, 15-17]. The Union was not informed of the meeting. [ALJD 10, 16-17]. Marion asked Excellent if he had taken his phone in his truck cab, and Excellent denied that he had. [ALJD 10, 18-19]. Marion explained that because Excellent's phone was found close to the slump rack he was suspended, pending investigation. [ALJD 10, 17-23]. Later that day, Kennedy called Excellent and told him not to report to work the next day. [ALJD 10, 22-23]. On March 6, Kennedy called Excellent and told him that the investigation was ongoing and not to report to work. [ALJD 10, 24-25]. Kennedy requested Excellent's cell phone records for the 2 months leading up to and including March 3, and Excellent said no and for Respondent to contact the Union. [ALJD 10, 25-29].

Respondent first contacted the Union regarding Excellent's alleged cell phone policy violation by an e-mail dated March 8, 2017 from Director of Human Resources Michael Beer. [Tr. 192: 16-20; 194: 5-8; See GCX 8]. This was the first communication the Union received from Respondent regarding Excellent's March 3, 2017 suspension. [ALJD 10, 31-32; Tr. 195: 3-4].

⁶ Kennedy testified that Respondent suspended and terminated Excellent because his cell phone was found in a drivable area. [Tr. 349: 10-12].

Over the next several weeks, Respondent and the Union negotiated with respect to Excellent's continued employment and Respondent's investigation of the cell phone incident. [ALJD 10, 32-34]. Beer explained that Respondent believed that Excellent had his cell phone with him in the cab of his truck, but was willing to work with the Union to attempt to verify Excellent's claim that he did not possess the phone in his work truck if he provided his cell phone records. [ALJD 11, 2-12]. Excellent did not provide Respondent with cell phone records.

As the parties were not able to resolve the dispute, Respondent formally discharged Excellent on April 28. On or about April 28, 2017, Excellent received a letter from Respondent notifying him that his employment was terminated pursuant to Respondent's no cell phone possession rule. [ALJD 23, 1-3; See GCX 6; Tr. 117: 8-15]. Excellent did not receive compensation from the time of his suspension on March 3, 2017 to the time he received his discharge letter on or about April 28, 2017. [Tr. 117: 16-18]. Beer testified that the discharge letter contains all the reasons for Excellent's discharge. [Tr. 79]. Beer further testified that no other documents in the Excellent's personnel file set forth the reasons for his discharge. [Tr. 79]. Respondent did not have a copy of Excellent's cell phone records when they made the decision to terminate his employment. [ALJD 23, 4-5; Tr. 79].

f. Respondent's Enforcement of its Cell phone Policy.

Pursuant to subpoena, Respondent ultimately produced about 50 or so disciplinary records of employees who had been disciplined for violations of its cell phone policy at its facilities nationwide. These records reveal that Excellent was the only employee who was suspended and discharged after dropping a cell phone in Respondent's yard.⁷ Excellent was also the only employee who was disciplined for violating the cell phone policy when Respondent had no

⁷ See GCX 9,12,13, 16-24; RX 3, 5-9, 12-53.

evidence of Excellent using or possessing his cell phone while inside the cab of his ready-mix truck.

A review of the disciplinary revealed the following. There were 14 incidents where employees were issued a discipline for violations of the cell phone policy, typically a 3-day suspension, but where there was no evidence that these employees were first suspended pending investigation prior to being disciplined. [ALJD 12, 30-34; GCX 16-24; RX 25, 45,53, 53]. The documents demonstrated that there were 33 situations where Respondent discharged employees for violating the cell phone policy, but their records did not indicate that they were suspended pending investigation prior to discharge. [ALJD 12, 38-40; RX 17-42, 46-52]. In four incidents, Respondent issued discipline short of termination for employees violating the cell phone policy, and then later relied on these incidents to terminate employees pursuant to their progressive discipline policy after the employees committed additional infractions. [ALJD 12, 34-35]. The majority of Respondent's disciplinary records reflected that the discharge was effective *immediately* and no passage of time between the incident and the discharge occurred. [ALJD 12, 40-43].

III. ARGUMENT AND CITATION TO AUTHORITY

As explained below, the Administrative Law Judge's ("ALJ") decision is fully supported by the record evidence and is consistent with well-established Board precedent.

- a. The ALJ Correctly Concluded that Respondent's Confidentiality and Cell Phone Policies are Unlawful Under *The Boeing Company*. Accordingly, the Board should deny Respondent's Exceptions 15, 21-25, 31, 53, and 72-73.**

The ALJ properly analyzed Respondent's cell phone policy and confidentiality policy pursuant to the balancing test for Category 2 rules set forth in *The Boeing Company*, 365 NLRB

No. 154 (Dec. 14, 2017).

An employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies 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). In *Boeing*, the Board reevaluated its approach to determining when an employer's mere maintenance of facially neutral rules will be found to violate the Act. The Board overruled prior applications of its holding in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), where facially neutral rules were found unlawful when employees “would reasonably construe” the rules to interfere with, coerce or restrain them in the exercise of Section 7 rights. *Id.*, slip op. 2. Under the new test, if the rule is not explicitly unlawful and is facially neutral, the Board will engage in a balancing test to evaluate two things: (1) the nature and extent of the potential impact of the rule on Section 7 rights, and (2) legitimate justifications associated with the rule. *Id.*, slip op at 4, 15. If the potential impact on employees' rights outweighs the justifications for the rule, the rule is unlawful. *Id.*, slip op at 15.

The Board will conduct this evaluation “consistent with the Board’s duty to strike the proper balance between ... asserted business justifications and the invasion of employee rights in light of the Act and its policy, focusing on the perspective of employees.” *Id.*, slip op. at 3. In so doing, “the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral),” and make “reasonable distinctions between or among different industries and work settings.” *Id.*, slip op. at 15. The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights. *Id.*, slip op. at 16.

The Board delineated three categories of employment policies, rules, and handbook provisions: Category 1, 2, and 3. *Id.*, slip op. at 16. *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. *Id.*, slip op. at 4, 16. The Board included in this category rules requiring “harmonious relationships” in the workplace, rules requiring employees to uphold basic standards of “civility,” and rules prohibiting cameras in the workplace. *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications. *Id.*, slip op. at 4. *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. *Id.* The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other. *Id.*, slip op. at 3-4, 15. The Board explained that it expected that by assigning rules to these categories it would provide certainty and clarity. *Id.*, slip op. at 10-11, 14-15.

