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

DURA-LINE CORPORATION,
A SUBSIDIARY OF MEXICHEM

and

Cases 09–CA–163289
09–CA–164263
09–CA–165972
09–CA–166481
09–CA–167265

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL–CIO–CLC

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY, ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL–CIO–CLC,
LOCAL 14300-12

*Linda Finch, Esq.*
for the General Counsel.
*Howard Jackson, Esq.*
for the Respondent.
*Matthew Lynch, Esq.*
for the Charging Parties.

## SUPPLEMENTAL DECISION

### STATEMENT OF THE CASE

**MELISSA M. OLIVERO**, Administrative Law Judge. On June 20, 2017, I issued a decision in which I found, inter alia, that the General Counsel had established that Respondent's maintenance of a Confidentiality/Non-Disclosure Agreement (confidentiality agreement) violated Section 8(a)(1) of the National Labor Relations Act (Act). Citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), I found that the confidentiality agreement violated the Act because employees could reasonably construe its language to prohibit Section 7 activity and because the rule was promulgated in response to union activity. Subsequently, the Board issued its decision in *The Boeing Company,* 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018), which modified the standards for determining whether an employer's

work rule interferes with employee rights under the Act. On November 19, 2018, the Board issued an Order severing and remanding the Confidentiality/Non-Disclosure Agreement allegation to me for the purpose of reopening the record, if necessary, and the preparation of a supplemental decision addressing this complaint allegation in light of *Boeing*. The work rule allegation before me on remand is set forth in paragraph 6(a) of the Amended Second Consolidated Complaint (Complaint) issued by the General Counsel on May 5, 2016.

On November 21, 2018, I issued an Order on Remand, offering the parties an opportunity to file a motion seeking to reopen the record and conduct a supplemental hearing. No party moved to reopen the record or for a supplemental hearing. On December 11, 2018, I issued a Supplemental Briefing Order, allowing the parties time to file briefs. No party timely filed a brief.

The following incorporates and supplements the findings and conclusions contained in my initial decision. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs initially filed by the parties at the conclusion of the hearing, I make the following findings of fact and conclusions of law.[1]

## FACTS

Respondent Dura-Line has been owned by Mexichem since September 2014. (Tr. 301.) Mexichem is a chemical company with plants around the world. (Tr. 322.) Respondent manufactured conduit at its Middlesboro, Kentucky, facility by converting resin into pipes. (Tr. 291.) Respondent employed approximately 125 employees at the Middlesboro facility. (Tr. 482.)

Dura-Line's corporate management began discussing the possibility of closing the Middlesboro facility with Dura-Line's previous owners and this was disclosed to Mexichem in September 2014. (R. Exh. 3; Tr. 283–285.) Respondent announced the closing of the Middlesboro facility to employees on September 15, 2015. (Tr. 20, 63, 106, 155–156, 205, 264, 394, 475–476.) Some of the work once performed at the Middlesboro facility is now performed at Respondent's facility in Clinton, Tennessee. (Tr. 237.) Respondent ceased production at the Middlesboro, Kentucky, facility in December 2015.

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC, Local 14300-12 (Local Union or Union), represented the following unit of Dura-Line employees:

> All production and maintenance employees employed by [Respondent] at its Middlesboro, Kentucky facility, including plant clerical employees and assistant shift leaders, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions herein are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, and evidence presented at trial, as well as logical inferences drawn therefrom.

(GC Exh. 1(dd) and (ii); R. Exh. 1.)

At the time of the events giving rise to this case, Patsy Wilhoit was Respondent's Human Resources Manager in Middlesboro and Michael Hilliard served as Respondent's Senior Vice President of Global Operations. Respondent admits, and I find, that Wilhoit and Hilliard were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

Two of Respondent's hourly employees at its Middlesboro facility, Sean Chapman and David Ramsey, left to work at the Clinton facility before the Middlesboro facility closed. (Tr. 196.) These employees transferred and were not required to complete new employment applications. (Tr. 196–197; 543.) Several of Respondent's supervisors also transferred from Middlesboro to Clinton. (Tr. 199-200, 445.) Wilhoit provided these employees and supervisors with confidentiality agreements to sign. (Tr. 196–197.)