Contrary to Respondent’s assertions, Board precedent does not require evidence that an employee has been disciplined pursuant to a rule in order to find it unlawful. The Board has long-held that the mere maintenance of unlawful rules may violate the Act without regard for whether the employer has ever applied the rule for unlawful purposes. *Beverly Health & Rehabilitation*

Services, 332 NLRB 347, 349 (2000) (“Evidence of enforcement of the rule is not required to find a violation of the Act. . .mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees.”) (citations omitted), *enfd. sub nom Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

The ALJ properly analyzed Respondent’s cell phone policy and confidentiality policy under Category 2 of the *Boeing* Standard. These rules are not ones that have been designated as presumptively lawful or unlawful by the Board in *Boeing*. The Board in *Boeing* addressed rules prohibiting the use of camera-enabled cell phones to take photographs but did not address the use of possession of cell phones for communication purposes.⁸

Respondent erroneously argues that the ALJ improperly found that *Boeing* “seems to support the idea that the extent of the infringement on employees’ rights (i.e. the broadness of the rule) is part of the balancing test.” The first prong of the *Boeing* balancing test examines the nature and extent of the potential impact of the rule on Section 7 rights. It is logical for the ALJ to examine how the rule impacts employees’ rights. As the ALJ correctly reasoned, *Boeing* does not permit employers to “institute the most restrictive rules possible because some employees will break less stringent rules that adequately protect the employer’s legitimate interests.” [ALJD 20, 31-35]. Here, while Respondent appears to have a legitimate interest in prohibiting *use* of cell phones while operating ready-mix trucks, Respondent failed to establish that it has a legitimate basis for prohibiting the mere *possession* of cell phones in the cabs of ready-mix trucks. Respondent’s only possible basis for prohibiting possession is that employees cannot use cell

⁸ The Administrative Law Judge, citing to *Boeing*, stated that “employees may use personal devices to record and photograph information in furtherance of their Section 7 rights, absent a legitimate business reason to prohibit such conduct.” [ALJD 18, 29-31]. However, in *Boeing* the Board found rules prohibiting photography and recording to be lawful Category 1 rules with no need for further balancing of employee rights and business interests. See *Boeing Co.*, 365 NLRB No. 154 (2017). The Board did not, however, address rules prohibiting the mere possession of cell phones, which restricts employee communications.

phones if they do not possess them.

Respondent also contends that *Boeing* requires the General Counsel to put on evidence that actual employees interpreted the policy as interfering with their Section 7 rights. This is not accurate. Under the *Boeing* framework, the threshold inquiry is whether a reasonable employee reading the rule in question would reasonably interpret it as interfering with the 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”). The *Boeing* decision does not require testimony from employees of how they interpreted the policies, but merely requires the Board to analyze the rule from the perspective of an objectively reasonable employee. Id. at 15-16.

b. The ALJ Correctly Concluded that Respondent’s Confidentiality Policy is Overly Broad and Interferes with Employees’ Section 7 Rights. Accordingly, the Board should deny Respondent’s Exceptions 26-41.

The ALJ correctly concluded that Respondent’s Confidentiality Policy, when reasonably interpreted by an employee, would interfere with employees’ Section 7 rights in a manner that the Board has determined outweighs the Respondent’s business justifications. Contrary to Respondent’s assertions, the ALJ correctly analyzed the rule in context, applied Board precedent, and relied on the relevant facts in the record to reach her conclusions.

It is well established that employees have a right to discuss wages, hours, and terms of employment with each other and with non-employees. Thus, a confidentiality policy that prohibits disclosure of “employee” or “personnel” information, without further clarification, is reasonably construed as restricting Section 7 communications. *Flamingo-Hilton Laughlin*, 330 NLRB 287, 288 fn. 3 (1999); see also *Lily Transportation*, 362 NLRB No. 54 (2015) (finding a confidentiality rule facially unlawful that prohibited employees from disclosing “employee information” maintained in “confidential personnel files”); *Hyundai America*, 357 NLRB No. 80 (2011) (finding

facially unlawful a provision in a handbook stating “any unauthorized disclosure of information from an employees’ personnel file is grounds for discipline, including discharge”).

First, Respondent’s attempt to twist the meaning of the term “earnings” and “employee information” is not persuasive. The ALJ correctly found that a reasonable employee would interpret the terms “earnings” to include employee wages and “employee information” to include information about employees, such as names, addresses, phone numbers, wages, raises, benefits, promotions, disciplines, etc. [ALJD 15, 26-30]. Respondent’s policy does not include any clarifying or limiting language that would allow a reasonable employee to conclude that such information is excluded from the policy. Respondent’s argument that “employee information” cannot include wages, benefits, and other terms and conditions of employment because employees do not “obtain access” to such information because they “receive” it upon hire has no merit. Employees’ Section 7 rights extend beyond just discussing their own wages, but also the names, wages, benefits, disciplines, and terms and conditions of their co-workers.⁹ Such information is a basic tool utilized in union organizing campaigns and a hallmark of employees’ NLRA rights to seek to improve their working conditions. Respondent is attempting to limit the definition of protected concerted activity to just discussing an employee’s own terms and conditions of employment. An employer may not prohibit employees from discussing their own wages and working conditions or from attempting to ascertain the wages of other employees.

⁹ See *Rocky Mountain Eye Center*, 363 NLRB No. 34, slip op. at 9-10 (2015) (employee engaged in protected activity by providing union organizer with employee names and phone numbers obtained by accessing the employer’s computer system), *Albertson’s, Inc.*, 351 NLRB 254, 259 (2007) (employee engaged in protected activity by disclosing list of employees’ names to the union), *Gray Flooring*, 212 NLRB 668, 669 (1974) (employee engaged in protected activity by providing union organizer with co-worker names and telephone numbers that were obtained from a list hanging in a supervisor’s office and from index cards obtained from a supervisor’s desk).

Respondent's reliance on *Mediaone of Greater Florida, Inc.*, 340 NLRB 277 (2003) is misplaced. Respondent's confidentiality policy is distinguishable from the non-disclosure rule analyzed in *Mediaone*. The rule in *Mediaone* explicitly stated that its aim was to protect the employer's proprietary information, which it explicitly limited to information concerning "information assets and intellectual property." *Id.* at *4. The Board heavily relied on this limiting language in concluding that the phrase "employee information" did not include information regarding employees' own terms and conditions of employment. *Id.* at *4. As such, the Board concluded that "while the phrase 'customer and employee information, including organizational charts and databases' is not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of 'proprietary information, including *information assets and intellectual property*' and is listed as an example of 'intellectual property.'" *Id.* *4 [emphasis added]. Thus, the Board analyzed the rule as a whole and held that employees would reasonably conclude that the employer was attempting to protect their proprietary business information and was not restricting the discussion of employee wages. Here, unlike the rule in *Mediaone*, Respondent's rule does not contain language limiting the definition of confidentiality to information concerning intellectual property, proprietary business information, or information assets.¹⁰ On the contrary, Respondent defined confidential information as "*all private information* not generally known in the industry and not readily available." [emphasis added]. Respondent's argument fails because a

¹⁰ The Board has found similar rules prohibiting the disclosure of "*employee*" information to be unlawful. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3, 291 (1999) (rule prohibiting revealing "confidential information regarding our customers, fellow employees, or Hotel business" found unlawful); *University Medical Center*, 335 NLRB No. 87, slip op. at 5 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003)(rule prohibiting "release or disclosure of confidential information concerning patients or employees" found unlawful); *IRIS USA, Inc.*, 336 NLRB 1013, 1014, 1016 (2001)(rule prohibiting the disclosure of trade secrets or confidential information, "whether about [the company], its customers, suppliers, or employees" found unlawful.).

reasonable employee would conclude that wages, benefits, as well as other terms and conditions of employment provided by a company to its employees are sources of private information, as they are not readily available to the public. It is well known that companies offer wage and benefit packages in order to attract and keep the most qualified employees and maintain a competitive edge within their industry. As such, Respondent's argument that disclosing such information would not result in giving Respondent's competitors an unfair advantage carries little weight.

Unlike the rule in *Mediaone*, Respondent's policy also includes the term "earnings" in its definition of confidentiality. A reasonable employee would believe that this term includes employee wages, especially when listed along with the term "employee information." Contrary to Respondent's assertions, the ALJ correctly applied Board law and analyzed the rule as a whole when she concluded that Respondent's confidentiality policy interferes with employees' Section 7 rights. As the ALJ noted, the terms "employee information" and "earnings" stick out as not being related to the other terms listed in Respondent's definition of confidentiality. [ALJD 15, 28-30]. Unlike the rule in *Mediaone*, Respondent's inclusion of the terms earnings and employee information together do not serve as logical examples of intellectual property or information assets. Respondent is requesting that the Board disregard the common meaning of the terms "earnings" and "employee information," and force a different interpretation of the terms just because they are part of a list that defines a very broad term- "private information."

The fact that Respondent's policy includes language reminding employees that they have the right to consult with an attorney prior to signing the policy does not merit or support a finding that the rule is lawful. The Board has never considered this a factor in analyzing whether a rule interferes with employees' Section 7 rights. *Boeing* makes clear that, in determining whether a rule would be interpreted in such a way as to interfere with the free exercise of Section 7 rights,

the Board will examine the rule from the employees' perspective, and employees reasonably would read “employee information” to include employee wages, names, addresses, and benefits. *Boeing* at 15-16. It seems financially burdensome, time-consuming, and unreasonable to assume that all employees will be able to consult with a legal professional.

For the reasons set forth above, the Board should adopt the ALJ’s finding that Respondent’s Confidentiality Policy violates Section 8(a)(1) of the Act.

- c. The ALJ Correctly Concluded that Respondent’s Policy Prohibiting the Possession of Cell phones in the Cabs of their Ready-Mix Trucks Violated Section 8(a)(1). Accordingly, the Board should deny Respondent’s Exceptions 3-5, 8-15, 50-71, 74-75, 77, 85, and 97.**

The ALJ considered all relevant evidence and properly concluded that Respondent’s cell phone policy banning possession of cell phones in the cabs of employees’ ready-mix trucks is unlawfully overbroad in violation of Section 8(a)(1) of the Act because it deprives employees of the ability to communicate with each other regarding terms and conditions of employment during non-work time at work, and Respondent’s justification for the rule does not outweigh the impact on employees’ Section 7 rights.

- i. A reasonable employee reading Respondent’s no cell phone possession rule would reasonably interpret it as interfering with their exercise of NLRA-protected rights.

Employees’ Section 7 rights have been found to “necessarily encompass [] the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). This includes employee communications regarding their terms and conditions of employment. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972); *Parexel International, LLC*, 356 NLRB 516, 518 (2011). Employees also have the right to engage in activity for their “mutual aid or protection,” which also includes communicating regarding their terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Respondent's argument that its policy only prohibits possession of cell phones during working time fails to consider record testimony that drivers have extended waiting periods and/or breaks when they are away from the facility during substantial portions of the day. [ALJD 19, 37-40; Tr. 163; 18-19; 164: 9-24]. Employees do not have access to their cell phones to use on breaks while away from the facility because they are not allowed to possess cell phones in their ready-mix trucks. Contrary to Respondent's contentions, the ALJ determined that Respondent's policy "virtually eliminates drivers' ability to communicate with other employees, take pictures, or make recordings concerning their wages, hours and working conditions during as much as 85 percent of their shifts." [ALJD 19, 37-40].

Respondent attempts to minimize the amount of time drivers spend away from the facility by emphasizing that the average trip time for a driver is two hours. However, Respondent fails to consider crucial evidence regarding the nature of drivers' schedules. First, the ready-mix drivers do not spend the entire two hours driving. The ALJ credited Perez's testimony regarding time jobsite delays, and properly found that these various delays can last from as long as mere minutes to 90 minutes or more and that drivers typically spend 20 to 80 minutes of the two-hour trip time at the jobsite. [ALJD 4, 24-39; Tr. 161]. The time spent at the jobsite by drivers includes long periods of wait time and/or breaks. [ALJD 4, 38-39; Tr. 161].¹¹ Moreover, drivers average between three to five trips per day. [ALJD 4, 34-35; Tr. 93: 4-5; 159:1-3]. Respondent argues that employees at the jobsite are never on break or are always on working time. However, Perez, who was credited by the ALJ, testified that drivers only need to periodically monitor the drum, while they are at a jobsite waiting on a customer or job and that employees generally do nothing

¹¹ The ALJ noted that a driver may be detained at a job site for various reasons, including rain, an inspection that has not been completed, unsafe conditions, or an improper grade of an area on which the concrete will be dispersed. [ALJD 4, 21-23].

while waiting to discharge cement. [Tr. 162: 4-25; 163:1-2]. Excellent corroborated Perez's testimony by indicating that Respondent does not assign drivers any specific tasks and employees generally eat and do nothing during their down time. [Tr. 162: 35, 163: 1-2].

Respondent's attempt to portray its drivers as always operating their ready-mix trucks while away from the facility is also misleading. Respondent relies on evidence in the record that ready-mix trucks must stay turned on at jobsites, because the drum is always rotating to preserve the consistency of the concrete. However, this argument fails. First, contrary to Respondent's contentions, the drum rotation is automatic and drivers only need to check the concrete once every 15 to 20 minutes unless the drum stops rotating, which a driver would immediately notice. [Tr. 165; 18-25]. Perez explained that drivers are monitoring to see if the concrete is drying up too quickly. While drivers may occasionally need to add water, there is nothing in the record to suggest this is a time-consuming process. Furthermore, drivers are taught to add water immediately prior to discharge as it is apparently better for the concrete. [Tr. 166, 7-22].

Additionally, Respondent, for the first time in its Brief in Support of Exceptions, contends that ready-mix drivers are more akin to machine operators operating presses and cranes. Respondent's argument is irrelevant. The record is void of any evidence describing the duties or working conditions of press or crane operators, and Respondent fails to provide any context for such a comparison. It appears Respondent is attempting to prove that monitoring an automatic drum every 15-20 minutes while standing outside a ready-mix truck is substantially similar to sitting in a crane and operating several levers, buttons, and pedals to move and position objects. Respondent is comparing apples to oranges without citing to any record evidence to support this comparison.

Moreover, Respondent distorts the ALJ's conclusion to mean that employees have a statutory right to possess and/or use cell phones. On the contrary, the ALJ balanced the adverse impact of Respondent's rule on employee Section 7 rights against Respondent asserted business justification for the rule. [ALJD 20:31-40, 21:1-10]. Employees using their cell phones to communicate with one another or the union regarding terms and conditions of employment and to communicate information regarding terms and conditions of employment via phone calls or by social media or other means, are all forms of protected activity. In analyzing the lawfulness of the policy, the ALJ properly concluded that Respondent's ready-mix drivers had a greater need for non-face-to-face conversations because of their staggered shift start and end times, the time they spend away from the facility, and their erratic break and lunch schedules. [ALJD 18, 41-45].