Chapman met with Wilhoit in September 2015 and she told him that there would be a job for him at Clinton if he was interested. (Tr. 539.) Wilhoit then handed him a piece of paper to sign. (GC Exh. 1(dd); Tr. 538, 540). Wilhoit advised Chapman not to talk about the Middlesboro plant shutting down, his position in Clinton, or his wages, with anyone. (Tr. 542.)

By signing the confidentiality agreement, Chapman agreed that he would not reveal any confidential information to third parties. (GC Exh. 1(dd), att. A.) The confidentiality agreement specifically defined "confidential information" as:

> business plans (including particularly, but not limited to, Dura-Line's plans for locating a facility in Clinton, Tennessee and its plans related to how other plants and locations may be impacted by the opening of the new facility), financial information regarding the business (including pricing, performance, revenue, sales projections, and other similar financial information regarding the status, performance and plans of Dura-Line), sales and marketing plans and projections, and software code or practices. . . "Confidential Information" does not include information that is available via public sources, or that has been legitimately released into the public arena.

Chapman did not discuss his transfer to Clinton with anyone other than Wilhoit. (Tr. 541.) He was not sure of the consequences for violating the confidentiality agreement. (Tr. 543.)

According to Hilliard, Respondent wanted its employees to sign such agreements in order to keep the Middlesboro facility running, to avoid "scuttlebutt conversations," because Respondent had not identified all of the employees who would be transferring to Clinton, and to avoid jealousy. (Tr. 395, 417.) Wilhoit testified that employees were asked to sign confidentiality agreements to keep the Middlesboro facility running smoothly, to give upper management the opportunity to explain the closure of the Middlesboro facility, and to keep secret the opening of the Clinton facility. (Tr. 189, 215.)

## ANALYSIS

In paragraph 6(a) of the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by requiring employees to sign a confidentiality/non-disclosure agreement as a condition of accepting employment at the Clinton, Tennessee facility.

In *Boeing,* the Board revealed a new analysis for determining whether an employer's facially neutral policy or rule interferes with employees' NLRA rights in violation of Section 8(a)(1) of the Act. 365 NLRB No. 154, slip op. at 15. The Board stated:

> In cases in which one or more facially neutral policies, rules, or handbook provisions are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirements(s). Again, we emphasize that *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.

(Emphasis in original.) (Internal quotation marks omitted.) 365 NLRB No 154, slip op. at 15.

The Board set forth the following categories of employment policies, rules and handbook provisions, in *Boeing*:

> • 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 NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are [a] no-camera requirement . . . and other rules requiring employees to abide by basic standards of civility.
>
> • 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 NLRA rights, and if so, whether any adverse impact on NLRA protected conduct is outweighed by legitimate justifications.
>
> • Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

365 NLRB No. 154, slip op. at 15–16. These three categories represent a "classification of results" from the Board's application of the new test, but they are not part of the test itself. Id. at 16. The Board applied the standard in *Boeing* retroactively. Id. at 18.

The confidentiality agreement at issue here does not explicitly prohibit or limit conduct protected by the Act and, thus, does not fall into Category 3. Moreover, the confidentiality agreement is not a no camera rule or civility rule, such as those found in Category 1. Instead, it

forbids discussing Respondent's plans for its Clinton, Tennessee facility, the fate of other plants, and financial information. As such, I find that the confidentiality agreement here should be analyzed as a Category 2 rule and will undertake a balancing analysis to determine whether the adverse impact on the rights of Respondent's employees is outweighed by any legitimate justifications.

The confidentiality agreement in this case is vague, in that it includes certain specific information, but goes on to state that it is not limited to that information. Employees are thus left to wonder what else they are precluded from discussing with others. "Financial information" could be reasonably thought to include wage costs or wage information by employees. Moreover, at the time the confidentiality agreement was signed by an employee, Wilhoit told him that he was prohibited from discussing his wages with others. Thus, I find, that the confidentiality rule would be viewed by employees as restricting their ability to share information regarding their terms and conditions of employment with others.