Respondent argues that employees take long breaks at the facility and can engage in protected communication during those periods. However, as the ALJ concluded, employees spend only 15 to 20 percent of their time at the facility and most of that time is spent performing work in and out of their truck cabs, performing duties such as pre-trip check, fueling, loading, inspecting the load, washing and parking the truck. [ALJD 5:8-14, 18:41-43]. The drivers then make three to five deliveries per day and the times of those deliveries vary, as do the starting and ending times of drivers shifts. [ALJD 3:31-34, 4:34-36]. Thus, contrary to Respondent's assertion, drivers do not take long breaks at the facility and, furthermore, they are not together at the facility at the same time.

As found by the ALJ, and contrary to Respondent's arguments, employees cannot use the two-way radios to engage in protected concerted communications. [ALJD 19, 1-11]. The two-way radios are constantly monitored by Respondent's managers and supervisors and that monitoring is likely to chill the exercise of Section 7 rights via the radios. [ALJD 19, 4-8]. Furthermore, drivers

usually use the radio to communicate with Respondent through “10-codes” and use of the radio is limited by Respondent’s policies to business purposes only. [ALJD 5:26-34, 19:8-12; GCX 14; RX2, page 18]. *Boeing* makes clear that, in determining whether a rule would be interpreted in such a way as to interfere with the free exercise of Section 7 rights, the Board will examine the rule from the employees' perspective. *Id.* at *4. A reasonable employee will not be likely to engage in protected communications via the two-way radio given Respondent’s monitoring of those communications and its rules regarding use of the radios. Accordingly, Respondent’s argument that its rule prohibiting mere possession of cell phones in ready-mix trucks is lawful because employees can use the radio to engage in protected communications must fail.

Respondent attempts to heighten Counsel for the General Counsel’s burden, as set forth in *Boeing*, to include evidence that the rule has been applied or enforced in an unlawful manner to prohibit employees from engaging in protected communication. While the Board *may* consider such evidence, it is not required. *Boeing* at 15. An employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies 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 Board has long-held that the mere maintenance of unlawful rules may violate the Act without regard for whether the employer has ever applied the rule for unlawful purposes. *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 349 (2000) (“Evidence of enforcement of the rule is not required to find a violation of the Act. . .mere maintenance of an ambiguous or overly broad rule tends to inhibit or threaten employees.”) (citations omitted), *enfd.* sub nom *Beverly Health & Rehabilitation Services v. NLRB*, 297 F.3d 468 (6th Cir. 2002).

- ii. The ALJ properly found that Respondent's rationale for maintaining the no cell phone possession rule does not outweigh the impact on its drivers' rights under Section 7 of the Act.

Respondent's objectives for its no cell phone possession policy do not outweigh the direct adverse impact this policy has on employees' Section 7 right to communicate with each other about terms and conditions of employment. Respondent contends that even if its cell phone policy interferes with employees' exercise of Section 7 rights, the policy is justified by overriding employer interests in safety.

In support of its safety argument, Respondent relies on testimony from manager Beer regarding two work-related accidents that unfortunately resulted in the deaths of the drivers. Beer did not witness the accidents and he did not explain how he learned of the circumstances surrounding the accidents. Furthermore, Respondent failed to offer documents or other evidence establishing that the accidents were the result of cell phone usage or, if they were the result of cell phone use, how that contributed to Respondent's implementation and/or maintenance of a total prohibition on possession of a cell phone in a ready-mix truck.¹² [ALJD 8, 32-45]. Accordingly, the ALJ concluded that "Beer did not adequately explain through his testimony or documentary evidence the basis for his assertion that cell phone use contributed to the cause of any of these accidents."¹³ [ALJD 8, 38-40]. More importantly, neither Beer's testimony, nor the record as a whole, identifies any actual incidents when an employee's mere *possession* of a cell phone or similar device resulted in injury to a person or property. [ALJD 8, 43-44].

Respondent also relies on the FMCSA regulations [GCX 11] to justify its rule prohibiting possession of cell phones in ready-mix trucks. The FMCSA regulations permit drivers to use

¹² Presumably, Respondent maintains accident reports, insurance claims, employee files, and similar records when an accident occurs, yet it offered none of those things in support of its claim that cell phone use contributed to the accidents.

¹³ The Board should defer to the ALJ's credibility determination in this respect.

hands-free mobile devices, even while driving, but restrict the use of handheld devices while driving a commercial motor vehicle.¹⁴ [See GCX 11]. FMCSA regulations do not prohibit drivers' possession of cell phones in commercial motor vehicles and do not require employers to adopt policies prohibiting possession. [See GCX 11]. Respondent concedes that its policy prohibiting mere possession of cell phones is more restrictive than the rules required by FMCSA. Respondent attempts to justify its rule by citing statistics from NHTSA, which it claims are unrefuted. However, the cited statistics are not part of the record evidence and should be disregarded as they were not proffered as a justification for the rule until after the hearing. Even if they are accepted as accurate, that does not justify infringing on employees' Section 7 rights by through a total prohibition on possession of cell phones in ready-mix trucks.

The ALJ correctly found that Respondent's purported safety justifications for its cell phone policy are undermined by permitting other drivers of heavy-duty vehicles to possess cell phones in the cabs of their vehicles and by requiring ready-mix drivers to use two-way radios that require the use of one hand throughout the communication. [ALJD 20:1-15]. Respondent allows supervisors, managers, and service technicians to possess cell phones in the cabs of their work vehicles. [ALJD 20:1-15; Tr. 81: 24-25; 82:1-2; 83: 4-6; 84:12-14]. These vehicles include service trucks such as a Ford 350 or 450, front-end loaders, and light duty vehicles. [Tr. 81: 8-11]. Moreover, as found by the ALJ, Respondent also issued Nextel phones to its block truck drivers, which can be utilized as cell phones and at minimum require one hand to operate as a two-way radio. [ALJD 20, 9-15]. As the ALJ noted, while these vehicles may not be as heavy as ready-mix truck, they can still cause serious bodily injury and death. [ALJD 20, 11-15].

¹⁴ Ready-mix trucks are considered commercial motor vehicles, and thus, the weight limits of these vehicles are considered in the FMCSA.

Respondent's rule prohibiting possession of cell phones in vehicles prevents employees from engaging in protected communications and heavily infringes of the exercise of Section 7 rights. Respondents asserted safety justifications for the total ban on possession is undercut by the record evidence and does not outweigh the employees' right to engage in protected communication. Accordingly, the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad rule prohibiting possession of cell phones should be affirmed and Respondent's exceptions related to this finding denied.

d. Existing Board Precedent Supports the ALJ's Findings and Conclusions that Respondent's Electronic Communications Policy is Unlawful in Violation of Section 8(a)(1).

The ALJ correctly relied on the record evidence and extant Board precedent, including *Purple Communications*, to decide that Respondent's Electronic Communications policy is unlawful under Section 8(a)(1). However, the General Counsel, pursuant to reasons set forth in Counsel for the General Counsel's Brief in Support of Cross-Exceptions, believes that *Purple Communications* was wrongly decided, and should be overturned.

- i. The ALJ correctly applied *Purple Communications* to the facts of this case and found that Respondent's Electronic Communications policy violates Section 8(a)(1) of the Act. Accordingly, the Board should deny Respondent's Exceptions 6-7 and 42-49.

The ALJ properly found that Respondent's electronic communications policy is unlawfully overbroad under Section 8(a)(1) of the Act because it prohibits employee use of its e-mail system for non-business purposes, which would include protected communications among employees, and Respondent has failed to show special circumstances that would justify such a bar. [ALJD 17-18].

In *Purple Communications, Inc.*, the Board established a test to address employees' use of their employers' email systems for employee-to-employee communications. 361 NLRB 1050, 1063 (2014). Under the test, the Board presumes that employees who have rightful access to their

employer's email systems in the course of their work have a right to use the email system for statutorily protected communications during nonworking time. *Id.* An employer may rebut the presumption by showing that prohibition is justified by special circumstances necessary to maintain production and discipline justify the restrictions on employees' rights. *Id.* Because limitations should be no more restrictive than is necessary to protect the employer's interests, the Board emphasized in *Purple Communications* that it anticipated that special circumstances will rarely justify a total ban on all non-work email use by employees. *Id.*

The Board's reasoning in *Purple Communications* was based on a consideration of Board and Supreme Court precedents addressing the accommodation of employer property interests and employees' Section 7 rights, and in particular, *Republic Aviation*, 324 U.S. 793 (1945). See *id.* 1060-63. The Board did not rely on the *Lutheran Heritage* "reasonably construe" standard in *Purple Communications*, and, therefore, the Board's determination in *Purple Communications* is not directly affected by its establishment of the *Boeing* balancing test for considering the lawfulness of facially neutral rules. Thus, the balancing of the important interests raised by the limitation of employees' use of an employer's email systems for employee-to-employee communication should be resolved with the legal presumption established in *Purple Communications*.

Contrary to Respondent's contention, the ALJ properly determined that the fact that ready-mix drivers do not have access to Respondent's e-mail system is not dispositive of the issue as to whether the rule unlawfully infringes on any of Respondent's employees' Section 7 rights. [ALJD 17, 25-30]. Respondent's argument that the ALJ is assuming facts not in evidence because she suspects that there are some statutory employees that have access to Respondent's e-mail system is misplaced. The ALJ drew a reasonable conclusion that some of Respondent's have access to

email based on evidence in the record and her credibility findings. The ALJ relied on evidence that Respondent required all its employees to sign its electronic communications policy and properly concluded that Respondent was actively avoiding Counsel for the General Counsel's questions soliciting evidence regarding which employees had access to its e-mail system. [ALJD 17, 29-30; 32-35]. Accordingly, the ALJ correctly drew the conclusion that "there are some statutory employees assisting in the operations of a company the size of Respondent's with access to the e-mail system." [ALJD 17, 35-39].

Respondent's Electronic Communications policy prohibits employees who have access to the Employer's e-mail system from using that system to engage in Section 7 solicitation during non-work time. Respondent's "Electronic Communication Policy" explicitly prohibits such communications by stating that its e-mail system "is to be used for business purposes and not for personal purposes." [See GCX 4]. The policy does not carve out any exceptions for Section 7 activity or make exclusions for employee use during non-work time. Accordingly, the e-mail policy is overbroad and unlawful under *Purple Communications*. Moreover, the record is void of any evidence to show special circumstances that would justify a bar on employees' use of the e-mail system for non-business purposes.

ii. The Board should overturn *Purple Communications*.

For the reasons set forth in detail in General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision the Board should overrule *Purple Communications*. First, contrary to decades of Board precedent, the decision impermissibly created a right for employees to use employer-owned and -financed communication systems, even where employees possess a plethora of other means of communication. Second, the decision requires employers to provide and pay for employee communications in violation of their First Amendment rights. Third,

permitting employees to use an employer's email systems for Section 7 communications places an undue and unnecessary burden on employers' business operations and has the practical effect of reducing productivity, disrupting business operations, and can compromise system security and confidentiality.

- e. The ALJ correctly found that Excellent's suspension and discharge was unlawful under *Continental Group*. Accordingly, the Board should deny Respondent's Exceptions 16-18, 76, 78-80, 92, 98, and 100.**

The ALJ correctly analyzed this case under *Continental Group*, 357 NLRB 409 (2011) and found Respondent violated Section 8(a)(1) of the Act when it suspended and ultimately discharged Excellent pursuant to its unlawful rule prohibiting the possession of cell phones in the cabs of its ready-mix trucks.

In *Continental Group*, the Board defined the proper scope of the *Double Eagle*¹⁵ rule, and found that an employer violates Section 8(a)(1) by imposing discipline pursuant to an unlawfully overbroad rule in two scenarios: (1) if the employee was engaged in protected conduct; or (2) if the employee was engaged in conduct that otherwise implicates the concerns underlying Section 7 of the Act. 357 NLRB at 412. Conduct that implicates the concerns underlying Section 7 of the Act includes conduct that is not protected, but which "touches the concerns animating Section 7" because disciplining employees for such conduct "creates a greater risk that employees would be chilled in the exercise of their Section 7 rights." See *Id.* at 411-12 (discussing the chilling effect rationale for the rule). An employer can avoid liability under *Continental Group* if it can establish that the employee's conduct interfered with its operations and that it discharged the employee because of that interference. *Id.*

¹⁵ *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn.3 (2004), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006).

The ALJ properly concluded that the conduct that led to Excellent's suspension and discharge implicated concerns underlying Section 7 of the Act. [ALJD 22, 1-12]. As discussed above, employees in this job cannot effectively communicate with their co-workers about terms and conditions of employment without access to their cell phones. Thus, the conduct of carrying a cell phone is a necessary predicate to their ability to engage in Section 7 activity and as such, it falls within the ambit of Section 7. Respondent suspended and discharged Excellent pursuant to its unlawful cell phone rule despite the fact there is no evidence that Excellent possessed or used the cell phone while operating a ready-mix truck or even brought the cell phone in his truck. Instead, Respondent applied its cell phone policy to discipline Excellent merely because his cell phone was discovered on the ground outside the Employer's premises and it suspected him of having the cell phone in the truck. The Employer suspension and discharge of Excellent pursuant to its overbroad cell phone rule implicates Section 7 concerns because employees who witnessed their co-worker being suspended and discharged under these circumstances will be chilled from carrying and using their cell phones for Section 7 activities anywhere in the vicinity of the Employer's premises, and risk discharge if they carry cell phones with them in order to engage in protected concerted activity during breaks or lunch.

In its brief in support of exceptions, Respondent contends that it was willing to reinstate Excellent if his phone records revealed that he had not used the phone while operating his vehicle and it supports that assertion by citing to Beer's testimony which describes a conversation with a union agent, as follows:

He also asked me how I knew that he had used his phone and he said can you prove that he has used his phone while he was out there. And I said, well, we can show when he was out there. If we can compare it against the phone records, we'll know exactly, and that's the report that I was telling you, whether or not he was using his phone during that time frame. And if he wasn't then all of my managers wanted to assure -- be assured that he wasn't using it, right, and they wanted to bring

him back. [Tr. 408].