The Act has long protected the rights of employees to discuss their wages and other terms and conditions of employment with others. *The Exchange Bank,* 264 NLRB 822, 831 (1982), citing *T.V. and Radio Parts Company, Inc.,* 236 NLRB 689 (1978) and *Poly Ultra Plastics, Inc.,* 231 NLRB 787 (1977). For example, the Board and courts have held that a rule prohibiting employees from talking to the media about "hospital matters" violated Section 8(a)(1) of the Act. *Veritas Health Systems, Inc.,* 366 NLRB No. 135, slip op. at 1–2 (2018). Barring employees from discussing their discipline has similarly been found to have violated the Act. *Westside Community Mental Health Center,* 327 NLRB 661, 666 (1999). Forbidding employees from discussing the wages of other employees, without the permission of the other employees, was found to have violated the Act. *Labinal, Inc.,* 340 NLRB 203, 210 (2003). An admonition prohibiting employees from disclosing any company knowledge to any client has similarly been held violative of the Act. *Trinity Protection Services,* 357 NLRB 1382, 1383 (2011). Under the Act, information concerning wages, hours, and working conditions is precisely the type that may be shared by employees, provided to unions, or given to governmental agencies. *Hyundai America Shipping Agency, Inc.,* 357 NLRB 860, 871 (2011), rev'd on other grounds 805 F.3d 309 (D.C. Cir. 2015).

Respondent's evidence regarding its justifications for maintaining the confidentiality agreement consists solely of the testimony of Hilliard and Wilhoit. Both cited the following reasons for maintaining the confidentiality agreement: to keep the Middlesboro facility running smoothly; to avoid "scuttlebutt conversations;" because Respondent had not identified all of the employees who would be transferring to Clinton; to avoid jealousy; to give upper management the opportunity to explain the closure of the Middlesboro facility; and to keep secret the opening of the Clinton facility. This anecdotal evidence is not particularly compelling, as it was both brief and inadequate. Respondent has not set forth a compelling justification for maintaining its confidentiality agreement, such as a government mandate, a threat of a work disruption, or national security interests. Although it is understandable that Respondent wanted to keep the closing of its facility and loss of over 100 jobs a secret from its employees and their union, these reasons do not outweigh the restriction placed on employees, forbidding their discussion of their terms and conditions of employment with others.

I find that none of the reasons advanced by Respondent's witnesses for the maintenance of the confidentiality rule outweighs its adverse impact on its employees' protected conduct. Thus, I find that Respondent's maintenance of its confidentiality agreement violates Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW REGARDING REMANDED ALLEGATION

1. By requiring employees to sign a confidentiality agreement, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

2. The unfair labor practice committed by Respondent affects commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent maintained a confidentiality rule that unlawfully interfered with employees' Section 7 activity, I shall require Respondent to rescind the confidentiality agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

## ORDER

The Respondent, Dura-Line Corporation, a subsidiary of Mexichem, Middlesboro, Kentucky, and Clinton, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or promulgating an overly broad confidentiality agreement that unlawfully interferes with employees exercising their rights, guaranteed by Section 7 of the Act, to engage in union or protected, concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind its confidentiality agreement signed by employees at the Middlesboro, Kentucky facility before transferring to the

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Clinton, Tennessee facility.

(b) Within 14 days from the date of this Order, notify all employees employed at its Middlesboro, Kentucky, facility as of September 21, 2015, that the confidentiality agreement referenced in the paragraph above has been rescinded, and is void and will not be enforced.

(c) Within 14 days after service by the Region, post at its facility in Clinton, Tennessee, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. As Respondent has closed the Middleboro, Kentucky, facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees employed at the Middlesboro, Kentucky, facility by the Respondent at any time since September 21, 2015.

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

Dated, Washington, D.C. August 20, 2019

Melissa M. Olivero
Administrative Law Judge

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[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

## NOTICE TO EMPLOYEES

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

**WE WILL NOT** maintain any overly broad confidentiality agreement or rule that unlawfully interferes with your rights to engage in union and/or protected, concerted activity.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

**WE WILL**, within 14 days from the date of this Order, rescind the confidentiality agreement signed by employees at our Middlesboro, Kentucky facility before transferring to the Clinton, Tennessee facility.

**WE WILL**, within 14 days of the date of this Order, notify all former employees of the Middlesboro, Kentucky, facility that the unlawful confidentiality agreement has been rescinded, is void, and will not be enforced.

**DURA-LINE CORPORATION, A SUBSIDIARY OF MEXICHEM**
(Employer)

Dated __________________ By ________________________________________
(Representative) (Title)

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

550 Main Street, John Weld Peck Federal Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-163289 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.