Beer's testimony reveals that Respondent wanted records to determine whether Excellent used his cell phone while away from the facility, which would reveal that he possessed the cell phone in the truck, but would not show that he actually used the cell phone while he was in the truck.¹⁶ Moreover, Kennedy admitted that Respondent suspended Excellent because his cell phone was found in a drivable area. [Tr. 349: 10-12]. He further claimed that if the cell phone records revealed that Excellent had not used his cell phone, it would establish that he did not have the cell phone in the cab with him. [Tr. 353:8-14]. This testimony further establishes that Respondent would have discharged Excellent pursuant to its overly broad rule if it determined that he merely possessed the cell phone in the truck, without regard to whether Excellent was actually operating the truck when he used the cell phone. Thus, based on the testimony of Respondent's own witnesses it is apparent that if the phone records showed that Excellent had used the phone at any time during his trip, Respondent would have discharged him for merely possessing the phone in the truck, and without regard to whether Excellent used the phone while operating the truck.¹⁷ If Respondent had reviewed Excellent's phone records and found he had made a call during his shift it would have discharged Excellent without considering whether he was inside or outside of the truck when he used the phone, and without considering whether he was operating the truck while using the phone or was using the phone while on break or during downtime, such as when he was parked waiting to unload.

¹⁶ Beer later testified that Union agent Rolle asked him for a copy of a truck utilization and asked whether the report would reveal whether Excellent had used the cell phone while in the cab of the truck. Beer replied that he believed that Respondent could show that to him. [Tr. 409:17-22]. However, his reply to Rolle's inquiry does not support Respondent's assertion that it would only have discharged Excellent if his cell phone records revealed that he used his cell phone while actually operating the truck.

¹⁷ Based on her findings, it is apparent that the ALJ discredited Respondent's witnesses to the extent they offered testimony suggesting that Respondent would have reinstated Excellent if it were shown that he had not used his cell phone while operating the ready-mix truck.

Furthermore, in its Brief to the ALJ, Respondent argued, “Here, however, because of Mr. Excellent’s refusal to cooperate and the compelling substantial evidence that he had *possessed* the phone while in his truck at the slump rack the Employer had necessary grounds to suspend.” [emphasis added] [p. 49]. In its Brief to the ALJ, Respondent also stated, “Mr. Excellent was also not suspended for possessing a cell phone on plant grounds, but because his cell phone was found in Naples that signaled to management the *likelihood he possessed it in his truck cab.*” [p. 78, emphasis supplied].

In summary, the testimony of Respondent’s witnesses and its arguments in its Brief to the Administrative Law Judge demonstrate that Respondent would have discharged Excellent even if his phone records revealed that he merely possessed his cell phone in the truck and did not establish that he had used his cell phone while operating the vehicle. Accordingly, the ALJ correctly concluded that Excellent was suspended “for the mere suspicion that he had his cell phone in the cab of the truck” and that there is “no evidence that supports a conclusion that Respondent would have discharged Excellent only if his phone records proved he had used the phone while driving.” [ALJD 23:1-12].

As the ALJ logically found, because Respondent did not establish that it would only have discharged Excellent if he used his cell phone while operating the vehicle, it failed to substantiate a claim that Respondent discharged Excellent based on conduct or suspected conduct that jeopardized the safety of Respondent’s operations. [ALJD 22, 39-46]. The ALJ correctly concluded that the record was void of any evidence that Excellent’s conduct interfered with the performance of his or other employees’ work. [ALJD 22, 31-37]. Respondent did not provide any evidence of customer complaints, accidents, or evidence that Excellent even possessed or used his cell phone while he was driving the ready-mix truck, or even when he was away from the facility.

Accordingly, the Board should adopt the ALJ's findings and find that Respondent violated Section 8(a)(1) of the Act by suspending and discharging Excellent pursuant to its unlawful cell phone policy.

f. The Extant Board Precedent Supports the ALJ's Findings and Conclusion that Respondent Suspended and Terminated Bargaining Unit Employees Without Providing Pre-Imposition Notice to the Union and Bargaining, in violation of Section 8(a)(1) and (5) of the Act.

The ALJ correctly relied on the record evidence and extant Board precedent, including *Total Security*, to decide that Respondent suspended Mr. Excellent, without providing pre-imposition notice to the Union and giving the Union an opportunity to bargain, in violation of Section 8(a)(5) of the Act. However, for the reasons set forth in the General Counsel's Brief in Support of Cross-Exceptions, believes that *Total Security* should be overturned.

- i. The ALJ correctly applied *Total Security* and found that Respondent failed to notify and provide the Union with an opportunity to bargain over Excellent's suspension. Accordingly, the Board should deny Respondent's Exceptions 1, 19-20, 82-89, and 91.

The ALJ properly applied *Total Security* to the facts of this case and found that Respondent violated Section 8(a)(5) of the Act by failing to give the Union adequate notice and an opportunity to bargain before implementing Excellent's suspension.

In *Total Security Management Illinois 1, LLC*, the Board held that in the interim period between a union's certification and the existence of an initial collective-bargaining agreement, employers have an obligation to notify the union and give it an opportunity to bargain before imposing discretionary and serious discipline (in the form of a suspension, demotion, discharge, or analogous sanction) on an employee in the bargaining unit. 364 NLRB No. 106, slip op at 1 (Aug. 26, 2016). The Board specifically held that if the employer engages in bargaining only after imposing the discipline, this does not cure the violation. *Id.* at 13. In defining discretionary discipline, the Board stated as follows:

[W]here an employer's disciplinary system is fixed as to the broad standards for determining whether a violation has occurred, but discretionary as to whether or what type of discipline will be imposed in particular circumstances, we hold that an employer must maintain the fixed aspects of the discipline system and bargain with the union over the discretionary aspects

Id., slip op. at 5.

The ALJ properly determined that *Total Security* applied to the facts of this case. It is uncontested that the parties have not yet reached their first collective-bargaining agreement. [Tr. 192: 19-21]. It is also uncontested that Respondent failed to notify the Union prior to its decision to suspend Excellent for violating its cell phone policy. [Tr. 195: 3-4]. In its Answer to the Complaint, Respondent admits that it suspended Excellent without providing the Union with advanced notice and an opportunity to bargain. [GCX 1(l)]. Moreover, as explained below, Respondent had discretion in deciding what discipline, including suspension, to issue Excellent for violating the cell phone policy.

Second, the ALJ acknowledged and properly rejected Respondent's attempts to classify "Argos-Florida" as a separate entity. [ALJD, 3, fn 5]. The ALJ relied on testimony from Respondent's own witnesses that Respondent is a nationwide company that is structured into different geographical regions. [ALJD, 3, fn 5]. Respondent never raised an affirmative defense that "Argos-Florida" was a separate entity, nor was this issue ever raised in the Answer or during the case proceedings. [See GCX 1(l)]. Respondent attempts to portray the policies in its Florida facilities as separate and different from those nationwide. However, record testimony contradicts this. Beer testified that Respondent has an overriding nationwide policy which states that employees cannot carry their cell phones with them [Tr. 66]. While the Cellular Telephone Acknowledgement form is not currently in effect at all locations nationwide, it is clear that all of Respondent's facilities prohibit the possession of cellphones in the cab of their ready-mix trucks.

[Tr. 64:24-25; 65:1, 74: 4-7]. Respondent's managers and supervisors, in conjunction with human resource managers use the "Progressive Discipline Table- A Guideline," [GCX 10], as a guideline to determine an employee's discipline. [Tr. 229:13-21]. This guideline was created by Beer approximately three years ago and is used *nationwide*. [Tr. 299: 22-25].

Third, the ALJ properly found that Respondent failed to show that suspending employees pending investigation is an "automatic" procedure. Respondent is requesting that the Board disregard documentary evidence because it does not support Respondent's position or corroborate the testimony of its witnesses. Considering the testimony of Beers, Marion, and Kennedy, the ALJ correctly relied on the documentary evidence that contradicted their testimony that all employees are automatically suspended and then terminated for violations of their cell phone policy. As the ALJ properly noted "just because it was Marion's and Kennedy's practice, does not mean that they did not have the discretion to act differently under Respondent's disciplinary rules as other managers applying the policies clearly do." [ALJD 26, 17-18]. The ALJ correctly relied on documentary evidence demonstrating that there were 14 incidents where employees were issued a discipline for violations of the cell phone policy, but where there was no evidence that these employees were first suspended pending investigation. [ALJD 12, 30-34; GCX 16-24; RX 25, 45,53, 53]. The ALJ further found that there were 33 situations where Respondent discharged employees for violating the cell phone policy, but their records did not indicate that they were suspended pending investigation before they were discharged. [ALJD 12, 38-40; RX 17-42, 46-52]. In four incidents, Respondent issued discipline short of termination for employees violating the cell phone policy, and then later relied on these incidents to terminate employees pursuant to their progressive discipline policy. [ALJD 12, 34-35]. The ALJ appropriately observed that the majority of Respondent's disciplinary records reflected that the discharge was effective

immediately and no passage of time between the incident and the discharge occurred. [ALJD 12, 40-43].

Fourth, Respondent's assertions that the ALJ is requiring them to maintain a written policy in order to establish that they did not have discretion is misplaced. On the contrary, the ALJ is citing to the written policies Respondent *does* have to show that they *do* have discretion. The ALJ correctly pointed out that Respondent did not have a written policy requiring its managers or supervisors to "automatically" suspend employees for violations of the cell phone policy. [ALJD 25, 24-36]. Respondent's own cell phone policy indicates that Respondent may use its discretion by considering an employee's disciplinary history. [GCX 5]. The policy allows for "a minimum of three (3) days suspension and final written warning for the first-time offense," and up to termination if the employee's progressive discipline status warrants termination. [ALJD 25, 26-29; GCX 5]. The 2014 "Cellular Telephone Acknowledgment" form states that violation of the policy "can lead to immediate termination" and that Respondent has "a zero tolerance for the use of cell phones while operating a commercial vehicle." [ALJD 25, 29-33; GCX 2]. Finally, Respondent's "Progressive Discipline Table- A Guideline" suggests only a step 2, written warning with a document to the employee's file for a violation of the cell phone policy. [ALJD 25, 32-35; GCX 10]. The ALJ properly concluded that "[i]nherent in each of these suggested disciplines for violations of the cell phone policy is that the managers do have discretion in what punishment to levy." [ALJD 25, 34-36]. Disciplinary records produced by Respondent show that Respondent's supervisors and managers exercised discretion in issuing different forms of discipline for employee cell phone violations including, immediate termination, two- or three-day suspensions, written warnings, and final warnings. [See GCX 9,12,13, 16-24; RX 3, 5-9, 12-53].

Even if the Board finds that Respondent had a past practice of automatically suspending employees for violations of the cell phone policy, the ALJ properly rationalized that it was discretionary to apply that practice to Excellent. [ALJD 25, fn 20]. As suggested by the ALJ, the circumstances involving Excellent were significantly different from that of other employees who were suspended in Florida. Of all the employees disciplined by Respondent for violating the cell phone policy, not one of them was suspended merely for misplacing a cell phone on the ground; rather, in every case, the employee was seen or admitted to possessing, or was confirmed by the Respondent to have possessed or used a cell phone in Respondent's ready-mix trucks. [ALJD 25, fn 20]. Respondent attempts to argue that the circumstances surrounding Lester Austin and John Miller are like Excellent's and that they relied on circumstantial evidence to determine they possessed their cell phone. However, unlike Excellent, Lester Austin admitted that he had his cell phone with him, [RX 3], and John Miller said "it [was] in [his] vehicle." [RX 13]. Respondent also contends that they disciplined Robert Williams, Alberto Crespo, and Rafael Bello based on circumstantial evidence because these employees called into the Naples plant while making deliveries and "someone could have brought their cell phones to them at the job sites." [p. 48]. The record does not contain any evidence to support this conclusion. Unlike Excellent, all three employees admitted to using their cell phones, [Tr. 386, 11-12; Tr. 356, 10-13; Tr.360, 16-23; RX 7; RX6; RX 8], and Respondent had evidence that they had used their cell phones.

Fifth, the ALJ properly concluded that no exigent circumstances existed at the time of Excellent's suspension to warrant Respondent not providing the Union with an opportunity to bargain over the suspension. [ALJD 25, 1-15]. As the ALJ noted, Respondent had no evidence that Excellent had his cell phone in the ready-mix truck, and there is no evidence that "the mere presence of a cell phone in a ready-mix truck cab increases the likelihood of an accident." [ALJD

25, 3-4]. Respondent tries to rely on the fact that Excellent refused to provide telephone records to support their argument that these were exigent circumstances. However, Respondent suspended Excellent before they even requested the records. [Tr. 115: 10-25]. Furthermore, Respondent's argument that the Board should consider Rolle's "failure" to request bargaining over Excellent's suspension fails because Respondent notified the Union of Excellent's suspension only after it was imposed. Excellent's apparent misplacement of his personal cell phone—a non-hazardous personal item—on the ground of the Respondent's yard does not constitute misconduct under the Respondent's policy.

Sixth, Respondent's reliance on *Libertyville Toyota*, 360 NLRB 1298 (2014) is misplaced. First, the parties' burden in *Libertyville Toyota* and the Board's analysis of its facts are different from the case at bar. In the instant case, the Board is analyzing whether Respondent exercises *discretion* when deciding what discipline it will impose on ready-mix drivers for violations of Respondent's cell phone policy. In *Libertyville Toyota*, the Board was analyzing whether an employer met its burden under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981) with regards to a Section 8(a)(3) discharge. In analyzing a *Wright Line* defense, the Board is examining whether the employer would have taken the same action despite the discriminatee's union activity. That is not the analysis required by the Board in this case. Respondent's comparison is a red herring that should be given no weight by the Board. The General Counsel's burden in this case does not include having to show that all employees were treated the same, the General Counsel just needs to show the Respondent has some discretion in deciding the discipline imposed. Even if the Board finds that Respondent always suspended employees when they violated the cell phone policy, this does equate to the Respondent not exercising discretion. A person can use their discretion to repeatedly impose the same or a similar discipline. The fact is,

Respondent's managers, by their very own written policy, are given the discretion to decide whether they will suspend, write-up, or discharge an employee, and if suspended, for how long the suspension will be.

Even if the Board finds the decision in *Libertyville Toyota* is applicable and relevant, the facts are distinguishable from the case at bar.¹⁸ Unlike the records in *Libertyville Toyota*, the records the ALJ relied on establish that the Respondent did not “automatically” and “every time” suspend employees for violations of the cell phone policy. As explained more thoroughly above, there are numerous disciplinary records showing Respondent's supervisors and managers exercised discretion in issuing different forms of discipline for employee cell phone violations including, immediate termination, two- or three-day suspensions, written warnings, and final warnings. Contrary to Respondent's assertions, as the ALJ cited and as explained above, Respondent's failed to show: 1) that all employees were suspended before a discipline was issued [ALJD 12, 30-34; GCX 16-24; RX 25, 45,53, 53]; 2) that all employees were suspended pending investigation before they were discharged [ALJD 12, 38-40; RX 17-42, 46-52]; and 3) that all employees were terminated for violating the cell phone policy [ALJD 12, 34-35]. Moreover, most of Respondent's documents showed that discharge was effective *immediately* and no passage of time between the incident and the discharge occurred. [ALJD 12, 40-43]. In this case, there is no

¹⁸ In *Libertyville Toyota*, the discriminatee was suspended for losing his license and the employer argued that it would have taken this action despite the discriminatee's union activity. To undercut their defense, the General Counsel attempted to show that the employer treated other employees more leniently and allowed them to continue working, without being suspended, by signing a waiver eliminating their driver duties. The Board found that the record evidence was insufficient to overcome the employer's *Wright Line* defense and determined that its treatment of the discriminatee was consistent with the way it treated similarly situated employees. The Board found that the documentary evidence General Counsel relied on showed a gap of time between the date the employees lost their license and the date they were offered a waiver to continue working. *Id.* at 1302. The Board concluded that it was possible that the employees served a suspension during that gap of time. *Id.* At 1302.

“gap in time” for the Board to conclude that the ready-mix drivers may have been suspended. Also, in *Libertyville Toyota*, the Board rejected testimony of an employee who claimed that he lost his license on two occasions and was allowed to continue to work without being suspended as insufficient to overcome the employer’s defense. However, as the Board noted in *Libertyville Toyota*, that testimony was about events that occurred *10 years ago* in 2003 and 2004, and the employer’s manager began working for the employer in 2010. *Id.* at 1302. Here, the disciplinary records only date back to 2015, and were all during the time that Beer testified the cell phone policy was in effect.

Sixth, part of Respondent’s argument lies in convincing the Board that employee suspensions without pay are not a form of disciplinary action and/or do not materially or substantially alter employees’ terms and conditions of employment. Respondent attempts to circumvent a violation under *Total Security* by arguing that the discipline was the termination, and they bargained with the Union. This argument merits no weight. Excellent was suspended from March 3, 2017 to April 28, 2018 and received no pay during the entire time period. [Tr. 117: 16-18]. The suspension of Excellent had an immediate and clear impact on Excellent’s terms and conditions of employment and, despite the Employer’s contention to the contrary, was disciplinary in nature.

Accordingly, the Board should find that the ALJ corrected applied the existent Board law to find that Respondent violated Section 8(a)(5) of the Act when Respondent suspended Excellent, without providing pre-imposition notice to the Union and giving the Union an opportunity to bargain.

ii. The Board should Overturn *Total Security Management*.

For the reasons set forth in General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision, the Board should overturn *Total Security Management Illinois 1, LLC* (“*Total Security*”), 364 NLRB No. 106 (Aug. 26, 2016) because the decision is inconsistent with pre-existing Board law, conflicts with Sections 8(a)(5) and 8(d) of the NLRA as well as Supreme Court precedent in *NLRB v. Weingarten*, 420 U.S. 251 (1975), and imposes impractical and unworkable bargaining requirements that disrupt business operations and impose obstacles to the negotiation of a first collective bargaining agreement. As Member Miscimarra succinctly stated in his dissent, the *Total Security* majority decision creates pre-imposition discipline bargaining requirements that “substitute mayhem for . . . longstanding and well-reasoned principles.” 364 NLRB No. 106, slip op. at 32.

If the Board declines to overrule *Total Security Management*, then Respondent’s Exceptions 90, 92-94, and 99 should also be denied.

g. The ALJ Correctly Ordered Appropriate the Appropriate Remedies under Extant Board Law. Accordingly, the Board Should deny Respondent’s Exception 2, 90, 96, and 101-102.

The ALJ correctly ordered a nationwide posting in this case because Respondent’s confidentiality, electronic communications, and cell phone policy are nationwide policies. Dating back to at least June 1, 2014, Respondent has maintained and enforced a cell phone policy at all its facilities prohibiting employees from possessing or using cellular phones in its ready-mix trucks. [ALJD 7, 15-40; GCX 5: pages 6-7 titled Cell Phone Policy While Operating a Vehicle]. Since at least June 11, 2014, Respondent has had a confidentiality policy in effect at all of its locations nationwide. [ALJD 6, 17-25; Tr. 68: 13-15; GCX 3]. Moreover, all of Respondent’s employees are required to sign its electronic communication policy, which is in effect at all its locations nationwide. [ALJD 6, 40-41; Tr. 69; GCX 4]. Accordingly, Respondent must rescind the unlawful rules at all locations

where the unlawful rules are in effect, and post a Notice notifying employees that this has been done. Additionally, if the Board adopts the ALJ's finding that Excellent was suspended and discharged pursuant to its unlawful cell phone policy in violation of Section 8(a)(1), Respondent is required to offer him reinstatement and make him whole for any loss of earnings or other benefits.

IV. CONCLUSION

Counsel for the General Counsel respectfully urges that the Board deny all of Respondent's Exceptions, except on the limited basis as set forth above, and adopt the ALJ's correct conclusion that Respondent policies concerning confidentiality, electronic communications, and cell phone possession are unlawfully overbroad, and Excellent was suspended and terminated pursuant to overly broad rule prohibiting the possession of cell phones in Respondent's ready-mix trucks. Additionally, the record and existing Board law, including *Total Security Management Illinois, LLC.*, also support the ALJ's findings and conclusions that Respondent unilaterally suspended Mr. Excellent without notifying and offering to bargain with the Union, in violation of Section 8(a)(5) of the Act. However, the General Counsel requests that *Purple Communications* and *Total Security Management Illinois, LLC* be overturned. Counsel for the General Counsel also respectfully urges the Board to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by the ALJ. Finally, Counsel for the General Counsel further seeks any other relief the Board determines to be appropriate to remedy Respondent's unlawful conduct.

Dated: August 9, 2019

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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 Exceptions to Administrative Law Judge Decision and Recommendation Order, was served on August 9, 2019 as follows:

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